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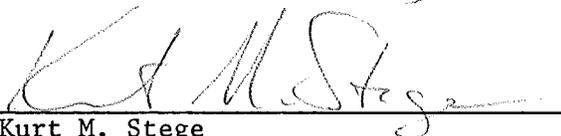
PERSONNEL COMMISSION

CERTIFICATION

Kurt M. Stege, deputy legal custodian of the Commission's records, hereby certifies that he has compared the attached copy of the Order of the Personnel Commission Promulgating Rules with the original Order of the Personnel Commission Promulgating Rules, dated July 17, 1987, and said copy is a true copy thereof.

Dated at Madison, Wisconsin

this 17th day of July 1987.



Kurt M. Stege
Hearing Examiner

7-1-87

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ORDER OF THE
PERSONNEL COMMISSION
PROMULGATING RULES

To repeal PC 1.07, 1.08, 1.10(1), 3.03(2), (6), (7), (9), (10), (11), 4.01, 4.02, 4.06, 4.07, 6.01 to 6.03, 6.05 and 6.06; to renumber PC 5.02; to renumber and amend PC 1.03 to 1.06, 1.09, 1.10(2) and (3), 2.01, 3.01, 3.03(1), (3), (4), (5) and (8), 3.05, 5.01, 5.03, and 6.04(5); to amend PC 1 (title), PC 2 (title), PC 3 (title), PC 4 (title), PC 5 (title) and PC 6 (title); to repeal and recreate PC 1.01, 1.02, 2.02, 3.02, 3.04, 4.03 to 4.05 and 6.04 (title) and (1) to (4); and to create PC 1.03, 1.04(2), 1.05, 1.09 to 1.12, 1.14, 2.01, 2.03 to 2.08, 3.01, 3.03, 4.01(3) 5.02, 5.03(2), (5), (6)(a),(b) and (c), (8) and (9), 5.04 to 5.08, 5.10 and 6.05 (title), (1), (2), (3) and (5), relating to practice and procedure.

ANALYSIS BY THE PERSONNEL COMMISSION

The last revision of the personnel commission's rules was completed early in 1980. Since that time, the commission's jurisdiction has expanded and there have been several revisions of related statutory provisions. The proposed rule revision completely revises the commission's old rules to reflect these changes, to eliminate problems found within the 1980 version and to recite additional procedures for use in processing cases filed with the commission. The new rules also more carefully reflect the distinction between appeals and complaints that are filed with the commission: appeals proceed to hearing without an investigation by the commission while complaints are investigated before reaching the hearing stage. Certain chapters of the new rules apply to any type of case that has reached the administrative hearing stage, regardless of whether the case was filed as an appeal or as a complaint.

Many of the changes found in the revision result simply from reorganizing the 1980 version into a more logical order. More substantive changes are summarized by chapter below, followed by a citation to any statutes that the rule interprets and to any related statutes or rules.

1. New chapter PC 1 contains a listing of definitions of terms that are used in the rules. All except one of the seventeen definitions are new. The term "probable cause," previously found in s. PC 4.03(2), has been modified for consistency with s. Ind 88.01(8) and to clearly encompass all forms of illegal retaliation over which the commission has authority. The rule reminds parties of their responsibility to notify the commission of address changes. It clarifies that with certain exceptions, all documents provided to the commission must also be provided to the opposing parties. In s. PC 1.07, the rules compute time in terms of calendar days rather than, as previously, work days. The sections dealing with consolidation (s. PC 1.10) and withdrawal (s. PC 1.11) are new and the language codifies the current practice of the commission. The new rules transfer the responsibility for preparing informational posters regarding the commission's procedures from the department of employment relations (formerly in s. PC 1.01(6)) to the commission (in s. PC 1.14). Citations: ss. 230.44(1), (4)(b) and (e) and 230.45(1), Stats., and s. Ind 88.01(8).

2. Chapter PC 2 sets forth the procedures for filing and processing complaints. Previously, these subjects were treated in old ch. PC 4. The language in s. PC 2.02 reflects the commission's current practices regarding the adequacy of complaints and their amendment. The new rules specifically provide that the commission may require answers to complaints. The rules also indicate that the available methods of investigation include fact-finding conferences and all statutory discovery techniques. The new rules list sanctions that may be invoked if a party fails to cooperate with the commission's investigative efforts. Finally, in s. PC 2.07, the rule clarifies the various procedures that apply when an initial determination is issued. Citations: subch. II, ch. 111, and s. 230.45(1)(b), Stats., ch. Ind 88.

3. Chapter PC 3 sets forth the procedures for filing appeals. This chapter makes no major substantive changes from the commission's prior rules on this subject which were formerly found in ch. PC 1. Both in new ch. PC 2 and 3, recitation of the applicable statutory time limits for filing have, for the most part, been removed from the body of the rules and placed in notes to the rules so that any future statutory changes can be reflected easily. Citations: ss. 230.44(2) and (3), Stats.

4. New chapter PC 4 includes a modification of old PC 2.01, which required parties to exchange witness lists and exhibits prior to hearing. The new version clarifies the analysis used in determining whether testimony and exhibits are to be excluded in the event of non-compliance with the requirement. Citations: ss. 227.44(4), 227.45(7), 227.50, and 230.44(4)(b), Stats.

5. In new chapter PC 5, the commission codifies a procedure for seeking a continuance, or postponement, of a hearing. (Section PC 5.02) New s. PC 5.03(5), provides that the hearing examiner has the authority to admit hearsay evidence and to give it appropriate weight. The commission has listed additional circumstances related to hearing conduct for which sanctions may be imposed. In former s. PC 3.04, only the sanction for failure to appear was described. Now, in s. PC 5.03(8), the rules also specify sanctions for misconduct, failure to respond to a subpoena and for a refusal to answer a proper question. In new s. PC 5.05, information necessary for awarding fees and costs is specified. A standard period of 10 days is established in s. PC 5.06(1) for responding to written objections to a proposed decision. Section PC 5.07 codifies the method for computing interest on any back pay award. The method is consistent with prior commission decisions. Finally, s. PC 5.10 establishes a procedure for the determination of parties for purposes of judicial review as required by s. 227.47, Stats. Citations: ss. 227.45(1), 227.46 and 227.47, Stats., and s. Ind 88.18(4).

6. New chapter PC 6 is derived, for the most part, from old ch. PC 5 and 6. The commission has included a provision relating to disqualification of commissioners which is similar to the provisions relating to disqualification of hearing examiners in new s. PC 5.01(3) and (4). The commission has made limited modifications regarding fees for copies of commission records (formerly in s. PC 6.06(2)) in order to be consistent with the open records law. The new fee language is found in s. PC 6.05(5). Citations: ss. 19.31 to 19.37, Stats.

Pursuant to the authority vested in the state of Wisconsin personnel commission by ss. 230.45(1)(i) and 230.89(1), Stats., the State of Wisconsin personnel commission hereby promulgates rules interpreting and relating to subch. II of ch. 111, subch. III of ch. 227, ss. 230.44 and 230.45 and subch. III of ch. 230, Stats.

SECTION 1. CHAPTER PC 1 (title) is amended to read:

CHAPTER PC 1

~~PLEADINGS-AND-PREHEARING-PRACTICE~~ AUTHORIZATION AND GENERAL PROVISIONS

SECTION 2. PC 1.01 and 1.02 are repealed and recreated to read:

PC 1.01 AUTHORIZATION. The rules in chs. PC 1 to PC 6 are adopted by the commission pursuant to ss. 230.45(1)(i) and 230.89(1), Stats., and relate to the commission's jurisdiction under s. 230.45, Stats.

PC 1.02 DEFINITIONS. In the commission's rules:

(1) "Agency" means an association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law.

(2) "Appeal" means a written request for relief filed with the commission and relating to one or more employment actions where the statutory basis for review does not provide for the commission to conduct an investigation.

Note: This definition includes actions filed under s. 230.45(1)(a), (d), (e) and (f), Stats., and grievances filed under s. 230.45(1)(c), Stats.

(3) "Appellant" means a person who, alone or with others, has filed an appeal.

(4) "Case" means a complaint or an appeal.

(5) "Chairperson" means the chairperson of the commission.

(6) "Commission" means the personnel commission.

(7) "Commissioner" means a member of the commission.

(8) "Complainant" means a person who, alone or with others, has filed a complaint.

(9) "Complaint" means a written request for relief filed with the commission and relating to one or more employment actions where the statutory basis for review provides for the commission to conduct an investigation.

Note: This definition includes actions filed under ss.
230.45(1)(b), (g), (gm), and (j), Stats.

(10) "Filing" means the physical receipt of a document at the commission's office.

(11) "Hearing examiner" means the person designated by the commission pursuant to s. 227.46(1), Stats., to preside over an administrative hearing.

(12) "Meeting" means a convening of the commissioners that falls within the definition set forth in s. 19.82(2), Stats.

(13) "Party" means a petitioner or a respondent.

(14) "Petitioner" means an appellant or a complainant.

(15) "Presiding authority" means the hearing examiner or, where the hearing is before the commission as a whole, the commissioners.

(16) "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation or unfair honesty testing probably has been or is being committed.

(17) "Respondent" means the person or state agency whose interests are adverse to those of the petitioner or who will be directly affected by the commission's decision.

(18) "Representative" means an attorney or any other agent of a party who has been authorized by the party to provide representation before the commission, where authorized by law.

SECTION 3. PC 1.03 is renumbered 1.08 and amended to read:

PC 1.08 MOTIONS. (1) HOW MADE. An application to the ~~board~~ hearing examiner or the commission for an order shall be by motion which, unless made during a hearing or a prehearing conference, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. ~~Copies of the motion and supporting papers shall be served on all parties to the appeal by the party making the motion. A notice of motion is not required, notice being satisfied by service of the copy of the motion.~~

(2) SUPPORTING PAPERS. ~~The brief and~~ Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be ~~served and~~ filed with the motion.

(3) (title) MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION. Any party may move at any time to dismiss ~~an appeal~~ a case on the ground the commission does not have subject matter jurisdiction of ~~the subject matter of the appeal.~~

Note: Because a case will normally be dismissed if a jurisdictional objection is sustained, any motion to dismiss due to lack of subject matter jurisdiction should be filed as soon as the basis for it becomes apparent.

SECTION 4. PC 1.03 is created to read:

PC 1.03 PARTIES. (1) CHANGE OF ADDRESS. Parties shall promptly notify the commission, in writing, of any change of address during the pendency of the case.

(2) SUBSTITUTION. If a petitioner dies during the pendency of a case, the deceased petitioner's successor or personal representative shall, upon motion, be substituted for the petitioner. A case shall be held open for a reasonable period to permit substitution by the successor or personal representative.

SECTION 5. PC 1.04 is renumbered 1.06 and amended to read:

PC 1.06 CAPTIONS. All ~~pleadings-and-motions~~ papers shall, ~~insofar-as~~ to the extent possible, contain a caption setting forth the names of the parties and the case number ~~of-the-appeal~~.

SECTION 6. PC 1.06 is renumbered 1.04 and 1.04 (title) and (1) and as renumbered are amended to read:

PC 1.04 (title) REPRESENTATIVES. (1) A party is entitled to appear in person or by or with ~~counsel or other agent of~~ the party's representative in any proceeding case before the commission except as otherwise prohibited by law. The representative shall be presumed to have full authority to act on behalf of the party, including the authority to file or withdraw a case.

SECTION 7. PC 1.04(2) is created to read:

(2) One who has entered an appearance as the representative of a party shall be considered as the representative of that party unless and until a written withdrawal of representation is filed.

SECTION 8. PC 1.05 is renumbered PC 4.01 and 4.01(1), (2) (title) and (2), and as renumbered, amended to read:

PC 4.01 PREHEARING CONFERENCES. (1) PURPOSE. Prehearing conferences are intended to provide an opportunity to formulate a statement of the issue or issues presented by a proceeding case, to identify ~~and exchange lists of~~ potential witnesses, to attempt to reconcile differences among the parties and promote the settlement of appeals, cases and to perform any other functions in aid of the ~~commission's performance of its duties.~~ ~~Within the discretion of the commission, conferences may be conducted by telephone~~ disposition of the case.

(2) (title) HOW CONDUCTED. Prehearing conferences may be conducted by telephone conference call or in person. A ~~commission member~~ commissioner

or ~~other person designated by the commission~~ member of the commission's staff shall preside.

SECTION 9. PC 1.05 is created to read:

PC 1.05 FILING AND SERVICE OF PAPERS. (1) With the exception of the initial complaint and the initial appeal which will be served by the commission pursuant to ss. PC 2.03 and 3.03, and papers that are filed as part of an investigation, all papers filed by a party with the commission shall also be served by that party on all other parties to the case.

(2) Papers may be served either personally or by mail. Service by mail is complete upon mailing. That is, for purposes of service, the effective date is the date of mailing, not receipt. Filing is complete on receipt.

(3) The filing of any paper required to be served constitutes a certification that a copy of the paper has been timely served on all parties required to be served unless the person filing the paper states otherwise in writing. No affidavit, certificate, or admission of service need be filed with the commission.

(4) When a party is represented by a representative, service shall be made upon that representative. For purposes of service, where more than one petitioner has filed the case, the first-named petitioner shall be considered the sole petitioner, unless another petitioner is specifically identified as the agent for service.

SECTION 10. PC 1.07 and 1.08 are repealed.

SECTION 11. PC 1.09 is renumbered 1.07 and amended to read:

PC 1.07 TIME. Unless otherwise provided by ~~these rules~~ chs. PC 1 to 6, orders of ~~the commission setting forth~~ a hearing examiner or of the commission and time periods shall be expressed in terms of working set forth in correspondence from the commission, commissioners or staff shall refer to calendar days, which include every day except Saturdays, Sundays and statewide legal holidays provided in s. 230.35(4)(a), Stats. The day ~~the~~ an order is made or entered shall not count as one of the prescribed days. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday in which case the last day shall be the next day that is neither a Saturday, a Sunday or a legal holiday. As used in this section "legal holiday" means any holiday listed in s. 230.35(4)(a), Stats. ~~Any questions about time computations for procedural matters before the commission shall be resolved by reference to s. 801.15(1), Stats.~~

SECTION 12. PC 1.09 is created to read:

PC 1.09 BRIEFING SCHEDULES. The hearing examiner or the commission may establish a briefing schedule on any issue or motion pending before it and may decline to consider any brief that is filed after the brief is due.

SECTION 13. PC 1.10(1) is repealed.

SECTION 14. PC 1.10(2) and (3) are renumbered 1.13(1) and (2) and amended to read:

PC 1.13 (title) PAY STATUS FOR STATE EMPLOYE PARTIES AND STATE EMPLOYE WITNESSES IN COMMISSION CASES. (1) PAY STATUS OF STATE EMPLOYE PARTIES. State civil service employes who, as parties, are ~~requested-by-the commission-to-attend~~ interviewed as part of commission investigations or appear at prehearing conferences, conciliation sessions, oral arguments or hearings as-parties, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel ~~expense~~ guidelines schedule amounts established under s. 20.916(8), Stats.

(2) PAY STATUS OF STATE EMPLOYE WITNESSES. State civil service employes who are interviewed as part of commission investigations or attend hearings, whether held in person or via telephone, as witnesses shall do so without loss of state salary and with ~~the-standard~~ reimbursement by the employing agency for travel ~~expense, provided that the commission certifies that the testimony of the witness was or would have been relevant and material to the matter in issue and not unduly repetitive~~ expenses in accordance with the uniform travel schedule amounts established under s. 20.916(8), Stats., unless the hearing examiner or the commission determines that their testimony was or would have been irrelevant, immaterial or unduly repetitious.

SECTION 15. PC 1.10 to 1.12 are created to read:

PC 1.10 CONSOLIDATION. The commission may, on its own motion, consolidate two or more cases involving the same parties or one or more issues arising substantially out of the same circumstances or closely related circumstances. Consolidation may be for investigation, hearing, decision or a combination thereof. Nothing in this section limits the right of a party to make a motion to consolidate or to object to the commission's motion.

PC 1.11 WITHDRAWAL. Subject to the approval of the commission, a petitioner may withdraw a case at any time prior to a final decision by the commission. The withdrawal request should be in writing and should be signed by the petitioner or the petitioner's representative.

PC 1.12 DISMISSALS. Any dismissal order issued by the commission shall be with prejudice unless otherwise expressly stated. The commission may require the filing of a copy of any settlement agreement prior to dismissing a case.

SECTION 16. PC 1.14 is created to read:

PC 1.14 POSTING OF RIGHTS. Every agency employing persons who may invoke the commission's jurisdiction shall post in conspicuous places upon its premises a poster prepared and made available by the commission relating to the procedures for invoking the commission's jurisdiction.

SECTION 17. CHAPTER PC 2 (title) is amended to read:

CHAPTER 2

DISCOVERY FILING AND PROCESSING COMPLAINTS

SECTION 18. PC 2.01 is renumbered 4.02 and amended to read:

PC 4.02 (title) EXCHANGE OF DOCUMENTS AND WITNESS LISTS PRIOR TO HEARING. ~~At prehearing conferences, the parties shall file and exchange lists of their witnesses, and the originals or copies of the documentary and other physical evidence which they intend to utilize at the hearing, if available at that time. If the prehearing conference is conducted by conference telephone call, filing and exchange of these materials will be by mail. Following the prehearing conference, or if no prehearing conference is held, the parties are under a continuing obligation to file and exchange lists of further witnesses and further evidentiary matter which they intend to utilize at the hearing.~~ With the exception of rebuttal matter, names of witnesses and copies of exhibits ~~must~~ shall be ~~submitted more than 2~~ filed and served at least 3 working days before the commencement of the hearing ~~or will be subject to exclusion, unless good cause for the failure to comply is shown.~~ For the purpose of this section only, service is ~~not~~ complete on ~~mailing but on~~ receipt rather than on mailing. If no good cause is shown for the failure to comply with this section, the hearing examiner or commission may exclude the evidence after consideration of the following factors:

- (1) The prejudice or surprise experienced by the party against whom the evidence is being offered;

(2) The ability of that party to cure any prejudice;

(3) The extent to which waiver of the requirement would disrupt the orderly and efficient hearing of the case;

(4) Bad faith or willfulness in failing to comply with the requirement; and

(5) Other factors relevant to the determination.

SECTION 19. PC 2.01 is created to read:

PC 2.01 TIME LIMITS AND ADDRESS FOR FILING COMPLAINTS. All complaints shall be filed according to the appropriate time limits established by statute and shall be filed at the offices of the commission. The time limit for filing complaints with the commission pursuant to Wisconsin's fair employment act or the elder abuse reporting law shall be the period set forth in s. 111.39(1), Stats.

Note: The mailing address of the commission is:

State Personnel Commission
121 E. Wilson St., 2nd Floor
Madison, WI 53702

The Wisconsin fair employment act provides that complaints under that act be filed "no more than 300 days after the alleged discrimination or unfair honesty testing occurred." S. 111.39(1), Stats.

Complaints of retaliation relating to occupational safety and health are to be filed "within 30 days after the employe received knowledge of the discrimination or discharge." S. 101.055(8)(b), Stats.

Complaints of retaliation under the "whistleblower law" must be filed "within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last." S. 230.85(1), Stats.

SECTION 20. PC 2.02 is repealed and recreated to read:

PC 2.02 COMPLAINTS. (1) CONTENT. Complaints should identify the name, address and telephone number of the complainant, the name of the respondent agency, the facts which constitute the alleged unlawful discrimination, unfair honesty testing or retaliation and the basis or type of discrimination, unfair honesty testing or retaliation being alleged.

(2) FORM. Complaints shall be written on a form available from the commission or on any other form that is acceptable to the commission. The complaint shall be signed, verified and notarized.

(3) AMENDMENT. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or

omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

(4) ASSISTANCE. Appropriate assistance in completing complaint forms, including notarization, shall be provided by the commission in the commission's offices.

SECTION 21. PC 2.03 to 2.08 are created to read:

PC 2.03 NOTICE TO RESPONDENTS. (1) Except where prevented by the anonymity requirement of s. 111.375(1), Stats., the commission shall serve a copy of the complaint upon each respondent prior to the commencement of any investigation.

(2) When the commission invokes s. 111.375(1), Stats., and preserves a complainant's anonymity, the commission shall serve the respondent with a general statement describing the complaint.

PC 2.04 ANSWERS. Respondents may file written answers within 20 days after service of the complaint. If no answer is filed, every material allegation of the complaint is in issue. However, as part of an investigation, the commission may require that respondents file an answer to a complaint within a time period specified by the commission and may require that the answer include a statement regarding each allegation in the complaint, the respondent's version of the underlying facts, copies of

documents relating to the allegations and the assertion of any legal defenses to the allegations.

PC 2.05 INVESTIGATIONS. (1) METHODS. The commission shall determine the nature and scope of the investigation and shall impartially obtain and analyze information relevant to the complaint. The commission may obtain information by methods including, but not limited to, fact-finding conference, interview, on-site inspection, inspection of documents or examination of written submissions of parties and witnesses. To carry out its investigation, the commission may use all those methods of discovery specified in ch. 804, Stats., issue subpoenas and subpoenas duces tecum and require answers as provided in s. PC 2.04.

(2) INTERVIEWS. The commission may require that an interview with any employe, except a management or supervisory employe who is a party to or is immediately involved in the subject matter of the complaint, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employe voluntarily requests that presence. An appointing authority shall permit an employe to be interviewed without loss of pay and to have an employe representative present at the interview. An appointing authority of an employe to be interviewed may require the commission to give the appointing authority reasonable notice prior to the interview. In scheduling interviews, the commission shall consider the programmatic needs of the appointing authority. As used in this subsection, "management or supervisory employe" includes persons who served in management or supervisory positions at the time of the events that comprise the basis of the complaint.

(3) TIME LIMIT FOR RESPONDING TO COMMISSION'S DISCOVERY REQUESTS. A party shall respond to the commission's discovery requests within 30 days after service unless the commission grants an extension or modification for good cause shown.

(4) SANCTIONS. (a) The commission shall notify the party from whom discovery is sought that the failure to answer or produce requested information necessary for an investigation may result in the imposition of those sanctions set forth in paragraphs (b), (c) and (d).

(b) If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

(c) If a respondent fails to answer or to produce requested information necessary for an investigation, the commission may make an appropriate inference, analyze the available evidence and issue an initial determination. If probable cause is ultimately found, conciliation is unsuccessful and a hearing on the merits of the complaint is convened, the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

(d) If a respondent fails to file an answer when required by the commission under s. PC 2.04, the hearing examiner or the commission may invoke those sanctions described in paragraph (c).

PC 2.06 FACT-FINDING CONFERENCES. Upon the agreement of the parties, the commission may convene fact-finding conferences in order to obtain information, to identify those matters in dispute and to explore the possibility of a negotiated settlement. At least 10 days prior to the conference, notice of the conference shall be provided to all parties. A fact-finding conference is not a contested case hearing. A member of the commission's staff shall conduct and control the conference.

PC 2.07 INITIAL DETERMINATIONS. (1) WHEN ISSUED. At the conclusion of each investigation and absent a settlement between the parties or other final disposition of the complaint, the commission shall make an initial determination as to whether probable cause exists as to each claim raised in a complaint. The initial determination shall be in writing and shall be served on the parties along with an explanation of any time limits for obtaining review of the initial determination.

(2) PROBABLE CAUSE DETERMINATIONS. Upon either an initial determination of probable cause following investigation or a finding of probable cause following hearing, the commission shall seek to resolve the dispute between the parties by conciliation unless either party waives conciliation in writing. If conciliation is waived or is unsuccessful, the complaint may proceed to hearing on the issue of whether discrimination, unfair honesty testing or retaliation occurred.

(3) NO PROBABLE CAUSE DETERMINATIONS. Within 30 days after the service of an initial determination of no probable cause as to any claim raised in a complaint, a complainant may file, with the commission, a written request for hearing on the issue of probable cause as to that claim. If, after a hearing, the commission finds probable cause as to the claim and reverses the initial determination, the complaint shall be processed under sub. (2).

(4) MIXED DETERMINATIONS. When a complaint includes two or more claims and findings of both probable cause and no probable cause have resulted, those claims for which probable cause has been found shall be processed under sub. (2), and those claims for which no probable cause has been found shall be processed under sub. (3), except that the parties may agree to process the entire complaint under sub. (2) as if probable cause had been found as to all claims.

PC 2.08 CONCILIATION CONFERENCES. At any time during the pendency of a complaint, the commission may seek to effectuate a settlement between the parties by convening a conciliation conference.

SECTION 22. Chapter PC 3 (title) is amended to read:

CHAPTER PC 3

HEARINGS FILING APPEALS

SECTION 23. PC 3.01 is renumbered 5.01 and amended to read:

PC 5.01 HEARING EXAMINERS. (1) DESIGNATION. Any matter to be heard by the commission may be designated for hearing by one or more ~~members of the commission,~~ commissioners or by such other persons as may be permitted by statute. Hearing examiners shall have all powers necessary ~~for the~~ to conduct of commission ~~proceedings~~ hearings. When a hearing is conducted before the commission itself, the hearing shall be presided over by the chairperson or, in the chairperson's absence, by another commissioner designated by the commission.

(2) LIMITATION AGAINST FINAL DISPOSITION. ~~No~~ Notwithstanding sub. (1), no hearing examiner shall decide any motion which would require final disposition of ~~an appeal or any part of an appeal~~ any case except when the commission has by order directed that the hearing examiner's decision shall be the final decision of the commission. ~~Such motions shall be reserved for decision by the commission.~~

(3) DISQUALIFICATION. If a ~~hearing examiner~~ presiding authority is ~~disqualified~~ unqualified to preside for reasons of conflict of interest or personal bias, the ~~hearing examiner~~ presiding authority shall withdraw and notify the commission and the parties of the disqualification.

(4) (title) MOTIONS FOR SUBSTITUTION OR DISQUALIFICATION OF PERSONS CONDUCTING HEARINGS. If a party deems the ~~hearing examiner~~ presiding authority to be ~~disqualified~~ unqualified for reasons of conflict of interest or bias, the party may move in a timely manner for substitution of a different examiner or disqualification of the commissioner. The motion shall be accompanied by a written statement setting forth the ~~alleged~~

~~ground-for-disqualification~~ basis for the motion. If ~~the~~ a hearing examiner does not grant ~~the~~ a motion for substitution, it shall be referred to the commission, which shall determine the sufficiency of the ground alleged.

(5) UNAVAILABILITY. If the presiding authority shall-become becomes unavailable during the course of a hearing, the commission shall designate a substitute ~~hearing-examiner-to-finish-the-hearing.~~ The substitute may confer with the original presiding authority regarding the case.

SECTION 24. PC 3.01 is created to read:

PC 3.01 TIME LIMITS AND ADDRESS FOR FILING APPEALS. All appeals shall be filed according to the appropriate time limits established by statute and shall be filed at the office of the commission. The time limit for filing any appeals with the commission pursuant to s. 230.45(1)(d),(e) or (f), Stats., shall be 30 days after the effective date of the action, or 30 days after the appellant is notified of the action, whichever is later.

Note: The mailing address of the commission is:

State Personnel Commission
121 E. Wilson St., 2nd Floor
Madison, WI 53702

According to s. 230.44(3), Stats., appeals filed under s. 230.45(1)(a), Stats., "may not be heard unless the appeal is filed

within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later...."

Decisions grieved to the commission as the final step arbiter under s. 230.45(1)(c), Stats., must, according to s. ER 46.07(2), "be filed within 30 calendar days after service of a decision issued at the third step of the grievance procedure... or within 30 calendar days after the last day on which the employer could have served a timely decision, whichever is sooner."

SECTION 25. PC 3.02 is repealed and recreated to read:

PC 3.02 APPEALS. (1) FORM AND CONTENT. All appeals shall be in writing. Otherwise, there is no form that is to be used for filing an appeal. Appeals are not required to conform to any technical requirements except they shall identify the appellant. However, appeals should also contain the following:

(a) The appellant's address and telephone numbers at work and at home.

(b) The name of the state agency that took the personnel action being appealed.

(c) The facts forming the basis for the appeal.

(d) The reason the appellant believes the action to be improper.

(e) The relief or remedy requested.

(f) A copy of any written decision being appealed.

(2) AMENDMENT. An appeal may be amended, subject to approval by the commission, to clarify or amplify allegations or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date of the appeal.

SECTION 26. PC 3.03(1), (4), (5) and (8) are renumbered 5.03(1),(3), (4) and (7) and amended to read:

PC 5.03 CONDUCT OF HEARINGS. (1) GENERALLY. The commission is not bound by the strict rules of procedure and the customary practices of courts of law. ~~The pleadings, prehearing practice provisions, and discovery provisions in chapters PG-1 and PG-3, Wis. Adm. Code, shall be applicable to proceedings under this chapter.~~

(3) OPENING STATEMENTS. Opening statements are optional and ~~in any event~~ shall be confined to a brief summary of the nature of the case, the evidence intended to be offered, and the controlling legal authorities.

(4) ORDER OF PROCEEDING. The ~~appellant or complaining party~~ petitioner normally shall present evidence first unless the case falls into a

category in which the commission, the judiciary, or the legislature through statutory enactment has determined that the burden of proof shall be on the respondent. In such cases, the respondent ~~normally would~~ shall proceed first. The order of proceeding may be varied by ~~the commissioner or~~ the hearing examiner or commission in the interest of obtaining the most cogent presentation of the case.

Note: For example, the burden of proof in an appeal of a discharge decision is on the respondent. Reinke v. Personnel Board, 53 W (2d) 123, 191 NW (2d) 833 (1971).

(7) STIPULATIONS. Parties may stipulate to some or all of the facts, that are material to a case and the commission may ~~thereupon~~ base ~~its~~ an order upon the stipulation.

SECTION 27. PC 3.03(2), (6), (7), (9), (10) and (11) are repealed.

SECTION 28. PC 3.03(3) is renumbered 5.03(6)(d) and amended to read:

(d) At the request of either party, the hearing examiner or the commission may order the exclusion of witnesses in accordance with the provisions of s. 906.15, Stats.

SECTION 29. PC 3.03 is created to read:

PC 3.03 NOTICE TO RESPONDENTS. The commission shall serve a copy of the appeal upon each respondent.

SECTION 30. PC 3.04 is repealed and recreated to read:

PC 3.04 ANSWERS. Respondents may file written answers within 20 days after service of the appeal. If no answer is filed, every material allegation of the appeal is in issue.

SECTION 31. PC 3.05 is renumbered 5.09 and amended to read:

PC 5.09 REQUESTS FOR REHEARINGS. Requests for rehearings ~~shall~~ may be ~~made under s. 227.12~~ granted for those reasons specified in s. 227.49, Stats.

SECTION 32. Chapter PC (4) (title) is amended to read:

CHAPTER PC 4

~~EQUAL-RIGHTS-PROCEEDINGS~~ PREHEARING PRACTICE AND DISCOVERY

SECTION 33. PC 4.01 is repealed.

SECTION 34. PC 4.01(3) is created to read:

(3) REPORTS. The person presiding at the conference shall prepare a memorandum or report that summarizes the results of the conference. Copies of the report shall be served on all parties.

SECTION 35. PC 4.02 is repealed.

SECTION 36. PC 4.03 to 4.05 are repealed and recreated to read:

PC 4.03 DISCOVERY. All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats. For good cause, the commission or the hearing examiner may allow a shorter or longer time for discovery or for preserving testimony than is allowed by ch. 804, Stats. For good cause, the commission or the hearing examiner may issue orders to protect persons or parties from annoyance, embarrassment, oppression or undue burden or expense or to compel discovery.

PC 4.04 EX PARTE COMMUNICATIONS. As provided in s. 227.50, Stats., ex parte communications to the commission or to the hearing examiner are prohibited.

PC 4.05 ATTENDANCE OF WITNESSES. (1) REQUESTS TO APPEAR. At the request of any party or on its own motion, a commissioner or the hearing examiner may issue letters to state employees requiring them to appear and to testify at a hearing unless it is determined that their testimony will be irrelevant, immaterial or unduly repetitious. The commission shall mail the letters to the prospective witness unless the party requesting the letter asks to be responsible for personally serving the letters.

(2) SUBPOENAS. (a) Issuance. Subpoenas, including subpoenas to compel the attendance of witnesses and subpoenas requiring the production of material, may be issued by a commissioner or the hearing examiner at the request of a party or on the commission's own motion, or may be issued by an attorney of record in a commission proceeding in the same manner as

provided in s. 805.07, Stats. The commissioner or hearing examiner may review the reasonableness of any request before issuing a subpoena.

(b) Service. The party issuing or requesting a subpoena is responsible for service of the subpoena and for any costs related to service.

(3) WITNESS FEES. (a) State civil service employes. State civil service employes who attend hearings as witnesses are entitled to that compensation specified in s. PC 1.13(2).

(b) Persons subpoenaed. Persons, other than state civil service employes, subpoenaed as witnesses to commission hearings shall receive for attendance the fees and mileage provided for witnesses in civil actions in courts of record under ch. 885, Stats., provided the hearing examiner or the commission certifies that the witness' testimony was relevant and material.

SECTION 37. PC 4.06 and 4.07 are repealed.

SECTION 38. Chapter PC 5 (title) is amended to read:

CHAPTER PC 5

~~PERSONNEL-COMMISSION-MEETINGS-AND-AGENDA~~

HEARINGS, DECISIONS AND REVIEW

SECTION 39. PC 5.01 is renumbered 6.01 and amended to read:

PC 6.01 LOCATION AND SCHEDULING. The personnel commission shall meet in regular session at its offices ~~at 131 West Wilson Street, Madison, Wisconsin 53702,~~ unless a different meeting place is designated by the commission. Dates of meetings shall be set by the chairperson or at the request of 2 commissioners.

SECTION 40. PC 5.02 is renumbered 6.02.

SECTION 41. PC 5.02 is created to read:

PC 5.02 CONTINUANCES. (1) REQUIREMENTS. Prior to requesting a continuance of a hearing date, a party shall seek agreement for a continuance from all other parties to the case. In making the request to the hearing examiner or a commissioner, the party seeking the continuance shall advise the hearing examiner or commissioner if agreement between the parties has been reached. Requests for continuances of a hearing date shall only be granted upon a showing of good cause and after consideration of any hardship on the other parties. In any case in which a hearing examiner has been designated, the request shall be directed to the hearing examiner, if available. The hearing examiner or commissioner may require presentation of evidence before considering the request.

(2) NOTIFICATION OF WITNESSES. Each party is responsible for advising the party's own witnesses of any continuance.

SECTION 42. PC 5.03 is renumbered 6.03 and amended to read:

PC 6.03 AGENDAS. Items to be considered by the commission at its regular meetings may be submitted at any time; ~~however.~~ However, for items to appear on the agenda of the commission meeting, they must be received by the commission office no later than 3 working days before a commission meeting. The commission may consider items of special concern without regard to this rule.

SECTION 43. PC 5.03(2), (5), (6) (a), (b) and (c), (8) and (9) and 5.04 to 5.08 are created to read:

(2) OPEN TO THE PUBLIC. Except where requested by an appellant pursuant to s. 230.44(4)(a), Stats. or to the extent necessary to protect the confidentiality of materials or testimony as provided by law, all hearings conducted by the commission shall be open to the public.

(5) EVIDENCE. As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the commission shall give effect to the rules of privilege recognized by law. Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.

(6) WITNESSES. (a) Witnesses may testify either by answering questions posed to them or in narrative form.

(b) Cross-examination is not limited to matters to which the witness testified on direct examination.

(c) At the discretion of the hearing examiner or the commission, witnesses' testimony may be taken via telephone rather than in person.

(8) SANCTIONS. (a) Unless good cause can be shown, any party who fails to appear at a hearing after due notice is deemed to have admitted the accuracy of evidence adduced by the parties present and the hearing examiner and the commission may rely on the record as made. If the absent party has the burden of proof, the commission shall consider a motion to dismiss by the parties present without requiring presentation of any evidence.

(b) If a witness fails to appear despite the issuance of a letter or subpoena as provided in s. PC 4.05, the commission may seek initiation of contempt proceedings.

Note: Any person who, without reasonable excuse, fails to attend or to testify as lawfully required before a hearing examiner or the commission or otherwise fails to act as set forth in s. 885.12, Stats., is subject to the penalties set forth therein.

(c) If a witness refuses to answer a proper question or otherwise engages in misconduct, the hearing examiner or the commission may exclude the witness, may strike all or part of the witness' testimony, may make an

appropriate inference or may impose any combination of sanctions under this paragraph.

(d) The hearing examiner or the commission may exclude persons other than witnesses from the hearing for misconduct.

(9) RECORD OF PROCEEDINGS AND TRANSCRIPTS. A stenographic, electronic or other record of all hearings and such other proceedings as the commission may designate shall be made. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. Copies of tape recordings or transcripts shall also be furnished at the expense of the party making the request. However, upon a showing of indigency and legal need, a party may be provided a copy of the transcript or tape recording without charge. Where indigency and legal need have been found, the commission shall, in its discretion, determine whether to provide a copy of the transcript or to provide a copy of the tape recording.

PC 5.04 PROPOSED DECISIONS AND ORDERS. For those cases in which a proposed decision and order is required pursuant to s. 227.46(2), Stats., a copy of the proposed decision and order prepared by the hearing examiner shall be served on the parties and shall prescribe reasonable periods for the parties to file any motions for fees and costs, written objections to the proposed decision and order, and any request for oral arguments.

PC 5.05 MOTIONS FOR FEES AND COSTS. Any party seeking an award of fees, costs or both shall file a motion and supporting documentation that includes:

(1) The number of hours for which compensation is sought, itemized according to the work that was performed, the date it was performed, the hours claimed for the work and the individual who performed the work;

(2) The hourly rate customarily charged by each individual for whom compensation is sought supported by documentation of the rates prevalent in the practice of law for attorneys in the same locale with comparable experience and expertise;

(3) Other factors that affect the computation of fees or costs, as determined by the judiciary and by decisions of the commission;

(4) Documentation of costs for which the party seeks reimbursement.

Note: The commission's authority to award fees and costs is derived from ss. 227.485 and 230.85(3), Stats., and from Watkins v. LIRC, 117 W (2d) 753, 345 NW (2d) 482 (1984).

PC 5.06 WRITTEN OBJECTIONS AND ORAL ARGUMENTS. (1) WRITTEN OBJECTIONS. When a party adversely affected by a proposed decision files written objections, the opposing parties shall be provided a period of 10 days to file a written response to the objections unless the hearing

examiner or the commission concludes that some other period is more appropriate.

(2) ORAL ARGUMENTS. A request for oral argument may be granted if the commission determines, in its discretion, that an issue or question is better addressed by oral argument rather than written argument.

PC 5.07 COMPUTATION OF INTEREST. Any interest that may be awarded on a back pay award made by the commission shall be added to the award and computed at the annual rate specified in s. 814.04(4), Stats., simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof, in the back pay period on the net amount of back pay attributable to that calendar quarter, or portion thereof, after any set-offs, and shall continue to accrue until the date of compliance with the back pay order.

PC 5.08 TIME LIMIT FOR DECISIONS. The 90 day period established in s. 230.44(4)(f), Stats., for the issuance of certain decisions shall commence on the last date for filing objections to the proposed decision and order under s. 227.46, Stats., or the date for the last written or oral argument, whichever is later.

SECTION 44. PC 5.10 is created to read:

PC 5.10 DETERMINATIONS OF PARTIES FOR PURPOSES OF JUDICIAL REVIEW.
The hearing examiner or the commission shall prepare a list of persons who are considered parties by the hearing examiner or the commission for

purposes of judicial review as required by s. 227.47, Stats. The list shall be found at the end of every final decision issued by the commission and shall be based upon the following criteria:

- (1) The nature of the case;
- (2) The persons affected by the decision and the degree of that impact;
- (3) The nature of the participation by those involved in the case, including attendance at hearings, cross-examination of witnesses, and submission of briefs.

Note: The list of parties is not necessarily coextensive with the definition of "party" found in s. PC 1.02(13).

SECTION 45. Chapter PC 6 (title) is amended to read:

CHAPTER PC 6

~~PUBLIC EXAMINATION OF COMMISSION RECORDS~~

PERSONNEL COMMISSION MEETINGS AND RECORDS

SECTION 46. PC 6.01 to 6.03 are repealed.

SECTION 47. PC 6.04 (title) and (1) to (4) are repealed and recreated to read:

PC 6.04 DISQUALIFICATION OF COMMISSIONERS. If a commissioner is unqualified to render a decision for reasons of conflict of interest or bias, the commissioner shall not participate in the commission's consideration of the case before it. If a party deems a commissioner to be unqualified for reasons of conflict of interest or bias, the party may move for disqualification in the manner set forth in s. PC 5.01(4).

SECTION 48. PC 6.04(5) is renumbered 6.05(4) and amended to read:

(4)
(3) EXEMPTED MATERIAL. The following material may be exempt from disclosure under the provisions of this rule if the commission determines that nondisclosure ~~outweighs~~ outweighs the benefits of open access:

(a) Matters ordered sealed in the public interest by the commission;

(b) Matters containing the advice of counsel rendered to the commission members that falls within the lawyer-client privilege defined by s. 905.03, Stats.;

(c) The identity of complainants ~~under~~ to the extent provided in subch. II, ch. 111, Stats.;

(d) Matters containing the mental impressions of the commission members with regard to the consideration of cases before the commission, such as draft opinions and memoranda, for a period no longer than five years;

(e) Investigatory files and reports, informants' names, and information which would be privileged under ss. 905.09 and 905.10, Stats.; or

(f) Other material specifically exempt by ~~statute-or-rule~~ law.

SECTION 49. PC 6.05 is repealed.

SECTION 50. PC 6.05 (title) (1), (2), (3) and (4)⁽⁵⁾ are created to read:

PC 6.05 PUBLIC EXAMINATION OF COMMISSION RECORDS. (1) GENERALLY.

The commission shall make its records available as provided in ss. 19.31 to 19.37, Stats., and shall render whatever assistance is necessary and appropriate for persons seeking those records.

(2) LEGAL CUSTODIAN. For purposes of ss. 19.31 to 19.37, Stats., the legal custodian of the commission's records is the commission which may in turn appoint deputy legal custodians.

(3) ACCESS TO RECORDS. Except as otherwise provided by law and except as provided in sub. (4), the records maintained by the commission shall be open to public inspection and copying during regular state office hours.

(5) FEES. The cost of copies of records shall not exceed the actual, necessary and direct cost to the commission of reproduction and transcription of the record, photographing the record, mailing or shipping the

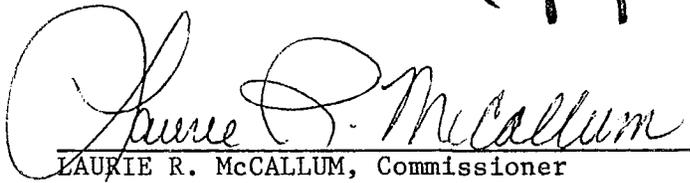
record, and locating the record, except that the commission shall not impose a fee for locating a record unless the cost of location is \$50 or more. The commission may require prepayment of fees if the total amount exceeds \$5.

SECTION 51. PC 6.06 is repealed.

EFFECTIVE DATE. The rules contained in this order take effect on the first day of the month following publication as provided under s. 227.22(2) (intro.), Stats.

Dated this 17th day of July, 1987.


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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