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NEVILLE I. PAUL,

Petitioner

MEMORANDUM DECISION AND ORDER

v.

LABOR AND INDUSTRY REVIEW COMMISSION      Case NO. 92-CV-164  
and ORC INDUSTRIES, INC.,

Defendants

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FACTS

On December 1, 1982, petitioner, Neville I. Paul, began employment with ORC Industries, Inc. (ORC), a private, nonprofit vocational rehabilitation facility.

On April 11, 1991, Barbara Barnard, president of ORC, met with her employees to discuss an upcoming conference of the National Industries for the Severely Handicapped (NISH), in Las Vegas, Nevada from April 20 through April 24, 1991. Petitioner, who was employed as controller and would travel to the conference, attended the meeting.

Although previous policy allowed employees to obtain small cash advances prior to attending out-of-town conferences and seminars, Barnard stated that no cash advances would be authorized for this NISH conference. In light of the Las Vegas conference, Barnard deviated from this cash-advance-policy to avoid improper appearances and eliminate accounting complications, due to the unprecedented number of employees attending the NISH conference.

ORC policy also required that Barnard approve cash advances.

On April 20, 1991, petitioner obtained a cash advance in the amount of \$200.00 by using a company-issued credit card, at a Las Vegas hotel.

On April 25, 1991, petitioner informed Barnard that he had obtained the cash-advance, which he indicated that he would pay back. Barnard told petitioner to account for the cash-advance.

On May 1, 1991, petitioner, having returned from vacation, submitted his expense statement and reimbursed ORC for the Las Vegas cash-advance.

On May 3, 1991, Barnard ordered petitioner to turn in his credit card because he had misused it for the unauthorized Las Vegas cash-advance. Credit cards had never been used for cash-advances at ORC.

On May 6, 1991, Barnard gave petitioner a termination letter, marked as Exhibit "1." Jim Willemsen, a recent hire, was also present.

On May 7, 1991, petitioner applied for unemployment compensation benefits, which were allowed.

On May 30, 1991, ORC appealed. The Administrative Law Judge decided that petitioner was discharged for misconduct. The Labor and Industry Review Commission modified and affirmed the Administrative Law Judge's decision.

Petitioner now seeks judicial review of the Labor and Industry Review Commission's (Commission) January 29, 1992 decision which denied petitioner unemployment compensation benefits, and ordered petitioner to repay certain benefits he had received. Petitioner seeks to have this court reverse the Commission's decision.

#### **STANDARD OF REVIEW**

The Wisconsin Statutes Unemployment Compensation Chapter 108 refers to Chapter 102 of the Wisconsin Statutes for purposes of judicial review:

"(7) JUDICIAL REVIEW. (a) The department or either party may commence action for the judicial review of a decision of the commission under this chapter after

exhausting the remedies provided under this section if the party or the department has commenced such action in accordance with s. 102.23 within 30 days after a decision of the commission is mailed to a party's last-known address.

(b) Any judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section..."

Wis. Stat. Sec. 108.09(7) (1989-90).

Wisconsin statutes Chapter 102, the Worker's Compensation Act, provides for

judicial review of administrative decisions involving unemployment compensation:

**"102.23 Judicial review.** (1) (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02...

(d)...This action may thereupon be brought on for hearing before the court upon the record...

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside **ONLY** upon the following grounds: [emphasis added]

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission or the department unless it is made to affirmatively appear that the plaintiff was damaged thereby....

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence."

Sec. 102.23 Wis. Stats. (1989-90).

## DISCUSSION

In the instant action, petitioner argues that using his company credit card for a cash advance in Las Vegas did not constitute misconduct because no written policy or discussion limited petitioner's credit card use.

"Section 108.04 (5), stats., provides that an employee is ineligible for benefits

if he or she has been discharged "for misconduct connected with his employment." No definition of "misconduct" is provided in ch. 108. The Wisconsin Supreme Court defined the term in Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941), as follows:

"The application of these principles leads to the conclusion...that the intended meaning of the term "misconduct" as used in sec. 108.04(4)(a) [currently sec. 108.04(5)], Stats., is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer...[M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

...Benefits may not be denied unless the employee's conduct amounts to an "intentional and substantial disregard of" or an "intentional and unreasonable interference with," the employer's interests." [footnotes and cites omitted]. Miller Brewing Co. v. Department of Industry, Labor & Human Relations, 103 Wis. 2d 496, 498-499, 308 N.W.2d 922 (Ct. App. 1981).

A reviewing court is not bound by the legal conclusions drawn by the Commission.

Shudarek v. Labor & Industry Review Commission, 114 Wis. 2d 181, 186, 336 N.W.2d 702

(Ct. App. 1983). The Wisconsin Supreme Court has repeatedly concluded:

"If it is true that a determination by the commission that there has been misconduct under the standard prescribed by the statute is a conclusion of law, it does not follow that every such determination is open to an independent redetermination by this court. If several rules, or several applications of a rule are equally consistent with the purpose of the statute, the court will accept the agency's formulation and application of the standard." Milwaukee Transformer Co. v. Industrial Comm., (1964), 22 Wis. (2d) 502, 510, 126 N.W.(2d) 6.

"Thus if the commission's legal conclusion, such as a determination of misconduct, is reasonable this court will sustain the commission's view even though an alternative view may be equally reasonable. Tecumseh Products Co. v. Wisconsin Employment Relations Board (1964), 23 Wis.(2d) 113, 129, 126 N.W.(2d) 520."

Vocation. Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis. 2d 230, 243, 251 N.W.2d 41 (1977).

In the case at bar, the Commission made factual findings that petitioner received clear

and definite notice from Barnard, president of ORC, that cash would not be advanced to employees for the NISH conference held in Las Vegas. Petitioner deliberately disobeyed Barnard's order when he initiated the cash-advance transaction on his company credit card in Las Vegas. This conduct amounted to an "intentional and substantial disregard" of the employer's interests. Further, petitioner again deliberately disobeyed Barnard's order when he failed to comply with her demand for immediate reimbursement to the company, upon her learning of petitioner's unauthorized cash-advance.

The weight and credibility of the testimony rest with the Commission and examiner's findings, especially regarding demeanor evidence, and are conclusive on appeal. See generally, Haferman, Judicial Review of Workmen's Compensation, 1973 Wis. L. Rev. 576, 585-588 (1973) [citations].

In the case at bar, the Commission relied upon credible, substantial evidence in determining its factual findings, and a reviewing court may not disturb such findings. State ex rel. Harris vs Annuity & Pension Board, 87 Wis. 2d 646, 659, 275 N.W. 2d 668 (1979).

The Commission correctly concluded that petitioner had been terminated for misconduct. Credible evidence supports the Commission's legal conclusion.

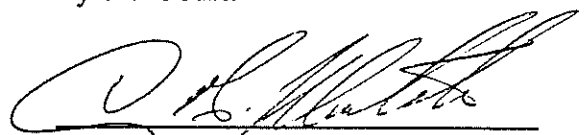
Accordingly, this court finds sufficient evidence to support the Commission's decision. Princess House, Inc. v DILHR, 111 Wis. 2d 46, 330 N.W. 2d 169 (1983).

#### ORDER

The Commission properly relied on the whole record in making its factual findings which support its order. The decision of the Commission is confirmed.

Dated: March 5, 1993

By the Court:



Dennis G. Montabon  
Circuit Judge