Memo from Steve Schooler to the Homeless Issues Committee – originally e-mailed to committee on 8/21/2014 and distributed in paper form to committee on 8/26/2014.

"Heidi,

I have reviewed the case you provided. I also reviewed two of the cases it cited, *Gehin v. Wis.Group Insurance Bd.*, 2005 WI 16, 278 Wis.2d 111, 692 N.W.2d 572 and *Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board*, 232 Wis. 170, 189, 285 N.W. 851 (1939). While neither the case you provided nor any of the other cases rely on a factual basis that clearly involved hearsay evidence that would have been admissible in court proceedings pursuant to the rules of evidence, the cases do by by their dicta discussions, require findings of administrative agencies to be supported by some credible evidence other than solely hearsay.

However, the basis for these decisions is that administrative agencies need only support their determinations by "substantial evidence." *Gehin*, 205 WI at ¶ 48. "Substantial evidence" is defined as "that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion." *Id.* This is obviously a more flexible and understandable standard than the burden of proof standard,"preponderance of the evidence", used in civil court proceedings. The whole basis for barring findings based solely on hearsay (whether or not admissible pursuant to the rules of evidence) is to make the "substantial evidence" standard workable and fair. The *Gehin*Court reasoned,

> The dilemma, however, is that if hearsay is admissible in court as an exception to the hearsay rule and a fact-finder in a judicial proceeding may base it decision on admissible hearsay, why then apply what appears to be a more restrictive rule barring an administrative agency from basing its decision on uncorroborated hearsay that falls within the exception? The primary reason is that in administrative hearings the claimants are often not represented by counsel and the decision-makers are often not attorneys. Requiring decision-makers to determine whether hearsay evidence falls within a hearsay exception defeats the reasons for the relaxed standards for the admissibility of evidence in administrative proceedings. The protection for the parties lies in the requirement that hearsay evidence must be corroborated if an agency is to rely on it as the sole evidence.

Gehin, 2005 WI at ¶90.

What the ordinance as currently drafted does, is confound various legal standards and rules for decision making. It combines a "preponderance of the evidence" standard for civil court proceedings with a "substantial evidence" rule of non-reliance on uncorroborated hearsay used for administrative proceeding reviews. Obviously, this is totally confusing and makes no sense.

I agree that the appropriate standard to be used is the "substantial evidence"standard which is used throughout Wisconsin for review of agency decisions. Therefore, the ordinance as proposed should be amended at section 5(h). The phrase "preponderance of the evidence"should be removed and 5(h) rewritten as follows:

> The grievance decision shall be based upon substantial evidence presented at the hearing. Substantial evidence is that quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion but a factual finding may not be based solely upon uncorroborated hearsay.

Actually, this revision considerably improves the ordinance as it will make the hearing less legalistic and better able to be administered by non-lawyers. You indicated that you had this reviewed by Dane County Corporation Counsel and I am surprised they did not suggest this as a change or raise the mixed potpourri of standards in the draft as a concern. Were there any other concerns raised by Corporation Counsel that perhaps would improve the ordinance?

In any event, as far as the hearsay rule goes, we are fine with 5(h) as we proposed. Please let me know your thoughts.

Thanks."