STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EUGENE NICHOLS, Complainant,

vs.

STATE OF WISCONSIN (UNIVERSITY OF WISCONSIN-MADISON), Respondent.

Case 535
No. 62217
PP(S)-333

Decision No. 31385-A

Appearances:

David Vergeront, Chief Legal Counsel, Department of Administration, Office of State Employment Relations, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

Eugene Nichols, appearing pro se, assisted at hearing by **Kathy Berigan**.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel Nielsen, Examiner: On March 17, 2003, Eugene Nichols filed a complaint of unfair labor practices against the University of Wisconsin-Madison, asserting that his termination from the position of Food Service Assistant 2 in July of 2002 violated the provisions of the State Employment Labor Relations Act, Section 111.80, Stats. ("SELRA"). The matter was held in abeyance for a period to allow conciliation, and the conclusion of related litigation. In June of 2005, the Commission appointed Daniel Nielsen, an Examiner on its staff, to conduct a hearing and make and issue appropriate Finding of Fact, Conclusions of Law and Order.

In response to a Motion to Dismiss, the complaint was clarified, to specify the following as the alleged violations of SELRA:

> 1. That the State violated Section 111.84 by changing the conditions of the Food Service Assistant II job in March, April and May of 2002, when it kept Mr. Nichols working as a Cook II until May 15th; that by this conduct, the State violated the collective bargaining agreement.

2. That the State violated Section 111.84 by characterizing Mr. Nichols' leave time usages in the Spring and Summer of 2002 as unscheduled, when in fact they were scheduled in accordance with the Union contract; that by this conduct, the State violated the collective bargaining agreement.

3. That the State violated Section 111.84 by harassing Mr. Nichols about his use of leave time, including demands by Denise Neath that he provide medical excuses for his doctor appointments, even though he had not met the three consecutive day threshold under the contract for requiring a doctor's excuse; that by this conduct, the State violated the collective bargaining agreement, and restrained, coerced or intimidated Mr. Nichols in the exercise or enjoyment of his legal rights.

4. That the State violated Section 111.84 by refusing to honor Mr. Nichols' requests for FMLA leave in connection with his post traumatic stress disorder; that by this conduct, the State violated the collective bargaining agreement, and restrained, coerced or intimidated Mr. Nichols in the exercise or enjoyment of his legal rights.

5. That the State violated 111.84 by discharging Mr. Nichols in retaliation for his attempt to use leave time and FMLA time, and as a means of discriminating against him based upon his post-traumatic stress disorder; and that the allegations of insubordination and poor attendance were a pretext for the retaliation and discrimination; that by this conduct, the State violated the collective bargaining agreement, and restrained, coerced or intimidated Mr. Nichols in the exercise or enjoyment of his legal rights.[1]

Hearings were held on the complaint on November 14, 15, 16 and 21, 2005 in Madison, Wisconsin. The hearings were transcribed and transcripts were received on December 20, 2005. The parties thereafter filed written arguments, and the State filed a motion to strike portions of the Complainant's reply brief. On April 10, the Examiner struck those portions of the reply brief which were irrelevant and those which consisted merely of insults against counsel for the State. The record was closed as of that date.

Now, having reviewed the record and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

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[1] This statement of the allegations was prepared by the Examiner, as his interpretation of the Complainant's allegations, in a September 21, 2005 letter to the parties. The Complainant confirmed that this was an accurate and complete statement of his SELRA claims in letters dated October 5 and October 12.

FINDINGS OF FACT

1. The Complainant, Eugene Nichols, (hereinafter referred to as either the Complainant or Mr. Nichols) was employed by the University of Wisconsin-Madison, Division of Housing, from March 1999 through March 20, 2002 as a limited term employee ("LTE"). On March 21, 2002, he was hired as a full-time employee by the Division of Housing, in the position of Food Service Assistant 2. That position carried with it a six month probationary period. He was terminated from that position on July 15, 2002.

2. The Respondent, University of Wisconsin-Madison, is an institution of higher education operated by the State of Wisconsin, under the direction and control of the Board of Regents. The University's Division of Housing provides housing services, including food service, for resident students. At all times relevant to this matter, Robert Fessenden was the Associate Director of University Housing and Cheryl Mekschun was the Human Resources Director for the Division of Housing. Prior to April 22, 2002, Linda Tank was the Food Service Manager for the Division's Commissary at Gordon Commons. On April 22, Denise Neath took over as the Food Service Manager. Carolyn Yanke was the Food Service Administrator who directly supervised Tank and Neath. Phil Balbach was a Food Production Manager at the Commissary, and Steve Frame was a Food Manager at the Commissary. Both Balbach and Frame report to Neath.

3. Regular food service employees of the University's Division of Housing are included in a bargaining unit represented by the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, ("WSEU") and are covered by a collective bargaining agreement between the State of Wisconsin and WSEU. Included in that collective bargaining agreement is a provision outlining the rights of management:

. . .

ARTICLE III
MANAGEMENT RIGHTS

> **3/1/1** It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management, however, such rights must be exercised consistently with the other provisions of this Agreement. Management rights include:
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> A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.
>
> B. To manage and direct the employees of the various agencies.

C. To transfer, assign or retain employees in positions within the agency.

D. To suspend, demote, discharge or take other appropriate disciplinary action against employees for just cause.

E. To determine the size and composition of the work force and to lay off employees in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

F. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goals or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

3/1/2 It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

A. Original appointments and promotions specifically including recruitment, examinations, certification, appointments, and policies with respect to probationary periods.

B. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, and allocation and reallocation of positions to classifications.

. . .

4. In response to legislative concerns about excessive use of the LTE position, the University in early 2002 replaced several long term LTE positions with five FTE positions. Mr. Nichols applied for a full-time position as a Food Service Assistant 2. At the time, he was working as an LTE Cook 2 in Pop's Club, in Gordon Commons. Cook 2 is a higher rated and more highly paid position that Food Service Assistant 2. Mr. Nichols expressed his interest in the full-time position by submitting a sheet showing his top three preferences for available positions. His first choice was a position in the Commissary, downstairs at Gordon Commons. The listed work schedule was Monday through Friday, from 8:00 a.m. to 4:30 p.m. His second and third choices were in Pop's Club. These positions showed a rotating schedule, with some regularly scheduled weekend work. Mr. Nichols was interviewed for the positions,

and was hired for the Commissary position he had listed as his first choice. In the course of the job interview, he was advised that the work hours for these positions were all subject to change during the summer. He was also advised that he would be a probationary employee for his first six months of employment.

5. The Position Description for Food Service Assistant 2 in the Commissary describes the job functions and requirements as:

Food Service Assistant 2 (03-07) Commissary

POSITION SUMMARY

Under general supervision, responsible for performance of food preparation for deli operations and catering, including service of food, supply and distribution of food and supplies to deli operations etc. and cleaning of assigned work areas. Direct and coordinate the work of others.

HOURS

8:00 a.m.-4:30 p.m. Monday through Friday; works Saturdays on a rotating basis and occasional Sundays.
Schedule subject to change.

GOALS & WORKER ACTIVITIES

40% A. Prepare hot and cold food items as needed daily for deli and catering operations.

- A1. Ensure that procedures and standards of high quality food production are met.
- A2. Prepare food items for deli operations and catering, assuring that standards for temperature of food, portion control and quality are maintained.
- A3. Supply food items as needed for daily production.
- A4. Prepare cold food items as assigned.
- A5. Coordinate the supply of containers and utensils needed for preparation area.
- A6. Keep work areas clean, neat and well organized.

25% B. Maintain and observe quality, sanitation and safety standards and timing requirements.

- B1. Interpret write-ups, collect and/or prepare plated sandwiches and salads for deli operations and catering functions, as needed.
- B2. Store food, beverages, and general supplies properly at the end of production.

B3. Following established guidelines, take and record temperatures of food produced for distribution.
B4. Keep production area clean and free of spills during production.
B5. Clean and sanitize work area at the end of production cycle.

15% C. Serve as relief in deli operations as needed.
C1. Set up servery line as needed.
C2. Cashier as needed.
C3. Prepare coffee, cookies, pastries, and sandwiches as needed.

15% D. Perform related duties as required.
D1. Drive food delivery trucks and food service employees to other units and/or events as needed.
D2. Maintain delivery truck including filling with gas, reporting necessary repairs, maintaining cleanliness of the truck interior, and maintaining truck log.
D3. Keep enclosed delivery carts clean.
D4. Assist with cleaning of all areas daily as directed.

5% E. Miscellaneous
E1. During closed periods, participate in cleaning activities in entire food service area, as assigned.
E2. Perform other food related and cleaning duties as assigned.

KNOWLEDGE AND SKILLS

Ability to drive trucks with standard and automatic transmissions and operate a truck lift.
Ability to load and unload trucks.
Ability to safely use food service equipment such as ovens, gas grills, slicers, steamers, etc.
Knowledge of ServSafe sanitation practices and food temperature/time guidelines.
Ability to maintain cleanliness and personal neatness.
Working knowledge and skill in food handling.
Knowledge of institutional kitchen and food service equipment and procedures.
Oral communication skills.

SPECIAL REQUIREMENTS
Job requires long periods of standing and walking and frequent lifting of objects weighing approximately 50 pounds. A drivers license, which meets the UW Risk Management Standards, is required.

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6. Mr. Nichols started his job as a Food Service Worker 2 on March 21, 2002. Through the end of the spring semester, he was required to split his time working mornings in the Commissary and afternoons in his old position as a Cook in Pop's Club. The practice of having an employee who accepts a new position work part-time in the former position to allow for a transition period while a replacement is being sought is not uncommon in Housing. Mr. Nichols was not paid at the higher Cook rate for his work in Pop's Club during this transition period.

7. As a regular employee, Mr. Nichols was entitled to sick leave benefits under Article XIII, Section 5 of the collective bargaining agreement, to cover absences due to personal illnesses, illnesses in the immediate family, and doctor and dentist appointments "which cannot be scheduled at times other than during working hours." Sick leave accrues at the rate of 0.0625 hours per hour of work, or five days in each 80 hour bi-weekly pay period.

8. Regular employees are also provided three and a half personal holidays for use during the year. Article 13, Section 9 of the collective bargaining agreement requires that requests for personal days be approved where they are to be used for non-Christian holidays and the employee gives at least 14 days advance notice of intent to take a holiday for religious reasons. Otherwise, the use of these personal holidays is conditioned upon prior approval of management. In the case of probationary employees, the personal days are available for use during the first six months of employment, but if the employee fails to pass probation, any usage in excess of the time actually earned, based on an annual pro-ration, is recovered from the employee's final check.

9. Denise Neath came to Gordon Commons from the Division's warehouse operation. She was transferred to Gordon Commons because Fessenden felt that the previous Manager had not been consistently applying the University's policies regarding time usage, schedules and other matters at Gordon Commons. Neath was assigned on the assumption that she would run a more disciplined and by-the-book operation.

10. Denise Neath started work as the Food Service Manager at Gordon Commons on April 22. Mr. Nichols was noted in the supervisor's log for a one hour dentist's appointment that day. He did not report to work until around noon. Neath asked him why he had been gone so long for a one hour appointment. He replied that he had come to work straight from the appointment.

11. On May 1, Mr. Nichols asked for a day off on Friday, May 10 for "important family matters." Neath approved the request, with a notation advising him that he had only 3.5 personal days available while he was on probation, and asking how many he had used to that point. Mr. Nichols subsequently changed the request from Friday, May 10 to Friday, May 17. That request was also approved. He then noticed that he had been scheduled to work

Saturday, May 18. May 18th was the date of University graduation ceremonies, and a busy time in the Commissary. Mr. Nichols sent a note to Carolyn Yanke, explaining that he did not realize that he was supposed to work on the 18th, since he had been on a Monday-Friday work schedule, and that he needed to be gone that day as well, in order to help put a roof on a modular house members of his family were having delivered in the Boscobel area. Yanke and Neath discussed the request, and it was approved.

12. On Friday, May 24, Mr. Nichols left a voice mail message for Neath, apparently advising her that he would not be in to work. The quality of the phone connection was very poor, and the message was largely unintelligible. The standard work rules call for employees to call back during the day if they don't speak with a supervisor when they call-in, but Mr. Nichols did not call back. Mr. Nichols was not scheduled to work on the weekend, nor on Monday, May 27, which was Memorial Day. On the 28th, Neath approached Mr. Nichols on the loading dock to ask him about his absence, and why he had not called back during the day to discuss when he would be returning. She told him the message was very scratchy and asked why he had been off. He initially told her it was none of her business, but when she persisted, he said he had been sick with diarrhea all weekend. Neath attempted to discuss the call back procedures with him, but Mr. Nichols became red-faced and angry at being questioned about his absence.

13. On Thursday, May 30, Catering Manager Mike Morrison advised Neath that there was a dent in the back of a pickup truck that Mr. Nichols used for making deliveries. Morrison had given Mr. Nichols a vehicle accident form to fill out, but Mr. Nichols refused, on the grounds that he had nothing to do with the dent. When Neath told Mr. Nichols that he had to complete the report, he replied that he had spoken to Phil Balbach, and that Balbach told him he didn't have to do the report. Neath advised him that he did have to finish the report. Eventually, Neath completed a portion of the accident report, and Mr. Nichols completed a portion of the report, though he refused to sign it.

14. On Friday, May 31, Neath held a meeting with the employees at Gordon Commons, to introduce herself and explain her expectations. Part of her presentation included a review of work rules, including dress code and the procedures for call-ins. Neath reminded employees that they were required to call-in before their shift and, if they got the answering machine rather than a supervisor, that they should call back before noon to let the supervisor know when they would be returning to work. Towards the end of the meeting, Neath advised the employees that the Gordon Commons would be hosting members of the State Patrol during the National Conference of Mayors, which was scheduled for June 13 through 18, and that this would be a busy time for all employees, so they should take care to be on time for their scheduled shifts during that period.

15. On Monday, June 3, Mr. Nichols submitted a sick leave request for doctor's appointments on Thursday, June 13. Neath asked him if it would be possible to reschedule the appointments, since the 13th was the start of the State Troopers' stay at the Commons. Mr.

Nichols advised her that he could not reschedule, as the appointments had been made months before. Neath asked if he would come in to work before and after his appointments, and he said he would.

16. Also on June 3, Mr. Nichols sent a note to Denise Neath, advising her that "Due to personal matters, I will be away from my scheduled day of work on Friday, June 14, 02. Thank you for your cooperation." Neath conferred with her supervisor, Carolyn Yanke, and wrote a reply that same day, advising Mr. Nichols that his request was "Denied because of operational needs."

17. June 3 was also the date of Mr. Nichols' two month performance evaluation with Neath. The evaluation meeting was held after Neath denied the request for a day off on the 14th. In the course of the evaluation meeting, he told her that his request for the 14th was actually due to medical reasons, and that he would use either sick leave or a personal day to cover the time. She advised him that he would need to provide a doctor's excuse for the day, and asked if it was possible that he could make do with less than the full day off. He said he needed the whole day, but did not raise any objection to providing a doctor's excuse.

18. Mr. Nichols' two month evaluation included four categories in which the supervisor selected one of five possible ratings, with additional written comments. Under "Quantity of Work", he received the middle rating of "Does a sufficient amount of work." Under "Job Knowledge", he received the second lowest rating of "Limited knowledge applied to job." In "Quality of Work", he received the second lowest rating of "Not consistent, always needs checking." In "Dealing With People", he received the middle rating of "Usually deals with people effectively." Among the supervisor's notes on the evaluation was Neath's observation that Mr. Nichols would be trained to work as a backup in the Blue Chip Deli when it reopened in the fall semester. Mr. Nichols signed the evaluation, indicating that it had been reviewed with him, but told Neath that he disagreed with her evaluation and believed that he was a good worker. The absence on May 24 was also discussed, and Mr. Nichols reiterated his view that it was none of Neath's business why he was absent.

19. On June 6, Mr. Nichols was given a verbal reprimand for violating the dress code by wearing blue jeans rather than black pants.

20. On Thursday, June 13, Mr. Nichols reported for work as scheduled, then left for his doctors' appointments. He later called in, and said he would not be able to return to work because he was in pain from the appointments.

21. Mr. Nichols stayed home from work on Friday, June 14, the day he had taken off citing medical reasons. Saturday, Sunday and Monday were scheduled off days for him. When he returned to work on Tuesday, June 18, Neath reminded him that he needed to supply a medical excuse for June 14. He told her that doctor's excuse was only required for absences longer than three days, and he asked her to prove that he was required to provide a written excuse. She told him again to produce a doctor's note.

22. On Thursday, June 20, Neath convened an investigatory meeting regarding what she felt was Mr. Nichols' pattern of extending weekends, and his insubordination on the topic of medical excuses. WSEU Steward Barb Peters was present, along with Mr. Nichols and Phil Balbach. Mr. Nichols had requested the presence of a Union representative for the meeting. In the course of the meeting, Neath again told Mr. Nichols that he needed to provide a medical excuse for the 14th, and that it should be provided by the following day. They also discussed Mr. Nichols' claim that Phil Balbach had told him he didn't need to write the accident report on May 30, which Balbach said was not true. Mr. Nichols told Neath that he felt she did not respect him, and was harassing him, and said he wanted a Union representative present for all future meetings with her. Barb Peters told Neath that she was getting lots of complaints about her supervisory style, and that many employees felt she was harassing them. Nothing was resolved in the meeting.

23. On Friday, June 21, Neath approached Mr. Nichols in the bakery area, and she asked him if he had the medical excuse for the 14th. Mr. Nichols gave her documentation of his June 13th appointments, and a business card from a counselor at the Vet Center, indicating that he had an appointment there for the afternoon of June 26. She told him that these had nothing to do with his absence on the 14th, and that he needed to provide a medical excuse for that day. At this, he became quite agitated, and told her she would just have to call the Vet Center to get it verified. Neath told him it was his responsibility to provide an excuse, and that she wasn't going to call his medical providers to verify his appointments. She again directed him to provide a medical excuse for June 14.

24. James Matosky was a co-worker of Mr. Nichols both during his time as a Limited Term Employee and while he was a regular employee at the Commissary. Mr. Nichols had told Matosky that he suffered from post-traumatic stress disorder. In June, 2002, Matosky advised Mr. Nichols that he should apply for coverage under the Family and Medical Leave Act. Matosky explained to Mr. Nichols that FMLA benefits could be applied retroactively to cover unexcused absences. Sometime on or about June 21, Mr. Nichols told Neath that he was seeking counseling for post-traumatic stress and inquired about the Family and Medical Leave Act. Neath advised him that FMLA requests were handled by Human Resources rather than the individual departments, and that he should contact them for information. Mr. Nichols did contact the Human Resources Department for FMLA forms. The forms were sent to him, but he never returned them.

25. On July 8, Neath again asked Mr. Nichols for a medical excuse for June 14, and he again told her that she should call the Vet Center to find out. She replied that it was his responsibility to provide the evidence. Another discussion on July 10 followed the same sequence. Mr. Nichols never did provide a medical excuse for June 14.

26. Following her fruitless attempts to secure the medical excuse from Mr. Nichols, Neath contacted Human Resources Director Cheryl Mekschun. She discussed Mr. Nichols' pattern of taking off on Fridays, and what she viewed as his insubordination in refusing to

provide the medical excuse, and said that she planned to terminate him at his three month performance evaluation meeting on Friday, July 12. She also told Mekschun that she was afraid of Nichols, based on his tendency to become very angry and confrontational whenever he was questioned or challenged.

27. On July 11, Steve Frame cautioned Mr. Nichols to discard some gum he was chewing on his way back from a break. Chewing gum at the work station is a violation of sanitary standards.

28. Neath had not discussed the scheduling of an evaluation meeting with Mr. Nichols. On the morning of Friday, July 12, Mr. Nichols' companion called in to say that he was sick and would not be in. Mr. Nichols called in around 8 a.m. and told Phil Balbach he was sick and wouldn't be at work.

29. Late in the day on Monday, July 15, Neath called Mr. Nichols in for his three month evaluation. Steve Frame was also present. She advised him that he was being terminated, and had Frame escort him from the building.

30. The three month evaluation Neath had prepared fro Mr. Nichols marked him at the mid-point in each of the performance standards, which was an improvement from his two month evaluation. Under "Final Action" she noted that he was terminated "Based on unscheduled absences & insubordination more than on job performance."

32. Mekschun followed up the termination with a letter to Mr. Nichols:

. . .

> Dear Mr. Nichols:
>
> This correspondence officially confirms the notification you received from Denise Neath that your original probationary period with the Division of University Housing was terminated. Your last day of employment with us was July 15, 2002.
>
> You began probation as a Food Service Assistant 2 on March 21, 2002. Your pattern of unscheduled absences and insubordination were violations of work rules and detrimental to meeting the operational needs of the Residence Halls Commissary.
>
> Your final probationary report is enclosed.
>
> Enclosed is an Exit Interview form which the University uses to compile information required by Wisconsin State Affirmative Action regulations. Please return the completed form to the Equity and Diversity Resource Center. The address is shown at the bottom of the form.
>
> I am sorry your employment with the Division of University Housing did not work out and wish you the best of luck in the future.
>
> Sincerely,
>
> Cheryl A. Mekschun
> Human Resources Director

33. On March 17, 2003, the instant complaint was filed, challenging the State's decision to keep Mr. Nichols working in his former Cook 2 position through the end of the spring semester, its characterization of his absences as unscheduled, Neath's demand for doctors' slips, the denial of his FMLA request, and the decision to terminate him.

34. Mr. Nichols' temporary split assignment between the Commissary and Pop's Club for the balance of spring semester in 2002 was consistent with the normal policies of the University in cases where employees start a new job. The work in Pop's Club was fairly within the scope of his duties as a Food Service Assistant 2. The assignment did not constitute a contract violation, and no grievance was ever filed nor was any protest lodged concerning this assignment until the filing of the instant complaint.

35. The collective bargaining agreement provides in Article VI, Section 2 that the Employer has the right to change work schedules to meet operational needs:

> **SECTION 2: Scheduling**
>
> **6/2/1 Work Schedules**
> Work schedules are defined as an employee's assigned hours, days of the week, days off, and shift rotations.
>
> **6/2/2** In those departments where work schedules are fixed or posted, fixed work schedules shall be defined as set and recurring without the need to be posted, and posted work schedules shall be defined as set for a specific period of time, established by the department, and communicated to employees. Changes in such work schedules shall be made only to meet the operational needs of the service, which, if requested, shall be explained and shall not be made arbitrarily. Insofar as possible, a minimum of five (5) calendar days notice will be provided to the local Union and to employees affected by a change in such work schedule. Work schedules will not be changed to avoid the payment of overtime. However, with management approval, employees may voluntarily agree to changes in work schedules. When the duration of such schedule change exceeds two (2) weeks, the Union will be notified. The Union shall have the right to file a grievance in accordance with Article IV commencing at Step One if it feels a work schedule change has been made arbitrarily.

The scheduling of employees in the Commissary for summer hours at the conclusion of the spring semester, and the scheduling of Mr. Nichols to work some weekend days in the summer of 2002 were based on legitimate operational needs, and were not arbitrary. No grievance was filed challenging these decisions.

36. The collective bargaining agreement provides in Article IV, Section 9 that the Employer has the right to discipline and discharge employees for just cause. That Section further provides for the presence of a Union representative if requested during any

investigatory interview which the employee reasonably believes might lead to discipline. Section 10 of that Article excludes probationary employees from the coverage of Section 9 of the contract:

> **SECTION 10: Exclusion of Probationary Employees**
>
> **4/10/1** Notwithstanding Section 9 above, the retention or release of probationary employees shall not be subject to the grievance procedure except those probationary employees who are released must be advised in writing of the reasons for the release and do, at the discretion of the Personnel Commission, have the right to a hearing before the Personnel Commission.
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> . . .

As a probationary employee, Mr. Nichols could be released without any recourse to the grievance procedure. The release of a probationary employee is not an act of discipline under the collective bargaining agreement, and the employer is entitled to release a probationary employee at any time prior to the end of probation without the necessity of establishing just cause or engaging in progressive discipline.

37. The meeting between Mr. Nichols, Neath and Frame on July 15, 2002, was an evaluation meeting, and did not involve any investigation of Mr. Nichols' conduct. Evaluation meetings, even where they entail the release of a probationary employee, are not investigatory interviews, and there is no right to have a Union representative present during such meetings.

38. In the twelve week period from Neath's arrival as supervisor on April 22 through Mr. Nichols' termination on July 15, he used five days of leave in conjunction with weekends. On three of those days – all Fridays – he used sick leave. The collective bargaining agreement provides in Article XIII, Section 5 that the Employer has the right to demand a doctors' excuse where "the Employer has reason to believe that an employee is abusing the sick leave privilege." The submission of a request for sick leave on Friday, June 14th, immediately after a personal day off on that day had been denied, and Mr. Nichols' distinct pattern of using time off benefits to extend weekends, provided reason to believe that Mr. Nichols was abusing the sick leave privilege. His refusal to provide a doctors' slip in response to Neath's repeated requests constituted insubordination.

39. There is no provision of the collective bargaining agreement specifically referencing an employee's right to access the Family Medical Leave Act, nor purporting to define an employee's rights under the FMLA. Mr. Nichols' first mention to any member of management about wishing to secure FMLA benefits was on or about June 21, after he had already displayed a pattern of extending weekends and refusing to provide requested information to Neath.

40. Subsequent to his non-retention, Mr. Nichols brought an action in the United States District Court for the Western District of Wisconsin – EUGENE E. NICHOLS V. UNIVERSITY OF WISCONSIN-MADISON, DIVISION OF HOUSING, CASE 04-C-573-S – alleging that his termination was due, in part, to retaliation for seeking benefits under the FMLA. In its November 18, 2004 Memorandum and Order, the Court found that: "Plaintiff has presented no evidence that he had a serious health condition which rendered him unable to perform the functions of the position. Further, he neither requested leave nor provided the required notice under the Act. 29 U.S.C. §2612(e)(2). Since the plaintiff never requested or received leave under the FMLA, he cannot pursue a claim that he was retaliated against for exercising rights under the Act." The Court granted summary judgment to the University and dismissed the action with prejudice and costs. The claim in federal court concerning denial of FMLA benefits and retaliatory discharge for seeking FMLA benefits is the same claim raised in portions of this complaint.

41. The termination of Mr. Nichols' employment as a Food Service Assistant 2 was motivated by concerns about his attendance record, his insubordination in refusing to provide a medical excuse when requested, and his interactions with supervision when questioned or challenged. It was not motivated by his mentioning that he was interested in applying for Family and Medical Leave benefits, nor by any effort to legitimately claim rights or benefits under the collective bargaining agreement.

On the basis of the above and foregoing Finding of Fact, the Examiner makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Eugene Nichols was an "employee" within the meaning of Section 111.81(7), Stats.

2. The University of Wisconsin-Madison is a subdivision of the State of Wisconsin, and is an "employer" within the meaning of Section 111.81(8), Stats.

3. The decision of the U. S. District Court for the Western District of Wisconsin dismissing the Complainant's claim of violations of the Family Medical Leave Act precludes the Commission from considering those portions of this complaint that allege violations of the Family Medical Leave Act.

4. By the acts described in Findings of Fact 4 through 41, the University of Wisconsin-Madison, its officer and agents, did not commit unfair labor practices within the meaning of Section 111.84(1), Stats.

On the basis of the above and foregoing Finding of Fact and Conclusions of Law, the Examiner makes and issues the following Order.

ORDER

That the instant complaint of unfair labor practices be, and the same hereby is, dismissed in its entirety.

Dated Racine, Wisconsin, this 23rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

STATE OF WISCONSIN (UW-MADISON)

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

This case centers on the dismissal of Eugene Nichols from his position as a probationary employee in the position of Food Service Assistant 2 with the University of Wisconsin-Madison. Mr. Nichols was hired into the position on March 21, 2002 and was terminated on July 15, 2002. As with all new hires into the classified service, he was on probation for the first six months of employment. A probationary employee in the Food Service Assistant 2 classification is a member of a bargaining unit, represented by the Wisconsin State Employees Union, and is covered by the collective bargaining agreement, but does not have rights under the agreement to challenge a non-retention decision.

Five alleged statutory violations are raised by the complaint:

- That the State violated the collective bargaining agreement by refusing to honor Mr. Nichols' requests for FMLA leave in connection with his post traumatic stress disorder.

- That the State violated the collective bargaining agreement when it kept Mr. Nichols working as a Cook II between March 22 and May 15.

- That the State violated the collective bargaining agreement by characterizing Mr. Nichols' leave time usages in the Spring and Summer of 2002 as unscheduled, when in fact they were scheduled in accordance with the Union contract.

- That the State violated the collective bargaining agreement by harassing Mr. Nichols about his use of leave time, including demands by Denise Neath that he provide medical excuses for his doctor appointments, even though he had not met the three consecutive day threshold under the contract for requiring a doctor's excuse.

- That the State discharged Mr. Nichols in retaliation for his attempt to use contractual leave time and FMLA time, and as a means of discriminating against him based upon his post-traumatic stress disorder.

A. The Complainant's FMLA Claims – Lack of Jurisdiction and Claim Preclusion

The first of Mr. Nichols' allegations, and a portion of the fifth, were dismissed by the Examiner in the course of the hearing. The collective bargaining agreement does not address employee rights to access the FMLA, and the WERC does not have jurisdiction over claimed violations of that federal statute.

In addition to the lack of any plausible basis for the assertion of the Commission's jurisdiction, the District Court for the Western District has already decided the issues of Mr. Nichols' claims that he was denied these rights, and that his attempt to secure FMLA benefits was the underlying reason for his termination. The Court dismissed both claims with prejudice, finding that he never proved that he had a condition qualifying for FMLA coverage, and that he never applied for the benefits nor provided the statutorily required notice. The Examiner is therefore precluded as a matter of law from considering these issues anew under the guise of a SELRA complaint. As discussed by the Commission in its recent Methu decision[2]:

> In summary form, under both state and federal law, the three necessary elements for claim preclusion are those cited by both SEIU and the Examiner, i.e., (1) identity of the parties; (2) identity between the causes of action; and (3) a final judgment on the merits by a court of competent jurisdiction. Examiner's Decision at 22, citing NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541, 551 (1995). When, as here, the preclusive effect of a federal court judgment is at issue, federal preclusion precedents apply. SHAVER V. F. W. WOOLWORTH CO., 840 F. 2D 1361, 1364 (7TH CIR. 1988), CERT. DENIED, 488 U. S. 856 (1988); RESTATEMENT OF JUDGMENTS (SECOND), SEC. 87. In SHAVER the court articulates the elements of federal claim preclusion essentially the same as the Wisconsin Supreme Court did in BUGHER: "'(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or privies in the two suits.'" ID. (citations omitted).[3]

Here, the federal litigation was brought by Mr. Nichols against the State, the same two parties that appear in this SELRA litigation. He claimed the failure to provide him with FMLA benefits, and his termination, were in violation of the FMLA and the Age Discrimination in Employment Act. The FMLA claims are identical to the claims in this case. A final judgment was entered on the merits by the federal court prior to the commencement of any hearing on the SELRA complaint. Each of the elements of claim preclusion is established on the record, and the Examiner cannot therefore revisit either the substantive claim of an FMLA violation, nor the retaliation claim.

B. The Complainant's Claim of a CBA Violation For His Assignment As A Cook

From the point at which Mr. Nichols assumed his new job as a Food Service Assistant 2 and through the end of the spring semester on approximately May 15, he was required to

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[2] AUDREY METHU V. DER, ET. AL, DEC. NO. 30808-A (WERC, 1/10/06) , hereinafter cited as "Methu."

[3] Methu, at page 7.

split his time between his former duties as a Cook 2 in Pop's Club and his new duties in the Commissary. He was paid for all of these hours at his new FSA 2 pay rate, which was approximately $2.00 an hour lower than his former rate of pay as a Cook 2. He claims in his complaint that the failure to pay him the Cook 2 rate for his time working in Pop's Club is a violation of the collective bargaining agreement.

Normally the Commission will not assert its Sec. 111.84(1)(E) jurisdiction to hear claims alleging violations of the collective bargaining agreement unless the Complainant has exhausted his contractual remedies prior to seeking recourse to the Commission. In this case, an October 26, 2005 letter to the parties detailing procedures for the hearing notified them of the exhaustion requirement:

> The Respondent may refute the Complainant's prima facie case by (1) providing evidence that the Complainant did, in fact, receive the right or benefit; or (2) showing that the claimed right or benefit was not applicable to the Complainant; or (3) proving that the Complainant failed to exhaust his contractual remedies. In connection with this last point, normally where the parties have negotiated a contract which includes a grievance arbitration as the mechanism for enforcing contractual rights and the grievance procedure has not been exhausted, the Complainant will be required to show why he did not make use of the grievance procedure to address the claimed violation. Where the employer and the union have negotiated a procedure for resolving disputes, the Commission will defer to that procedure, and will not exercise its discretion to hear claims of Section 111.84(1)(e) violations.

In a footnote to that paragraph, I noted that: "Respondent bears the burden of proving non-exhaustion as an affirmative defense"[4] and "Failure to exhaust the grievance procedure is an affirmative defense, which must be raised and proved by the Respondent."[5] The Respondent neither raised non-exhaustion as a defense nor sought to prove it. I will therefore assert the Commission's jurisdiction under Sec. 111.84(1)(e) to consider the merits of Mr. Nichols' contract claims.

The Complainant bears the burden of proving, by and clear and satisfactory preponderance of the evidence, that the Respondent has violated SELRA. In this instance, the asserted violation is in violating the collective bargaining agreement by requiring him to work half time in his old job as a Cook for FSA 2 wages until the end of the spring semester. He argues that this is inconsistent with his job description and is manifestly inequitable.

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[4] Citing MAHNKE V. WERC, 66 WIS. 2D 524 (1975).

[5] Citing CITY OF MENASHA (POLICE DEPARTMENT) 13283-A (WERC 2/77).

The record is clear that the Complainant did spend half of his time working in his former position, and that the Cook 2 rate is higher than the FSA 2 rate. It is not sufficient to assert that it is unfair to demand that the Complainant perform higher paid duties for a lower wage rate. It may or may not be fair. The Examiner's jurisdiction does not extend to remedying any and all employment practices he may consider subjectively unfair. The Complainant must prove that the practice violates some provision of the labor agreement, and thus the statute.[6] Here, the Complainant has provided no evidence whatsoever of a contract provision entitling him to out classification pay for splitting his time between his new job and his old job. It may well be that such a provision exists, but it has never been identified and the exhibits provided in the course of this hearing contain only excerpts of the collective bargaining agreement. Those excerpts do not address the issue, and the Examiner cannot speculate as to what other provisions might exist, and what their scope and limits might be.

C. The Complainant's Claim of a CBA Violation For The Change to Summer Hours

While it was not listed in the agreed upon statement of his causes of action, Mr. Nichols devoted some time at the hearing and in his briefs to arguing that the Commissary's switch to summer hours at the end of the spring semester was inconsistent with the hours that had been listed in the job description for his position. At the hearing, he conceded in testimony that he was advised that summer hours would be required, and that he did not object and did not really have any problem with this change in hours. He also stated that, while he believed his hours had changed while he worked, he could not recall what schedule he was on at any given point in time.[7] In light of this testimony, and given the collective bargaining agreement's provision that work schedules can be changed to meet operational needs,[8] it is not possible to conclude that there was any violation of the collective bargaining agreement by virtue of the change to summer hours for the entire Commissary department.

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[6] Mr. Nichols was advised of this requirement at pages 5 and 6 of the Examiner's October 26, 2005 letter:

> In order to make a prima facie case of a violation of Section 111.84(1)(e) the Complainant must provide evidence that the Employer's conduct violated a provision of the collective bargaining agreement. At a minimum, this would include providing a copy of the labor agreement, identifying which provision was allegedly violated, and the presentation of testimony or other evidence to the effect that the Complainant sought to use a right or benefit provided by that provision, was entitled to that right or benefit, and was denied that right or benefit.

[7] Transcript, pages 477-484.

[8] "Changes in such work schedules shall be made only to meet the operational needs of the service, which, if requested, shall be explained and shall not be made arbitrarily…" Article VI, Section 2 of the collective bargaining agreement.

D. The Complainant's Claim of a CBA Violation For Characterizing His Leave Time as Unscheduled

Mr. Nichols alleges that the State violated the collective bargaining agreement by characterizing his leave time usage as "unscheduled" in the statement of reasons accompanying his notice of non-retention. I do not view this as a free standing claim of a contract violation, since the characterization has no meaning outside of the context of the non-retention. Rather I take it as an argument in support of his claim that the non-retention decision itself was retaliation for use of leave time. I have therefore addressed this claim below, in the section of this decision discussing the non-retention decision.

E. The Complainant's Claim of a CBA Violation For Questioning Him About His Use of Leave Time

Mr. Nichols alleges that the State violated the collective bargaining agreement through Neath's harassment of him in connection with his use of leave time. He cites as instances of harassment her questioning him about his whereabouts when he returned from a dentist's appointment on April 22, her note to him that he had 3-1/2 days of personal leave available to him during his probationary period, and most particularly her demands for a doctor's slip for his June 14th absence.

With respect to Neath's questioning of the Complainant about his whereabouts on April 22, she testified credibly that the note in the supervisor's log about his doctor's appointment for that day said that he would be gone for an hour, and that she wanted to know why he didn't come to work until noon or so. It is difficult to imagine any supervisor not asking that question. The Complainant devotes some effort to explaining that doctor's appointments sometimes run late, but that is not the point. He was not docked for this time, nor was he disciplined. His claim is that merely by being questioned about it, he was being harassed. That is not a reasonable interpretation of Neath's actions, nor is an accurate depiction of the customary role of a supervisor in overseeing the work force and administering the collective bargaining agreement.

This leads to the second alleged example of harassment, Neath's notation on the Complainant's May 1st request for a personal day on May 10th. The notation was that he had only 3.5 days of personal leave, and asked how many he had already used. Neath explained this as just courtesy to a new employee, while the Complainant views it as Neath hassling him about using leave time. I read the record as supporting both interpretations. It is reasonable to believe that Neath would remind a new employee about his limited time off benefit, but such a note would also serve notice that she was watching time usage. Neath was brought in to replace Linda Tank in large part because management felt the rules were not being enforced in the Commissary. Neath was tasked with ensuring that the work force followed the rules, including the rules regarding leave usage. That she was more aggressive than Tank is not

surprising, but neither is it inconsistent with the collective bargaining agreement. Throughout the Complainant's argument, there is an underlying belief that management plays no role in administering the leave time provisions of the contract. As he expressed several times, both during his employment and at the hearing, he believes that it was none of Neath's business why he wanted to use leave on a given day, so long as he had the leave time on the books. That is simply not correct. Sick leave is intended for specific, limited purposes under the contract. Neath was entitled to take note of the fact that the Complainant's doctor appointments ("which cannot be scheduled at times other than during working hours") and his personal illnesses all tended to fall on days adjacent to off days. Personal leave is more flexible than sick leave, but it too has some limitations. It is subject to supervisory approval, and by implication it is subject to supervisory disapproval.[9] Neath was not obligated to completely ignore the operational needs of the Commissary when considering whether to approve personal leave requests.

Having said all of that, it bears noting that there is not a single instance in the record of a leave request by Mr. Nichols' having been denied, other than his initial request for personal leave on June 14th. That request was made right after Neath had announced that June 13 through 16 would be a very busy time, and that she would need everyone to follow the posted work schedule. When it was denied, the Complainant changed it from a request for a day off for personal reasons to a day off for medical reasons. That gave rise to the Complainant's claim that he was being harassed because Neath demanded that he produce a doctor's slip for the day.

The Complainant claims that the contract requires a doctor's slip only when an employee has been absent for three or more days. In fact, the contract does not contain any such provision, although the University apparently has a practice of seeking proof of fitness to return to work in that circumstance. Article 13, Section 13/5/2A of the contract provides in part that:

> In the event the Employer has reason to believe that an employee is abusing the sick leave privilege or may not be physically fit to return to work, the Employer may require a medical certificate or other appropriate verification for absences covered by this Article. When an employee has been identified as a sick leave abuser by the Employer and required to obtain a medical doctor's statement for sick leave use, the notice of such requirement will be given to the employee and the local Union in writing....

[9] The fact that the contract specifies one circumstance – observance of non-Christian holidays with 14 days advance notice – when personal leave requests must be approved demonstrates that there is a measure of discretion about approving them for other times and other purposes.

Mr. Nichols claimed a medical basis for his time off request on Friday, June 14 after his original request for time off for personal business was denied. He had already scheduled himself off for doctor's appointment on Thursday, June 13. He had agreed he would come in before and after his appointments on the 13th, but on that day he worked only two hours in the morning, and called in after his appointments to say he was in too much pain to return to work. Since Saturday, Sunday and Monday were scheduled off days, the time off on Friday the 14th created a four and a half day weekend for him.

It was reasonable for Neath to ask for medical verification of the absence on June 14 when it was initially requested, because the claim of a non-specific medical purpose was made only after the first request, without medical justification, was denied. That alone would raise a question in a reasonable person's mind about whether there actually was a medical purpose for the absence. In combination with the fact that the requested day was a Friday during a time of peak activity at work, Neath had ample grounds to suspect that the Complainant was abusing sick leave to secure time off. Once he failed to return as promised on Thursday, June 13, the case for demanding a doctor's slip for the following day became even more compelling.[10]

The Complainant points out, correctly, that there is no evidence that Neath advised the Union in writing that she suspected the Complainant of being a sick leave abuser and was requiring a doctor's slip from him. Notwithstanding the fact that Union grievance representative Barb Peters was made aware of the demand for a slip during the meeting on June 20, this lack of written notice may be a technical violation of the agreement. Be that as it may, it does not bear on the claim that Mr. Nichols was being harassed by Neath's insistence that he provide some sort of medical proof for his June 14 absence. Her demand for a slip was prompted by legitimate questions about whether he had a medical basis for taking that day off from work. He may have viewed her pursuit of the slip as harassment, but if so, she was harassing him to produce evidence that she was entitled to demand, and he was obligated to produce.[11]

It is clear that Neath brought a more aggressive and rule-oriented style of management to the Commissary than employees had been accustomed to under the former supervisor. She was determined, among other things, to police leave and time usage. Mr. Nichols may not have liked that, and may have resented her asking about his leave requests, but nothing that Neath did went beyond legitimate efforts to properly administer the collective bargaining agreement. Even if harassing someone about their leave time usage constitutes a violation of some unspecified contract provision, I conclude as a matter of fact that she did not harass him about his leave and time usage, and did not violate either the collective bargaining agreement or any provision of SELRA.

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[10] At the hearing, the Complainant testified that he was home sick on June 14. He offered no explanation of how he knew, 11 days beforehand, that he would be sick that day. Transcript, page 115.

[11] In connection with this, I note that the request for a doctor's slip was limited to the June 14 absence. No such proof was requested for his use of sick leave on June 13, or his call-off on July 12.

F. The Complainant's Claim of a CBA Violation For Terminating His Employment

Mr. Nichols' central allegation is that the State terminated him as retaliation for using his leave time benefits under the collective bargaining agreement. He also alleged that the State engaged in discrimination against him because of his effort to access the FMLA, but that portion of the claim has already been addressed and dismissed, both by the U. S. District Court, and by this Examiner.

The contract does not allow a probationary employee to claim the protections of the just cause standard in the case of a non-retention decision. It entitles the employee to a statement of reasons for non-retention, and suggests, incorrectly, that the employee may have recourse to the Personnel Commission.[12] The stated reasons for Mr. Nichols' non-retention were "unscheduled absences & insubordination."

Clearly Mr. Nichols' use of leave time played a part in his non-retention, as did his refusal to provide the doctor's slip Neath requested from him for June 14, and his resistance to completing the accident report she requested in connection with the damage to a truck he customarily drove, including his untrue claim that Phil Balbach told he didn't have to complete the form. Mr. Nichols contends that Neath's characterization of his leave time usage as "unscheduled" is untrue, and demonstrates that she had a darker motive in terminating him. The evidence does not support his contention. "Unscheduled absences" is not a term used in the collective bargaining agreement. The contract makes reference to "unanticipated leave" and defines that as a call-in by an employee or family member per the established procedure, "indicating he/she is not able to report or continue to work for that day under the guidelines of Article XIII, Section 5."[13] Assuming for the sake of argument that this is what Neath meant, Mr. Nichols had at least three incidents of unanticipated use of sick leave – Friday, May 24, Thursday, June 13 and Friday, July 12. May 24 and July 13 were both call-offs before the shift. As to June 13, even though he had scheduled doctors' appointments that day, Mr. Nichols had committed to returning to work after the appointments, then called in to say he was not able to return to work and used additional sick time for the afternoon. That constitutes an unanticipated leave under the contract. Factoring in the legitimate suspicions about his claimed illness on June 14, this represents four days in six weeks, each of which served to extend a weekend.[14] A pattern of using sick leave on days adjacent to weekends and other days off is commonly understood to be a warning sign of possible abuse.

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[12] The Personnel Commission lacks subject matter jurisdiction over the termination of employees who are serving their initial probationary period. See BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 WIS. 2D 545, 309 N.W. 2D 366 (CT. APP. 1981).

[13] Article 13, Section 13/5/2B.

[14] The Complainant points to other employees who had attendance problems, but were not discharged. He suggests that this proves disparate treatment and indicates that the true reason for his non-retention was illegal retaliation. The other employees cited were not on probation when their attendance problems became apparent, and did not have any instances of insubordination in their records. I therefore conclude that they are not valid bases for comparison, and that their treatment proves nothing about the legitimacy of the non-retention decision here.

Neath also had a legitimate basis for considering Mr. Nichols insubordinate. He does not deny that he refused to provide a doctor's slip for June 14, although he does suggest that his provision of an appointment card for June 26 at the Vets Center should have satisfied Neath. On the contrary, it was his obligation to provide medical verification. He does not claim to have had an appointment with the Vets Center on the 14th. He testified that he was home sick with depression that day. Neath was not in any way obliged to hunt down evidence that he was sick on June 14, or to inquire what the nature of the illness was, even assuming that a counselor or a clinic could or would confirm such information over the phone to a complete stranger. Mr. Nichols was repeatedly given clear, direct and legitimate orders to provide medical verification. He was given every opportunity to comply and he refused. That is classic insubordination.

Neath was further entitled to consider his resistance to filling out the accident form at the end of May to be insubordination. The Complainant points out that this was not mentioned in his June 3rd evaluation, and that is true. However, at that time, Neath did not know that Mr. Nichols' claim that Phil Balbach told him he didn't have to fill out the form was not true. Balbach denied this claim in the June 20th meeting. The untruth of the explanation is a legitimate consideration in treating this as a more serious form of insubordination. In any event, the accident report was plainly a less important element of this non-retention decision than was the refusal to provide the doctor's slip.

It bears repeating that the Complainant was a probationary employee, and the decision announced on July 15 was not whether there was just cause to discipline him.[15] The decision was whether Neath felt he should be retained for the balance of his probationary period. The standard for reviewing such a decision is whether it was arbitrary or capricious. The purpose of probation is to observe an employee's performance and conduct, and make a prediction about how that employee will perform and behave over the long run. As Associate Division Director Robert Fessenden noted in his testimony at the hearing, it is expected that an employee who is on probation will be on his best behavior. A supervisor making a retention judgment can reasonably expect that conduct problems during probation will not improve once the employee has just cause protections. Mr. Nichols had shown a pattern of using sick leave to extend weekends, and had displayed an unwillingness to follow legitimate supervisory

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[15] For this reason, I have not addressed the claim that he was denied progressive discipline and the presence of a Union representative at a disciplinary interview on July 15. I would note, however, that the testimony of Union grievance representative Barb Peters confirmed the plain language of the contract, to the effect that probationary employees are not subject to progressive discipline before non-retention and that Union representatives are not required for evaluation meetings, even if the outcome of the meeting is non-retention. I would also note that the July 15 meeting was not investigatory in nature, since the non-retention decision had already been made.

directives. The State is not required to show that these constituted just cause for discharge. It is sufficient that they are legitimate and non-arbitrary grounds on which to make a non-retention decision. I conclude that those are the grounds on which Neath decided not to retain Mr. Nichols, and it follows that she did not violate the collective bargaining agreement or SELRA.

Dated at Racine, Wisconsin, this 23rd day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

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Dec. No. 31385-A