

* * * * *
 *
 DARRILYN WINTERHACK, *
 *
 Appellant, *
 *
 v. *
 *
 Secretary, DEPARTMENT OF *
 HEALTH AND SOCIAL SERVICES, *
 *
 Respondent. *
 *
 Case No. 82-PC-ER-89 *
 *
 * * * * *

DECISION
 AND
 ORDER

This matter is before the Commission as a result of a complaint of discrimination filed by the complainant on September 17, 1982. Complainant alleged that she had been constructively discharged and that her discharge was improperly based upon her race and sex. An initial determination finding probable cause was issued on July 1, 1983. A hearing on the merits of the complaint was then held on April 13, April 16, May 21 and May 22, 1984. Both parties filed post-hearing briefs.

FINDINGS OF FACT

1. Complainant is a white female.
2. Complainant began working at the Waupun Correctional Institution in 1978 as a limited term employee. At that time she was employed as a typist in the health services unit of the facility.
3. In 1980, complainant successfully competed for the position of a Clerical Assistant 1 in the prison's social services unit. Complainant's supervisor in this position was Mr. Michael Traut. Complainant's duties included reviewing requests submitted by inmates to change their visitor lists. In the course of handling the requests, complainant would prepare

approximately 15 or 20 written responses to the inmates' requests. The responses would be sent to the inmates via the institution's internal mail system. Occasionally, when the proposed changes to the visitors lists were complicated, complainant would interview the inmate who had submitted the request. These interviews would take place in interview rooms located in the social services unit.

4. During the period from approximately January, 1980 through July, 1980, the complainant was engaged in a romantic affair with Mr. Robert Peters, a correctional officer in the health services unit. During the course of their affair the complainant corresponded with Mr. Peters by placing cards or letters in his locked automobile that was parked outside of the institution. Complainant always signed the correspondence with her name ("Darrilyn"). Mr. Peters invariably burned or otherwise destroyed the correspondence from complainant.

5. Between the time complainant was interviewed for the Clerical Assistant 1 (CA 1) position and the time she was actually hired, Mr. Traut, the social services supervisor, became aware of complainant's affair. Soon after she began working in the social services unit, Mr. Traut advised the complainant that he did not want the affair to interfere with the conduct of her job.

6. In the course of orienting the complainant to her new position, Mr. Traut discussed the proper relations between inmates and staff and explained that complainant's predecessor in the CA 1 position had become too friendly or involved with an inmate by writing letters and that she had resigned.

7. During the period she was employed at the social services unit, complainant received very favorable evaluations from Mr. Traut. The only

exception is the evaluation for the period from June of 1981 through June of 1982, which noted that complainant "[m]ust be aware of being overly friendly with inmates as this had let to misinterpretation by inmates." This comment reflected two separate instances where Mr. Traut had given complainant job instructions for having written a "folksy" letter to an inmate and for permitting inmates to converse with her when leaning over the half-door to the social services unit rather than conducting interviews in designated rooms.

8. On Friday, May 21, 1982, the last day before she was to transfer to a typist position in another unit in the institution, complainant received three letters from inmate James Taugher. The letters alleged that inmate Taugher and complainant had been involved in a romantic relationship. Inmate Taugher threatened to disclose the relationship and get complainant fired unless she would meet with him for a discussion.

9. After receiving the third letter, complainant disclosed the correspondence to a correctional officer in the social services unit who suggested that complainant write a conduct report regarding the letters. Complainant completed the conduct report on May 24, 1982. She stated that the letters were threats, disrespectful and an unauthorized form of communication.

10. A due process hearing was held based on complainant's allegations against inmate Taugher. On May 27, 1982, inmate Taugher was found guilty of violating prohibitions against threats and disrespect after complainant had testified that the allegations of a romantic relationship were false. Inmate Taugher read a written statement at the disciplinary hearing in which he alleged that he and complainant had exchanged love letters and had sexual contact. Inmate Taugher was subsequently disciplined. Immediately

after a copy of the decision was provided to inmate Taugher, he wrote the warden at the institution, Mr. Thomas Israel, and requested that he overrule the decision. The request was not granted and discipline was commenced under the terms of the findings by the hearing officer in the due process hearing.

11. In a letter to Mr. Gerald Heeringa, Superintendent of Security at Waupun, dated June 17, 1982, inmate Taugher asked that an investigation be conducted of his allegations that he and complainant had been romantically involved and that complainant's actions constituted misconduct. On receipt of the letter, Mr. Heeringa directed Mr. Jack Titter, who was in charge of conducting personnel investigations at Waupun, to commence an investigation.

12. Mr. Titter began his investigation by interviewing inmate Taugher. During the course of the interview, inmate Taugher supplied Mr. Titter with 19 letters and envelopes which he said were sent to him by the complainant using the pseudonym "Dee". Inmate Taugher also stated that he had telephoned complainant at her home, that complainant had visited his parents in Milwaukee, that he had had sexual contact with the complainant on more than one occasion and that the complainant did not object to the contacts.

13. Of the 19 letters and envelopes supplied by inmate Taugher, some were handwritten and others were typed. Mr. Titter checked the typewriters in the social services unit (and another unit to which inmate Taugher had been assigned as an inmate worker) to which the complainant and/or inmate Taugher might have access as well as the institution typing pool. Mr. Titter was unable to isolate any typewriter as the one used in typing the

letters. Mr. Titter failed to test any typewriter that inmate Taugher might have had access to in or around his cell, however.

14. One of the 19 documents was a greeting card with a typed message inside. There was also an area on the inside of the card that was covered by correcting fluid. Mr. Titter scraped off the fluid and discovered a message reading "Thank you very much Verda J. Davis." Mr. Titter failed to ask inmate Taugher to explain the existence of the uncovered message.

15. On July 1, 1982, Mr. Titter conducted an investigative interview of the complainant. The summary of the interview prepared by Mr. Titter indicates that complainant denied being "Dee", denied having written to inmate Taugher outside the line of duty, and stated that "Dee" was on inmate Taugher's visiting list:

I think her name is Deloris or something. She would call and if his Social Worker wasn't in, I would take the call. Usually when she called she would ask for Mary Jo [Paschke, a Social Worker at the institution who worked near complainant].

16. Also on July 1, 1982, Ms. Paschke signed a five-page statement in which she said that before March 6, 1982, inmate Taugher had told her he was having an affair with complainant, that she "frequently" saw them sitting together and that on one occasion she saw complainant "slip" inmate Taugher a greeting card in his cell. Ms. Paschke also denied ever having received a call from someone named "Dee" regarding inmate Taugher.

17. On July 2, 1984, Mr. Titter interviewed inmate Taugher's therapist, Mr. George Kaemmerer. The report of that interview indicates that in approximately February of 1982, in the course of therapy, inmate Taugher revealed that he had a relationship with a staff member of the institution. In April, inmate Taugher referred to the person as "Dee" and in June, identified the staff member as the complainant.

18. Mr. Titter's summaries of interviews with two of complainant's other co-workers indicates that one co-worker saw nothing that would have indicated a love affair. The other co-worker's interview summary, provided in part:

Mrs. Odell does not believe that there ever was an affair and believes that Taugher is just making it up out of his head, as he had been doing in a couple of letters that Mrs. Odell was shown by Darrilyn Winterhack previous to the three she received that caused her to write the conduct report. Mrs. Odell reports that these letters were "wild" in their content. Wild meaning crazy.

19. Mr. Titter's summary of his interview with Mr. Traut indicated that Mr. Traut had counselled complainant "on several occasions about being too friendly with the inmates", and felt the allegations were probably true, although he had never observed anything between complainant and inmate Taugher that would be classified as a love affair.

20. On July 5, 1982, Mr. Titter, who was certified as a "preliminary document examiner" compared the handwriting in several of the 19 documents submitted by inmate Taugher (suspect documents) to several documents acknowledged by complainant to have been written by her (known documents). Mr. Titter concluded that the suspect documents and the known documents had been written by the same person.

21. Mr. Titter telephoned Mr. Peters, who was then employed at another state institution. According to a report written by Mr. Titter after the conversation, Mr. Peters stated that one of the three suspect documents (#3) sounded like a note that complainant might have sent him during their affair, but that she had not written him one of the other suspect documents. On the day following Mr. Titter's conversation with Mr. Peters, the complainant admitted that she had written suspect document #3 to Mr. Peters.

22. Mr. Titter's summary of a second interview with complainant held on July 8, 1982, includes the following:

Mrs. Winterhack was also advised on the contents of the statement given by Mrs. Mary Jo Paschke and that Paschke had observed Winterhack give a greeting card to Taugher on one occasion, that Paschke believed that "Dee" was in fact Mrs. Winterhack and that Mrs. Paschke stated that she had never received any telephone calls from "Dee". At this point, Mrs. Winterhack deviated from her previous statement and said that she had not said that Winterhack had received calls from "Dee", but that she and Mrs. Paschke had "discussed" "Dee".

23. A polygraph examination was administered to inmate Taugher on July 13, 1982, by a certified polygraphy examiner. These questions were asked five times each of inmate Taugher. The examiner concluded that inmate Taugher was truthful when he answered no to the question, "Did you lie when you said, Winterhack handed you love letters she had written to you?" The other two questions were: "Did you lie when you said you fondled Winterhack's breasts?"; and, "Did you lie when you said you placed your hand on Winterhack's vaginal area?" As to both questions, inmate Taugher answered, "No" five times. Four of each set of five responses were interpreted by the examiner as indicating truthfulness, but one indicated not truthful. The examiner found the results to be inconclusive as to the last two questions.

24. Based upon the investigation up to that time, Mr. Titter and Mr. Heeringa prepared an "Investigation Report", dated July 14, 1982 which concluded that there was a love affair between the complainant and inmate Taugher and that the complainant had not been truthful during the investigation. The report was submitted to the office of the warden at Waupun. A copy of the report is attached hereto and included as if fully set forth as part of this finding.

25. Mr. Fred Stehling, an Administrative Officer in the Bureau of Adult Institutions, Division of Corrections, Department of Health and

Social Services, and in conference with two other employes of the respondent, actually made the decision as to what, if any, disciplinary action should be taken against the complainant. Mr. Stehling conferred with his supervisor, Mr. Ellsworth, and with Mr. Gruenwald of the Bureau of Personnel and Employment Relations of DHSS before making any "critical" decisions in the matter.

26. Mr. Stehling received a copy of the entire investigative file from Waupun. In addition, he was advised by Mr. Heeringa that the polygraph examiner felt that inmate Taugher was telling the truth and that the examiner had inferred that if retested, inmate Taugher would pass the two questions previously found to be inconclusive.

27. Mr. Stehling directed that an additional polygraph exam be conducted by inmate Taugher and that the State Crime Laboratory conduct an examination of the questioned documents.

28. Eleven of the 19 documents supplied by inmate Taugher were compared by an expert documents examiner to seven "exemplars" written by the complainant. None of the typewritten documents supplied by inmate Taugher (including the card referred to in finding 14) were examined by the expert because Mr. Titter had been unable to isolate a typewriter (or typewriters) in the institution with similar characteristics.

29. It was the opinion of the examiner that:

Notes A(Q1) and A(Q7) and the name and address on A(Q2) and A(Q5) were written by the writer of the exemplars A(S1)-A(S7) (Darrilyn Winterhack).

The hand printing on the envelopes A(Q3), A(Q4) is slowly drawn in an apparent attempt to disguise the traits of the writer. The writer cannot be identified to the exclusion of all other writers; however, where comparisons are possible, similarities do exist between the questioned printing on A(Q3) and A(Q4) and the exemplars A(S1)-A(S7) (Darrilyn Winterhack).

The brevity of the printed salutation on A(Q6), A(Q8), A(Q9), A(Q10) and A(Q11) precludes any possibility of identification.

Note A(Q7) is the note which complainant admitted she had written to Mr. Peters. (Finding 21).

30. On August 11, 1982, a second polygraph examination was conducted of inmate Taugher. The polygraphist concluded that inmate Taugher was consistently truthful when he stated that he had had sexual contact with the complainant. Two of the three questions posed in the second polygraph examination were identical to the two questions relating to sexual contact that were posed during the July 13 examination.

31. Mr. Stehling and Mr. Gruenwald reviewed other cases involving Division of Corrections employes found to have violated the Division's written administrative policy requiring staff to maintain a "professional relationship" with residents and prohibiting "any close social relationships." They determined that there had been five employes at Taycheedah Correctional Institution in 1980, a supervisor at Lincoln Hills School in the late 1970's and an officer at Green Bay Correctional Institution who had also been found guilty of the policy and that all of the cases had resulted in either discharge or resignation.

32. Mr. Stehling then advised Mr. Heeringa to hold a predisciplinary hearing regarding the allegations against the complainant and, unless some new information was brought up at the hearing, to discharge the complainant.

33. A predisciplinary hearing was held on August 17, 1982. Soon after the conclusion of the hearing, Warden Israel handed complainant a typed letter of resignation ready for complainant's signature and threatened to discharge her unless she signed the resignation within 10 minutes. Warden Israel also threatened to bring up the complainant's

affair with Mr. Peters if complainant decided to fight a discharge decision.

34. Complainant signed a letter of resignation on August 17, 1982. On the same day, Warden Israel ordered that all discipline imposed against inmate Taugher be expunged.

35. In 1978, inmate Taugher had alleged that a social worker at Waupun, Mr. Daniel Buchler, had provided him with marijuana on at least one occasion and that in payment, inmate Taugher had arranged for inmates to provide sexual favors to Mr. Buchler. Mr. Buchler was not aware of the allegations until after inmate Taugher had failed a polygraph examination. Inmate Taugher admitted that he had fabricated the charge. Mr. Heeringa, Mr. Titter and Mr. Stehling were all aware of the Buchler incident when they were considering the allegations against the complainant.

36. There have been seven other instances in which a Waupun employe was alleged to have been romantically involved with an inmate. Two of those instances involved male employes. In both cases the allegations were determined to have been unfounded before a polygraph had been scheduled. Of the five cases involving females, two resulted in resignations after the employes had been confronted with the allegation. Two more were resolved when the inmates admitted they were lying, in one case before and in the other after a polygraph exam had been administered. The final instance involved an allegation against a Division of Health employe. There, the case investigation and the imposition of discipline were handled by the Division of Health.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this complaint of discrimination pursuant to §230.45(1)(b), Stats.

2. The respondent is an employer within the meaning of §111.32(b), Stats.

3. The complainant has the burden of proving by a preponderance of the evidence that she was constructively discharged and that, with respect to that discharge, respondent discriminated against her on the basis of race and/or sex.

4. The complainant has established by a preponderance of the evidence that she was constructively discharged by the respondent.

5. The complainant has failed to establish that respondent discriminated against her on the basis of race and/or sex.

OPINION

A. Constructive Discharge or Voluntary Resignation

There are two lines of cases regarding the elements necessary to establish constructive discharge in a Title VII case. The first requires that the complainant establish an intent on the part of the employer to make working conditions intolerable, thereby forcing the employe to resign. Thompson v. McDonnell Douglas Corp., 552 F. 2d 220, 14 FEP 1582 (8th Cir., 1977); Muller v. U.S. Steel Corp., 509 F. 2d 923, 10 FEP 323 (10th Cir., 1975), cert denied, 423 U.S. 825 (1975). In contrast, the other line of cases asks whether the working conditions were such that a reasonable person would have felt compelled to resign and does not require the employe to establish that the employer intended to force the quit. Bourque v. Powell Elec. Mfg. Co., 617 F. 2d 61, 22 FEP 1191 (5th Cir., 1980).

Whichever standard is applied to the instant case, the same conclusion results. The evidence shows that Warden Israel intended to force the complainant to resign when he told her that if she did not sign the previously prepared letter of resignation, he would fire her. Similarly, a

reasonable person would resign rather than have an affair with a co-worker disclosed in a letter of discharge, as threatened here.

B. Basis for the Discharge

The complainant advances three separate theories in support of her allegations that her constructive discharge was the consequence of sex and/or race discrimination. Complainant argues that whereas she was discharged after having an affair with Officer Peters, Officer Peters was permitted to transfer to another institution without any disciplinary action being taken. Secondly, complainant argues that the respondent's conclusion that she had a love affair with inmate Taugher was premised on evidence unworthy of credence and resulted from an investigation that suffered from procedural irregularities. Finally, the complainant suggests that regardless of the procedure followed and regardless of what actually occurred with inmate Taugher, the complainant was treated differently than other staff who were found to have been romantically involved with an inmate. The three arguments are treated separately below.

1. Treatment of complainant as compared to the treatment of Officer Peters

The complainant and Officer Peters acknowledged that they had an affair for a period of approximately six months. The affair lasted approximately one month after the complainant was hired by the Social Services Unit in June of 1980. Mr. Traut, complainant's supervisor in the Social Services Unit, was aware of the affair at the time he hired the complainant. Officer Peters transferred to the Winnebago State Camp in March of 1982 and the complainant was discharged five months later on August 17, 1982.

These facts are sufficient for the complainant to establish a prima facie case of discrimination based upon sex. However, the respondent has articulated a legitimate, non-discriminatory reason for its actions. The question of whether the complainant can establish that inmate Taugher's allegations were merely a pretext for respondent's action is the ultimate question in this case. Furthermore, it should be noted that the record is unclear as to when some of the actors in this case became aware of complainant's affair with Mr. Peters. Mr. Israel had "heard a rumor" of an affair but it is not known whether he heard the rumor before or after the complainant was hired in the Social Services Unit or before Mr. Peters transferred out of Waupun. Mr. Heeringa also recalled institution gossip regarding complainant's affair with Peters, and "certainly" had heard that gossip before June of 1982. On the other hand, Mr. Stehling first became aware of the Peters affair at the end of July of 1982. The complainant's argument of disparate treatment, vis-a-vis Mr. Peters, would be undercut if it were established that the administration in Waupun was not aware of the affair until after Mr. Peters transferred to Winnebago.

2. Respondent's Determination that Complainant had a Love Affair with Inmate Taugher

The complainant has pointed out a number of problems with the evidence relied upon by the respondent in concluding that inmates Taugher's allegations were true as well as pointing out problems in the procedures used to obtain that evidence. The complainant argues that the lack of credible evidence and procedural irregularities establish that the respondent's reliance on inmate Taugher's allegations was merely pretextual.

Specifically, complainant points out that:

1. Inmate Taugher admitted he had lied when he had previously made an allegation of improper conduct against Mr. Buchler.

2. There was a delay of approximately 3 weeks between the date that inmate Taugher first alleged having an affair with complainant and when he sent the letter to Mr. Heeringa requesting an investigation. Complainant implies that inmate Taugher could have forged the documentary evidence during this period.
3. In a letter dated February of 1982, inmate Taugher had requested that a "Dee Wilson - who knows what she is!" be removed from his approved list of visitors.
4. Mr. Titter's investigation interview of complainant reads that the complainant had not reported to her supervisor the existence of two letters sent by inmate Taugher asking her to join a church group. Mr. Titter reported that complainant had shown the letters to a co-worker, Diane O'Dell. Both complainant and Ms. O'Dell testified that it was Ms. O'Dell who had been contacted by inmate Taugher about a church group.
5. Inmate Taugher was in "unassigned status", (i.e., he was neither employed in the prison nor in a prison educational program) at the time that he allegedly received some of the letters from the complainant.
6. Not all of the 19 documents submitted by inmate Taugher were analyzed by the State Crime Lab.
7. Mr. Titter failed to obtain any explanation for the whited-out portion of complainant's Exhibit 38.
8. When he made his typewriter comparison, Mr. Titter failed to examine any typewriters to which the complainant might have had access during the period between his May 27th due process hearing and when he turned the documents over to Mr. Titter in mid-June.
9. Many of the letters signed by "Dee" and alleged by inmate Taugher to have been sent by the complainant specifically referred to the complainant as a third person rather than as the author.

While it is clear that the investigation procedure and the evidence relied upon by the respondent in making its decision could have been better and/or stronger, the Commission is unpersuaded that the points raised by the complainant are sufficient to meet the burden of persuasion in this case.

Some of the complainant's points were adequately explained in various testimony. Inmate Taugher testified that the complainant used the name "Dee" (and "Dee Wilson") as a protective device and would refer to herself in the body of her letters in order to remain consistent with her deception. Inmate Taugher suggested that the reference to "Dee Wilson - who knows what she is!" was intended to show the complainant that he was dissatisfied with complainant's role in their relationship. The fact that someone is on unassigned status does not prevent an inmate from receiving

mail, nor would it have prevented complainant from issuing passes in order to see inmate Taugher. The fact that the Crime Lab did not consider all of the 19 documents submitted by inmate Taugher is consistent with the fact that Mr. Titter could not isolate or identify the typewriter that had produced the typewritten documents. Probably the most disturbing of the many points raised by the complainant was the failure of Mr. Titter to obtain an explanation for the whited-out portion of complainant's Exhibit 38, which included a signature of one Verda J. Davis.

However, these points must be considered in light of the evidence that was developed through Mr. Titter's investigation as well as the additional evidence that came to light at the hearing. Respondent conducted two separate polygraph examinations of inmate Taugher. In contrast to the Buchler incident, inmate Taugher was found to be truthful with respect to his allegations against the complainant. In a portion of the first exam, the results were inconclusive, but the subsequent retesting eliminated that inconclusiveness. The evidence indicated that the respondent has consistently relied heavily on the results of polygraph exams. According to one investigative interview summary, the complainant was advised before the polygraph examination that if inmate Taugher failed the exam, "she would be cleared of the allegations." (Complainant's Exhibit 26.)

The respondent also relied on two handwriting examinations, one preliminary and one by an expert, which concluded that the complainant had written some of the 19 documents handed over by inmate Taugher. The remaining documents were either too brief or were typewritten. Complainant changed her story during the course of the investigation when she first denied writing any of the documents and later said she might have written one to Mr. Peters. Mr. Peters had not recalled the complainant ever having

written to him on the style of stationery positively attributed to the complainant by the expert handwriting analysis. (Complainant's Exhibit 33, Document A(Q1).) During the course of his testimony at the hearing, Mr. Peters severely undermined any suggestion by complainant as to how inmate Taugher might have come into possession of the Winterhack to Peters correspondence when he said that (1) complainant always signed her letters or notes to him, (2) she always placed them in his locked car outside of the prison, and (3) he always destroyed her correspondence.

The respondent had obtained a statement by Ms. Pashke that inmate Taugher had told her of the affair, that she had "frequently" seen the two together and saw complainant "slip" a greeting card to inmate Taugher at his cell. Respondent's investigation showed that complainant's supervisor was "not surprised" by the allegations and that he had previously counselled complainant about being overly friendly with inmates. Mr. Kaemmerer's interview indicated that inmate Taugher had also advised his therapist that he was having an affair with a staff member, who was later revealed to be the complainant. Inmate Taugher's parents in Milwaukee told Mr. Titter that they had been telephoned by someone identifying herself as Darrilyn Winterhack.

On balance, the Commission concludes that the decision first reached by Mr. Titter, and Mr. Heeringa in Waupun and later by Mr. Stehling in Madison that the complainant actually was involved in a romantic relationship was reasonable based upon the evidence available at that time. The Commission also concludes that while there were additional inquiries that could have been made within the scope of the investigations of the allegations against the complainant, the "procedural irregularities" are not sufficient to meet the complainant's burden of proof in this case. For

purposes of comparison it is helpful to consider the facts of a case cited by the complainant, Williams v. Dekalb County, 577 F. 2d 248, 18 FEP Cases 1742 (5th Cir., 1978). In Williams, the court pointed out several irregularities in Dekalb County's promotional practices as they affected complainant Williams and remanded the matter to the district court to determine if there were non-discriminatory explanations for the procedures that were followed. Specifically, the court noted that an application submitted by the complainant one day before the day scheduled for the exam had been deemed late even though the job notice failed to specify a deadline for filing an application. In addition, the two whites who were subsequently hired for the management positions were "in training" for the positions during the "open completion" period for filling the positions. Finally, a white male was appointed to another managerial position one week before the complainant, a black, was notified that he could take the exam for the position.

In the present case, the complainant is really asking the Commission to step into the shoes of Mr. Titter and with the benefit of hindsight decide how the investigation should have been conducted. It is safe to assume that anyone who conducted the investigation into inmate Taugher's allegations could have followed a slightly different procedure than did Mr. Titter. Conducting an investigation is necessarily going to involve the frequent exercise of discretion as to what leads to follow-up on and how. As indicated above, Mr. Titter's investigation was reasonably complete and the irregularities that did occur are not of the same magnitude as those described in the William case.

3. Treatment of complainant as compared to others determined to have been romantically involved with an inmate

Complainant's third argument is to contrast the severity of the discipline imposed against her with the discipline imposed against other staff members who have been determined to have become romantically involved with an inmate.

Given the fact that it was Mr. Stehling who made the decision to terminate the complainant's employment,^{FN} the most relevant comparisons are those known to Mr. Stehling at the time of his decision.

The evidence showed that Mr. Stehling knew of seven cases where DOC employes had been found to have violated the prohibition against holding a close social relationship with an inmate. All of those cases resulted in either resignation or discharge. Nothing in the record indicates either the sex or the race of the DOC staff involved in those violations. Mr. Stehling was also aware that there had been a case involving a female Division of Health employe who had been seen kissing an inmate. Neither the race nor the level of discipline imposed against this employe were established at hearing, although it can be deduced through Mr. Stehling's testimony that the discipline was something less than termination.

Mr. Heeringa was aware of eight allegations of romantic or sexual involvement with inmates that were made against Waupun staff members. In only three of those cases were the allegations determined to be true. One was the female Division of Health employe referred to above. The other two

^{FN} Equal Rights Officer Teel Haas testified that during her investigation of this complaint she interviewed Warden Israel who stated that complainant's affair with Mr. Peters demonstrated her propensity to have affairs with inmates and that she was therefore, unsuitable for working around men. However, it was Mr. Stehling (along with others in Madison) who decided what disciplinary action to take against complainant. It was not disputed that Mr. Israel sought to permit the complainant to transfer to Dodge Correctional Institution, where she again would have had contact with male inmates. Mr. Stehling vetoed the transfer option.

were both white females and they both resigned as a result of the allegations.

These comparisons do not support a finding of discrimination in this matter. There were no comparisons establishing that respondent imposed a different level of discipline against employees of a different race than the complainant. Because no male DOC employees have ever been found guilty of violating the prohibition against forming "a close social relationship" with an inmate, the complainant's sex discrimination charge fails as well.

The appellant has failed to establish a prima facie case in regard to her allegation of discrimination based upon race. While the appellant established a prima facie case based on sex, the respondent produced evidence of a legitimate nondiscriminatory reason for its actions and the complainant failed to show that the reasons advanced by the respondent for discharging the complainant was pretextual. McGhie v. DHSS, 80-PC-ER-67 (3/19/82). Therefore, the complainant has failed to establish that respondent discriminated against her on the basis of race or sex in regard to her discharge in August of 1982.

ORDER

The complaint of discrimination is dismissed.

Dated: August 31, 1984 STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Chairperson

KMS:jab
JEN4


LAURIE R. McCALLUM, Commissioner

Parties:

Darrilyn Winterhack
610 Carrington
Waupun, WI 53963

Linda Reivitz, Secretary
DHSS, 1 W. Wilson St.
Madison, WI 53702

July 6, 1982

DATE

PRELIMINARY
 INTERIM
 FINAL

WCI NO. 82-6-17-A
COUNTY NO.

RECEIVED

TYPE OF INVESTIGATION: Staff involvement with inmate

INDIVIDUALS INVOLVED: TAUGHER, James - 37458
Winterhack, Darrilyn

DATE COMPLAINT RECEIVED: June 18, 1982

SUBMITTED BY: Gerald Heeringa, Security Director

DATE STARTED: June 22, 1982

DATE REFERRED TO OUTSIDE AUTHORITIES: _____

DATE COMPLETED: _____

APR 10 1984
Personnel
Commission

NARRATIVE:

On May 24, 1982 Inmate Taugher received a conduct report from civilian staff member, Mrs. Darrilyn Winterhack, for alleged violations of Department of Health and Social Services Administrative Rules, 303.16, Threats; 303.25, Disrespect; 303.30, Unauthorized Forms of Communications. After he had written to Mrs. Winterhack and threatened to have her fired if she didn't comply with certain instructions. On the theory that the law views a person's job as real property, with all the rights and privileges bestowed upon any other property, and that if Taugher actually felt that it was his duty to report wrong-doing to the Warden, he should have done so from the start and not threatened to do so, to gain his own end, the hearing officer found Inmate Taugher guilty of threats and disrespect, but not guilty of unauthorized forms of communications, and Taugher was given a minimum sanction under WCI guidelines in consideration of the fact that this was the first conduct report he had received since June 8, 1981.

At the Due Process hearing, held on May 27, 1982, Inmate Taugher presented and read a prepared statement alleging that he and Darrilyn Winterhack had been in love and that there had been an exchange of love letters between them (however, he presented no love letters at the hearing), he had called her at her home, and that at some of these meetings there had been physical contact in the form of "holding hands, fondling her breasts, stroking her buttocks and vagina, and French kissing," but that after a period of six or eight months Mrs. Winterhack had begun avoiding him and thus the reasons for the three letters that were the subject of the conduct report. Mrs. Winterhack denied that there had been any exchange of letters, phone calls or gifts and stated that there had been no affair and that she had no idea what Taugher's purpose was. Inmate Taugher made no offering of proof.

On June 17, 1982, Inmate Taugher wrote a letter to Mr. Gerald Heeringa and informed him that he had documented proof of the allegations he had made against Mrs. Winterhack and requested an investigation. This letter was referred and an investigation was started.

When interviewed, Inmate Taugher again stated that he was in love with Mrs. Winterhack and that there had been physical contact such as described in the prepared statement to the Due Process Committee but there had been no actual sexual relations, that there had been an exchange of letters and cards through the mail as well as through institution procedures and that he had phoned her at her home, and in addition, on one occasion, Darrilyn had actually visited his parents in Milwaukee, approximately eight or nine months ago. According to Taugher,

J. J. P. [Signature]
INVESTIGATING LIEUTENANT

APPELLANT'S
EXHIBIT # 24

Gerald Heeringa 9-14-82
SIGNATURE DATE
(ASST WARDEN - SEC REVIEW)

Darrilyn Winterhack was called "Dee" by him during their affair and she would also refer to herself in her correspondence to him as "Dee". Taugher stated that he was of the understanding that he and Winterhack were eventually going to be married and that there had been conversation between them where Darrilyn talked about leaving her husband, Dale, claiming that he was abusive and didn't love her anyway. Inmate Taugher presented 19 pieces of correspondence, cards, letters and envelopes, alleging that all of them had been received from Darrilyn Winterhack, and stated that there had been a number more of them, but that he had returned them to Darrilyn. From the 19 pieces submitted, three letters and/or notes and three envelopes were extracted for the purpose of comparison, one of these letters was on yellow legal pad paper and bore the signature "Darrilyn" and Mrs. Winterhack, when interviewed, admits to writing it, (hereafter known as KNOWN DOCUMENT A). The other two "notes" are on (SUSPECT DOCUMENT NO. 1) personal stationery and (SUSPECT DOCUMENT 3) a sheet of white, lined, tablet paper, and Mrs. Winterhack denies writing them. The three letters/notes and envelopes, after preliminary examination, were enlarged and a document comparison done, (See Attached Comparison Report) and 15 points of similarity were found, each appearing on the known documents and suspect documents on one or more occasions. In addition to these documents, several were received from Taugher that were totally typewritten, and of this writing this investigator has been unable to isolate the machine they were typed on, other than to say that they were typed on an elite machine with an alignment defect occasionally appearing on the capital letter D. The possibility exists that all letters were not typed on the same machine as this defect does not always appear.

Mrs. Winterhack was interviewed on July 1, 1982 and in the presence of Union representative, Officer Roger Riefsneider and this investigator admitted to have written the letter to Taugher that has heretofore been referred to as "Known Document A" (written on yellow legal pad paper) but denied having written the other two notes, saying, when shown the enlargements, that it did look like her writing, but that she hadn't written them, further that other than in the line of duty, she had never corresponded with Taugher or received phone calls from him, and that she wasn't "Dee". Winterhack stated that "Dee" did call the institution, and for the most part, when she called she would ask for Social Worker Mary Joe, and that she (Winterhack) would only take these calls when no one else was available.

After a private discussion of the situation by Officer Riefsneider and Winterhack, Riefsneider suggested that I interview A. Diane O'Dell, B. George Kaemmerer, C. Audry Sanders, and D. Mary Joe Paschke.

Mary Joe Paschke, nee Hedtke, was an LTE social worker and has since left employment with this institution and has married Sgt. Daniel Paschke. Mrs. Paschke was interviewed at her home in Waupun and gave a voluntary statement that A. During her employment at WCI, Inmate Taugher spoke to her about his love affair with Darrilyn Winterhack and told her that Winterhack had sent him letters under the name of "Dee", B. That she would frequently observe Winterhack^{Taugher} alone in vacant offices in the Social Services Building, C. That on one occasion when she and Winterhack were going from Social Services Department to the front of the institution, Winterhack asked her to come with her into the North Cell Hall and wait while Taugher signed some papers for her, but that the North Cell Hall sergeant wouldn't allow Winterhack to go down to the cell unescorted and asked Mary Joe to escort her, which was done. While at Taugher's cell Winterhack gave Taugher a clipboard of material to sign and Mary Joe observed Winterhack also pass a large envelope to Taugher which Mary Joe further observed Taugher open. The envelope contained a large greeting card in the shape of a teddy or panda bear. Taugher made some comment about the card, as did Winterhack, but the text of the comments has since been forgotten. D. That on one occasion Taugher showed Mary Joe a white, hand-knitted, shawl in a claim shell or flowered design, and said that it was to be a gift for Darrilyn Winterhack. Mary Joe did not observe Taugher give the shawl to Winterhack, but he later told her that Winterhack had refused to accept the gift and had thrown it in the trash.

J. D.

July 6, 1982

Page 3

Mr. George Kaemmerer, WCI Crisis Intervention Worker, was interviewed and relates that he began seeing Inmate Taugher in one on one therapy sessions nine or 10 months ago, about Taugher's previous relationships with women and at that time Taugher had presented a relationship that he was having, but not with who, or that the relationship was with a staff member. Approximately four and one-half ^{months} Taugher told Kaemmerer that the relationship was with a staff member, and about two and one-half months ago began referring to the staff member as "Dee" and finally two or three weeks ago, revealed that "Dee", the staff member, was, in fact, Darrilyn Winterhack. When asked if he had been given reasons to believe that Taugher and Winterhack were actually having an affair, Mr. Kaemmerer stated that he had not, however, it was apparent that Taugher actually believed it, and for the purpose of therapy of Taugher, that in itself supplied the basis for the therapy and Mr. Kaemmerer counseled, discussed and eventually tried to convince Taugher to extract himself from the alleged affair.

When interviewed, Mrs. Diane O'Dell gave this investigator the distinct impression of being on the defensive. Mrs. O'Dell clearly thought that the allegations of Taugher were a figment of his imagination and related that even prior to the three letters that had caused Winterhack to write the conduct report, Winterhack had received letters from Taugher and had shown a couple of these letters to O'Dell who described them to this investigator as being "wild". Mrs. O'Dell described that by "wild" she meant that the things that Taugher said in the letter were just crazy and something that Taugher was just making up. Mrs. O'Dell speculated that Winterhack represented a "mother figure" to Taugher, but when shown the comparison documents, at her request as she stated she knew Winterhack's writing, O'Dell conceded that the hand writing on suspect documents 1 and 2 could be Winterhack's writing.

Audry Sanders was interviewed and could offer nothing to the investigation except that she never observed any improprieties between Winterhack and Taugher.

Mr. Michael Traut was Mrs. Winterhack's supervisor at Social Services Department and as such was also interviewed. Mr. Traut related that he had given some thought to the conduct report that Darrilyn had written on Taugher and its relationship to, or coincidence to, the fact that it came within a day or so of Mrs. Winterhack's transfer to employment in the Security Office, particularly since Mrs. Winterhack confided in him that she felt a need to get up front behind the gates. Mr. Traut related that he has had frequent cause to warn Darrilyn about being overly friendly with inmates, however, Taugher was not one of those that necessitated the warnings. Mr. Traut further stated that Mrs. Winterhack, as well as all other female Social Service staff, had been instructed that in the event they ever received love-type letter from inmates, they were to immediately bring these letters to his attention, and that Winterhack had not advised him of the three letters that resulted in the conduct report, or the previous letters that she had shown to Diane O'Dell.

It is known that previously Mrs. Winterhack had had a brief affair with then, WCI Officer Ronald Peters, and it has been suggested by Union representative Officer Roger Riefsneider, that perhaps the letters that Taugher presented in evidence, and which are titled suspect document 1 and 2, were written to Peters and they have now fallen into Taugher's hands and that Taugher, for reasons of his own, is now using them to make false accusations. Officer Peters has since transferred to Winnebago State Camp and when contacted by telephone at 11 p.m., July 5, 1982 stated that suspect document No. 3 sounded to him like a letter that he might have received from Darrilyn during the period that they were "lovers". Regarding suspect document No. 1, Peters stated that this was not one of the letters written to him, and that Darrilyn has never called herself or signed anything, "Dee" to his knowledge. Peters wanted it known that he does not believe that Winterhack is or was involved with an inmate,

G. J.

July 6, 1982

Page 4

as he feels she is too smart to jeopardize her position by doing so.

Mrs. Joan Taugher was contacted at 8:45 a.m., July 6, 1982 and states that sometime back, eight or nine months ago they received a telephone call at their home from a woman calling herself Darrilyn Winterhack, who stated that she was in Milwaukee and that she liked their son Jimmie and wanted to meet his family. The Taughers were on their way out and, therefore the meeting never did take place. Mrs. Taugher stated that she was aware that something was going on as she has received several letters from James telling them about Darrilyn.

At approximately 9 a.m. July 6, 1982 Mrs. Winterhack stopped into the Investigation Office on her own to again discuss the letters, and at this time, she admitted having written sus document #3, however, states that it was written to Ron Peters, and she doesn't know how it came into Taugher's hands.

On July 8, 1982 a second investigatory interview was held with Mrs. Winterhack to resolve additional questions that had surfaced and to advise her that Taugher was scheduled to take a polygraph on July 13, 1982 at 8 a.m. Mrs. Winterhack continued to deny that there had been an affair between her and Taugher, and changed her story to say that in the previous interview she had not said that Mary Jo had received calls from "Dee", but that they, Mrs. Winterhack and Mary Jo, had discussed "Dee". When questioned about the two previous letters she had received from Taugher and shown Diane O'Dell, Mrs. Winterhack said that these letters were concerning Taugher's request that she join some church group. Winterhack further stated that she had been told by Taugher that even before she had gone to work at SSD he had been having an affair with a staff member. Winterhack revealed no names, however.

On July 13, 1982 Inmate Taugher was given a polygraph examination by examiner Ted Welch and the following primary questions were asked:

1. Did you lie when you said you had fondled Winterhack's breasts?
2. Did you lie when you said you had placed your hand on Winterhack's vaginal area?
3. Did you lie when you said Winterhack handed you love letters that she had written to you?

Five charts were run and to each question on each chart Taugher answered "No".

To question 1, four of the five charts showed that Taugher was truthful when he answered "No", one of the five showed deception. The test of question 1 is inconclusive.

To question 2, same as 1.

To question 3, all charts show Taugher as truthful.

It is the conclusion of this officer, based on the physical evidence presented and on the polygraph examination to question 3, that there was, in fact, a love affair between Mrs. Darrilyn Winterhack and Inmate James Taugher, and that Mrs. Winterhack has not been truthful during the investigation.

cc: Wanda L. Leland