STATE OF WISCONSIN PERSONNEL COMMISSION

TZU-YUEH (CONNIE) BOYLE,

Complainant,

v. ORDER

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 84-0090-PC-ER
84-0195-PC-ER

On September 22, 1987, the Commission adopted an order which made several revisions in the proposed decision and order on probable cause. By letter dated September 30, 1987, the respondent suggested that the September 22nd order was not entirely consistent in its treatment of the proposed decison. The Commission has reviewed the proposed decision and the September 22nd order and now makes the following additional changes in the proposed decision for the purpose of reconciling the two:

1. Conclusion of law #3 is amended as follows:

   3. Complainant has satisfied her burden of proof, and the Commission concludes there is probable cause, to believe respondent discriminated against complainant in violation of the Fair Employment Act (Subch. II, ch. 111, Stats.) as to the charges that respondent denied complainant a three day weekend, shift in July 1984, when Ms. Squires was hired, on the basis of national origin; ~~that respondent denied complainant a three-day weekend shift with Fridays off in January 1985, when Ms. Squires was terminated, on the bases of national origin and retaliation;~~

and that respondent denied complainant a three day weekend shift with Fridays off in December, 1985, when Ms. Koch left, on the bases of national origin and retaliation.

2. The order is amended as follows:

So much of this charge of discrimination (Case No. 84-0195-PC-ER) that relates to respondent's failure or refusal to give complainant a three day weekend shift in July 1984, and a three day weekend shift with Fridays off in ~~January 1985 and~~ December 1985 is referred to Commission staff for conciliation and possible hearing on the merits, along with the issue in Case No. 84-0090-PC-ER with respect to which probable cause was found in the initial determination issued August 12, 1985.

Dated: October 21, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan
DENNIS P. McGILLIGAN, Chairperson

Donald R. Murphy
DONALD R. MURPHY, Commissioner

KMS/rcr
RCR02

Parties

Tzu-Yueh Boyle
3918 Rockwell Drive
Madison, WI 53714

Tim Cullen
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

TZU-YUEH (CONNIE) BOYLE,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 84-0090, 0195-PC-ER

ORDER

This matter is before the Commission on consideration of the examiner's proposed decision and order (copy attached). The Commission has considered the parties' objections and arguments as to the proposed decision and order, and consulted with the examiner.

Complainant's objections to the proposed decision and order, filed July 20, 1987, include as attachments several exhibits, which were not part of the hearing record, and also include reference to an interview of a witness conducted by complainant's attorney after the proposed decision was issued. Respondent filed a motion on September 4, 1987, to disregard this matter and any argument based thereon. At the hearing of oral arguments, the Commission granted this motion and denied complainant's request to have the hearing reopened.

Complainant's position that this additional material should be permitted to supplement the record, and the hearing reopened if necessary, is premised on the argument that the proposed decision erroneously utilized a more rigorous standard in review of the evidence than is appropriate at the probable cause stage of this kind of proceeding, and that complainant in

effect was surprised and disadvantaged by this approach. Complainant particularly objects to the fact that the proposed decision made a finding (#14) concerning the assignment of certain 70% schedules which required the resolution of a conflict between Ms. Farrell's testimony at hearing and what was reflected in the initial determination. Complainant contends that such a conflict should only be resolved at a hearing on the merits.

The proposed decision contains the following discussion of the probable cause standard:

> Since this matter is before the Commission on the question of probable cause, the complainant's burden of proof is less than it would be at a hearing on the merits. The Commission discussed this point in Winters v. DOT, Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86), as follows:
>
> > 'Probable cause is not synonymous with preponderance,' being somewhere between 'preponderance' and 'suspicion.' Young Oil Co. of La, Inc. v. Durbin, 412 So. 2d 620, 626 (La. App. 1982). The Commission agrees with this kind of characterization of the matter, as it is supported both by the language of §PC 4.03(2), Wis. Adm. Code, and the policy underlying the probable cause requirement. p. 17.

The Commission continues to believe this is the proper approach to the application of the probable cause standard, and, further, that the determination of probable cause properly includes the resolution of factual disputes and credibility conflicts. In Winters, the Commission specifically rejected complainant's argument that at the probable cause hearing stage "any and all facts that give rise to competing inferences should be resolved in the complainant's favor." In McLester v. UGLRC, No. 79-PC-ER-38 (10/14/82), the Commission resolved certain credibility issues and decided conflicting factual issues in ruling on probable cause. Complainant contended that this was erroneous in a Chapter 227 petition. The Courts upheld the Commission approach on review, McLester v. Personnel Commission, Outagamie Co. Cir. Ct. Br. II, No. 82CV1315 (7/30/84); Court of Appeals Dist. III, No. 84-1715 (3/12/85). The Commission also notes that

complainant conducted substantial prehearing discovery, including deposing Ms. Farrell, and devoted much of the hearing to the presentation of evidence intended to contradict or impeach the respondent's evidence. Under the circumstances, it is not appropriate to permit complainant to augment or reopen the record.

With respect to the merits, at the time Ms. Farrell denied complainant's request for a 70% no-split shift position with more days off in February or March 1984, there were no such positions available. In August 1984, when Ms. Farrell changed the schedules of Ms. Smith and Ms. Kelly due to intervening changes in the tray line system, complainant was no longer in a 70% position, and it would not have been possible to have assigned her either of these 70% schedules.

Complainant stresses in argument that her 50% schedule in August 1984 was not her first choice, and that she had accepted that schedule only after her request in February or March 1984 for a 70% no-split shift schedule had been denied. However, this does not negate the fact that at the time the changes were made in the schedules of Ms. Smith and Ms. Kelly, there was no way that those schedules could have been made available to complainant.

There is a conflict between Ms. Farrell's testimony about this transaction and what was attributed to her in the initial determination, which reflected that she had said in the course of the investigation that complainant did not get such a schedule because she failed to sign a posting for the schedules.

As is noted in the proposed decision, Ms. Farrell testified that after she first saw the initial determination, she pointed out the error on this point in an in-house memo, and that complainant testified that when

she asked Ms. Farrell about the transaction more or less contemporaneously, Ms. Farrell had told her she did not get such a pattern because she had gone back to 50% employment. In the objections to the proposed decision, complainant argues that the examiner "failed to see that Ms. Farrell probably realized that the reason she gave Ms. Boyle at the time was so flimsy that she would need a more substantial one to persuade Equal Rights Officer Billups." The Commission fails to understand what was "flimsy" about the rationale given to complainant at the time and also at the hearing. Given the complainant's employment status at the time the schedules in question were changed, there simply was no way such a 70% position could have been given to complainant. Furthermore, there is nothing on this record to suggest the schedule changes were or could have been foreseen some six months earlier when complainant's request was denied in February or March 1984.

With respect to respondent's objections and arguments, certain changes in the proposed decision are indicated, primarily with respect to respondent's handling of the Squires' position after Ms. Squires' employment was terminated.

Ms. Farrell testified that the Squires' position was posted in January 1985, and complainant failed to request it. However, she also testified that before the vacancy was posted she had changed its off-day pattern. This would explain why complainant and Ms. Bouche, who had been looking for a different off-day pattern, would not have been aware that this position had been posted. The notion that Ms. Farrell would have eliminated this pattern rather than to give complainant an opportunity to have it seems highly unlikely, particularly in light of the fact that she did give complainant a different three-day weekend pattern at about the same time.

Under these circumstances, there is little if anything to suggest pretext as to the handling of the Squires' vacancy after the termination of her probationary employment, and there is not a sufficient basis for the probable cause determination set forth in the proposed decision, which rests substantially on the theory that if the position had been posted as Ms. Farrell said, complainant and Ms. Bouche would have been aware of it.

Respondent also argues that the other probable cause determinations should be rejected, asserting that the schedules involved in those transactions also were changed before posting. However, while there was testimony that this was a relatively common practice, there was no specific evidence this occurred with respect to the first Squires and Koch vacancies. Also, it seems particularly unlikely that this occurred as to the first Squires vacancy, because while Ms. Squires was in the position she had a three-day weekend with Friday off pattern.

Finally, footnote #3 on page 14 should be changed to eliminate the reference to Ms. Kelly being assigned to the nourishment room, to conform to Ms. Farrell's uncontradicted testimony that Ms. Kelly's schedule was changed as a result of the changes in the tray line system, but that she was not assigned to the nourishment room.

ORDER

The Commission adopts as its final decision of this matter the attached proposed decision and order with the following changes:

1. Finding #29 is amended as follows:

   29. A three-day weekend pattern was available in July 1984 when Ms. Squires was hired, and three-day weekend patterns with Fridays off were available ~~in January 1985 when Ms. Squires was terminated~~ and in December 1985 when Ms. Koch left. Complainant

was neither offered nor given any of these schedules, which were not posted. Management was aware of complainant's interest in these kinds of schedules. Complainant requested Ms. Squires three-day weekend pattern in November 1984 when she heard Ms. Squires would not be passing probation. Ms. Farrell told complainant that Ms. Squires' day-off pattern was not going to be continued in 1985. Ms. Farrell had made this determination in connection with her usual review and revision of the off-day schedule for the following year. Ms. Squires' vacant position was posted and filled in January 1985, but it was not the same off-day pattern due to changes Ms. Farrell had made for operational reasons.

2. Findings 30 and 31 are deleted since their subject matter is effectively incorporated in revised Finding #29.

3. Page 24 of the DISCUSSION is amended by addition of the following:

However, although Ms. Farrell testified that Ms. Squires' position was posted after her termination in January 1985, she also testified, and this is uncontradicted, that when it was posted the position did not have the same off-day pattern. This would explain why neither Ms. Bouche nor complainant saw the posting they were looking for (i.e., three-day weekend with Friday off) at this time. The decision to change the off-day pattern of Ms. Squires' position had been made before complainant inquired about it.

Ms. Farrell also testified that the Squires' and Koch's positions were posted in 1984 and 1985 respectively. This was contradicted by the testimony of Ms. Bouche and complainant that they did not see these postings. Respondent argues that these positions also were

subject to changes in their off-day patterns when they were posted. However, while there was testimony that these kinds of changes sometimes occurred, there was no specific testimony that this had occurred for these positions. The likelihood that such a change occurred when the Squires' position was first posted in July 1984 is lessened by the fact that when complainant asked for the job in November 1984 it had a three-day weekend, with Friday off pattern.

A further part of respondent's rationale for not giving complainant Ms. Koch's schedule or Ms. Squires' schedule in January 1985 was that Ms. Farrell did not know until July 1986, that complainant wanted Fridays off, and that thereafter such a schedule was arranged. The factual basis for this rationale was contested not only by complainant's testimony, but also indirectly by Ms. Bouche's testimony that it had been common knowledge that she wanted a three-day weekend schedule with Fridays off. This suggests complainant frequently made her wishes on this subject known, and she certainly had demonstrated a readiness to make her schedule requests known to management.

Therefore, as to the first vacancy in the Squires' position and the vacancy in the Koch position, there is sufficient evidence undermining respondent's explanations regarding the postings of the positions and Ms. Farrell's lack of knowledge of complainant's interest in this type of shift to lead to a probable cause determination with respect to these transactions.

As to the second Squires' vacancy, respondent's explanation as to the change in pattern prior to its posting is uncontradicted. Even assuming Ms. Farrell had a general awareness of complainant's interest in a three-day weekend, Friday off, pattern before complainant requested

the Squires' position, it seems highly unlikely that she would have eliminated this pattern rather than to make it available to complainant, particularly in light of the fact she did give complainant a three-day weekend pattern with Monday off in January 1985. The Commission cannot conclude there is probable cause with respect to the vacancy in the Squires' position after her termination.

4. Page 25 of the DISCUSSION is amended by deleting the first three paragraphs on that page.

5. Page 14 of the DISCUSSION is amended by revising footnote #3 as follows:

3. ~~Their~~ Ms. Smith's schedule~~s~~ included nourishment room duty.

Dated: September 22, 1987 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:rcr
RCR01/3

Parties:

Tzu-Yueh (Connie) Boyle
3918 Rockwell Drive
Madison, WI 53714

Tim Cullen
Secretary, DHSS
P.O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

TZU-YUEH (CONNIE) BOYLE,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 84-0090, 0195-PC-ER

PROPOSED DECISION AND ORDER ON PROBABLE CAUSE

NATURE OF THE CASE

These cases involve a number of allegations of discrimination with respect to various conditions of employment on the basis of national origin and retaliation. Following an investigation, an initial determination found probable cause to believe respondent had discriminated against complainant with respect to one of the conditions of employment and no probable cause as to the others. The parties agreed to a consolidated hearing as to certain of the latter allegations, and hearing was noticed on the basis of the following issues:

> Whether there is probable cause to believe the respondent discriminated against the complainant regarding the following incidents and on the bases noted:
>
> A. National Origin:
> 1. Denial of training opportunities/nourishment room.
> 2. Denial of 70% no split shift position.
> 3. Denial of 50% (laborer) position.
>
> B. National origin and retaliation:
> 1. Denial of 3-day weekend shifts in 1984 and 1985.
> 2. Assignment to multiple tasks.
> 3. Assignment of overtime.
> 4. Assignment to laborer worker [sic] for benefit of another employee.
> 5. Treatment when finger was injured in January, 1986.

In the following findings, unless specified to the contrary, all employes mentioned are not of foreign origin.

FINDINGS OF FACT

1. Complainant is of Asian origin. She came to the United States in 1974.

2. In 1981 complainant was examined for Food Service Worker (FSW) and Food Service Laborer (FSL). She achieved passing scores of 89 and 98 respectively and was certified for employment in either classification.

3. In February 1981, complainant was interviewed for employment by Caryl Farrell, a food service supervisor at Central Wisconsin Center (CWC).

4. At CWC, all the material FSW and FSL positions are in the classified civil service and part of a collective bargaining unit represented by a labor organization. The FSL classification is at a higher salary range.

5. At the aforesaid interview, complainant indicated she would accept either FSW or FSL employment. At the time, there were no FSL vacancies. Ms. Farrell hired complainant as a 50% FSW, effective in March 1981.

6. In July 1981, complainant asked Ms. Farrell if she could pick up a 50% FSL position while retaining her 50% FSW job.

7. Because of scheduling, payroll, and other administrative problems that had arisen when another employe had been employed simultaneously in both classifications prior to complainant's employment at CWC, the institution had a policy prohibiting employment in both classifications. Pursuant to this policy, Ms. Farrell denied complainant's request.

8. During complainant's tenure at CWC, a number of employes were promoted from FSW to FSL. No employes, including complainant, were

permitted to "switch" or transfer from FSW to FSL. Complainant never participated in an FSL competitive exam after she began employment at CWC.

9. From time to time during her tenure at CWC, complainant, as well as other nonforeign employes, were assigned on a temporary basis to perform FSL duties. These included occasions where FSL's who had signed up for voluntary overtime to perform FSW work were performing FSW duties. Complainant was not treated differently than other employes with respect to these assignments, which were in keeping with institution policies and practices and the applicable labor contract and local agreement.

10. Complainant attempted in 1984 to obtain an assignment to the nourishment room similar to that of Margaret Smith, a less senior FSW. Complainant's supervisors denied this request because they reasonably believed her English was inadequate for this assignment, with respect to both verbal and written communications.

11. In February of March, 1984, complainant requested a 70% no split shift schedule with more days off in order to accommodate difficulties she was experiencing in scheduling English classes.

12. At that time there was no such vacant schedule available. Ms. Farrell informed complainant of this and further informed her that she did not anticipate one becoming available.

13. Shortly thereafter, complainant requested and was granted a 50% schedule. As no 50% schedule with eight hour days was available, she accepted a 50% schedule with five hour days. This transaction was accomplished by a reduction in hours as opposed to a movement to a new position. This request was supported by a letter from a physician, Complainant's Exhibit 5, which stated that for health reasons it would be advisable for her to reduce her work level.

14. Margaret Smith was a 70% FSW who had six days off per pay period rather than the more usual four. This was connected with the fact that she was assigned to the nourishment room, which had different staffing demands than other FSW's. Also, in August of 1984, Ms. Farrell substantially revised the FSW schedules due in part to changes in the tray line system. Both Ms. Smith and Diane Kelly, another 70% FSW, had more days off under this new schedule. After learning of these two schedules, complainant asked Ms. Farrell why she had not been so assigned, and Ms. Farrell told her it was because she was a 50%, and not a 70%, FSW.

15. In 1983, a FSL, Joe Hrenek, requested and was granted two 50% FSL positions. He subsequently requested an 80% position because he wanted more days off. This request was denied because there were no such positions, but he was given and accepted the option of reducing his hours from 40 to 32 per week in 1984.

16. One day in August 1983, complainant was assigned to the 5:30 a.m. - 10:00 a.m. shift. Supervisor Yanke asked her to work overtime and to report to the nourishment room at 11:00 a.m. to assist with pouring nourishments. The crew that had been assigned to that duty was short-handed. These employes were on a later day shift than complainant, starting at 11:00 a.m. They were supposed to wash dishes after finishing with the pouring. The usual routine was that the employes assigned to such pouring would all take a break together after the pouring was completed, but because they were behind with the pouring, and in order that they might be able to take a lunch break before going to wash dishes, and because complainant was considered an "extra" person with respect to that crew, Ms. Yanke sent the other employes on their lunch break at about noon, and later to wash dishes, and asked complainant to finish up the pouring operation. Complainant told Ms. Yanke

she had only had one break since she started work and that the usual procedure was for the entire crew to take a break after the pouring was completed. However, Ms. Yanke did not understand her and in effect ignored her statement. Complainant subsequently continued working until about 2:00 p.m. when she became sick to her stomach and had to leave the area.

17. On one occasion in 1984, complainant was scheduled to work both an eight hour and a three and one-half hour shift on the same day. She missed her lunch break through inadvertence and when Ms. Yanke learned of this she made arrangements for complainant to take a lunch break at variance with the usual routine.

18. On one occasion at CWC in 1983 or 1984, Ms. Yanke made a remark to the effect that "they" (a reference that included complainant) come over here and they get a job and we bend over backwards and they're still not satisfied.

19. On January 1, 1986, complainant cut an index finger at work. On January 2, 1986, she was assigned to the adaptive equipment station. Her supervisor was not aware of the injury. Complainant reinjured the finger right after starting work, and it started bleeding again. She then went to the supervisor who helped her bandage the finger. Complainant did not request a change of assignment but finished her shift.

20. After the shift, complainant went to the health department where the nurse took care of her finger, called the supervisor's office, and informed them that due to her injury, the complainant should not be assigned dirty work or work that would involve banging or hitting the finger.

21. The following day (January 3d), complainant was scheduled to work 10:00 a.m. - 2:30 p.m. Before reporting to work she returned to health service for treatment of her finger. The doctor on duty called the

supervisors' office and advised that complainant should be reassigned to a different job as the job she had performed the previous day had aggravated the injury, that she should be assigned where she wouldn't be so apt to bump it, and that she should stay out of water for the next four or five days.

22. Complainant was assigned to the beverage and specials station for her shift on January 3d. The duties of this station include removing beverages and fruits from a refrigerator and placing them on trays, and lifting trays out of refrigerators. She also had cleaning duties afterwards. The latter activity includes mopping, scrubbing tables, and placing trays in the dish machine, and involves some degree of exposure to water. CWC policy required food service employes with dressings or bandages on their fingers to wear rubber gloves or rubber finger bandages.

23. Another employe, Beulah Bouche, suffered a finger injury in 1986. The nurse notified her supervisor that she should not be assigned to heavy work, and she was reassigned from the dessert station to the starter station. However, Ms. Bouche felt that the starter station would be more problematical with respect to her finger, so she requested and was granted a switch back to the dessert station.

24. It is usual for food service employes to be reassigned if this is medically indicated due to injuries, but only if the supervisory staff is aware of such circumstances.

25. Complainant signed the posting for unscheduled voluntary overtime in advance of the weekend of July 20-21, 1985. She learned on July 18th that Ms. Endres and Ms. Christiansen were being forced in to work overtime on those days. Complainant and Ms. Endres attempted on July 18th to effectuate an exchange for July 21st, but were told by management that no

one was needed for that day after all. Complainant subsequently was asked to work for Ms. Winer, who was being forced in to work overtime on July 21st.

26. Management's handling of overtime on July 20-21, 1985, as aforesaid, was substantially caused by two factors:

a. Management learned that another employe (Ms. Horn) was to return on July 21st from a leave of absence, thus eliminating the need for overtime. Subsequently, it was learned that she would not, thus creating a need for overtime.

b. Pursuant to a local agreement between management and the union which had been reached in 1984 or earlier in 1985 with respect to "scheduled" overtime (i.e., known 24 hours in advance), if there were no volunteers on the scheduled overtime list, management was to force in employes in reverse order of seniority as opposed to using the unscheduled overtime list.

27. In November 1984, complainant requested of Ms. Farrell a three day weekend pattern. This was granted effective in January 1985, when shift reassignments were normally made. Three day weekend assignments are usually offered to the most senior employe.

28. Ms. Margaret Smith had a predominantly three day weekend pattern prior to complainant receiving such a pattern in January 1985. Ms. Smith had less seniority than complainant but her pattern was related to her nourishment room assignment, which had different scheduling considerations than other food service positions.

29. A three day weekend pattern was available in July 1984 when Ms. Squires was hired, and three day weekend patterns with Fridays off were available in January 1985 when Ms. Squires was terminated and in December

1985 when Ms. Koch left. Complainant was neither offered nor given any of these schedules.

30. None of the foregoing vacant schedules were posted.

31. Management was aware that complainant was interested in such schedules.

32. Complainant filed her first complaint (84-0090-PC-ER), which alleged national origin discrimination with respect to certain conditions of employment, on July 30, 1984. Ms. Farrell became aware of this complaint in September, 1984.

33. The following table, prepared by complainant, is adopted by the Commission as a finding concerning certain personnel matters at CWC during the periods indicated:

	Year 1983		Year 1984		Year 1985		Year 1986	
	FSW	FSL	FSW	FSL	FSW	FSL	FSW	FSL
allotted positions	38	8	38	8	39	8.5	39	8.5
minorities employed	3	0	3	0	3	0	5	0
minorities applied	0	0	0	1	5	10	4	3
minorities certified	0	0	0	1	5	4	4	3
minorities hired	0	0	0	0	3	0	2	0
minorities passed probation	0	0	0	0	*0	0	1	0
minorities failed probation	0	0	0	0	*2	0	1	0

* 1 transferred out during probationary period

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats., and §PC 4.03(3), Wis. Adm. Code.

2. The complainant has the burden of proof as to the establishment of probable cause.

3. Complainant has satisfied her burden of proof, and the Commission concludes there is probable cause, to believe respondent discriminated against complainant in violation of the Fair Employment Act (Subch. II, ch. 111, Stats.) as to the charges that respondent denied complainant a three day weekend, shift in July 1984, when Ms. Squires was hired, on the basis of national origin; that respondent denied complainant a three day weekend shift with Fridays off in January 1985, when Ms. Squires was terminated, on the bases of national origin and retaliation; and that respondent denied complainant a three day weekend shift with Fridays off in December, 1985, when Ms. Koch left, on the bases of national origin and retaliation.

4. Complainant has not satisfied her burden of proof, and the Commission concludes there is not probable cause to believe that respondent discriminated against complainant in violation of the Fair Employment Act with respect to all other failures or refusal to give complainant a three day weekend schedule or a three day weekend schedule with Friday off; the denial of training opportunities for or assignment to the nourishment room; denial of a 70% no split shift position; denial of a 50% FSL position; assignment to multiple tasks; assignment of overtime; assignment to FSL tasks for the benefit of another employe; and the treatment of complainant when her finger was injured in January, 1986.

DISCUSSION

Since this matter is before the Commission on the question of probable cause, the complainant's burden of proof is less than it would be at a hearing on the merits. The Commission discussed this point in Winters v. DOT, Nos. 84-0003-PC-ER, 84-0199-PC-ER (9/4/86), as follows:

> 'Probable cause is not synonymous with preponderance,' being somewhere between 'preponderance' and 'suspicion.' Young Oil Co. of La, Inc. v. Durbin, 412 So. 2d 620, 626 (La. App. 1982). The Commission agrees with this kind of characterization of the matter, as it is supported both by the language of §PC 4.03(2), Wis. Adm. Code, and the policy underlying the probable cause requirement. p.17.

In evaluating whether probable cause is present, the Commission normally follows the method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668, 5 FEP 965 (1973), and its progeny. However, since the parties tried this case completely, the Commission will proceed on the assumption that complainant has established a prima facie case as to each issue, and, looking at all the evidence presented, analyze each issue as to there is probable cause to believe discrimination occurred. See U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (9183): "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."

Before turning to the specific issues, the Commission will consider complainant's statistical contentions, which she summarized in her brief in the table which is set forth at Finding 34. In the Commission's view, these statistics have little probative value. There is no comparison made between the hiring and retention rates for minority and nonminority employes. Standing alone, the fact that two of three minorities failed

probation in 1985 (the third transferred out during the probationary period) has little significance. In addition, it is difficult to attach much meaning to such small samples.

Complainant requested of supervisory staff in 1984 the same Nourishment Room assignments as Margaret Smith was getting. Such an assignment involved more desirable hours and more days off. Ms. Smith had been hired a week later than complainant and thus had less seniority. Complainant's supervisors denied this request, citing her inadequate command of English.

In her posthearing brief, complainant argues that Ms. Farrell originally told the Commission investigators that the perceived problem was with complainant's capabilities with respect to the written language, and then changed her position at the hearing to stress complainant's inadequacies with verbal communications after the complainant demonstrated at the hearing her ability to understand written English material.

The contention that Ms. Farrell only raised the matter of complainant's written language comprehension with the Commission's investigators appears to be incorrect. While complainant cited in her brief one section of the investigative findings set forth in the initial determination which discusses the difference between reading requirements in the nourishment room and on the trayline, the initial determination makes numerous references to Ms. Farrell's stated concerns about complainant's lack of capability as to both written and spoken English, e.g.:

> 3. In her First Complaint, complainant alleged she was denied training opportunities because of her national origin. Complainant requested training to enable her to perform duties in the "nourishment" and "formula" room at CWC. American-born employees have been given these training opportunities. Ms. Carol Farrell, Food Service Administrator 3, who managed complainant's work unit, denied the request. Ms. Farrell told

> complainant that complainant did not speak and understand English well enough to perform those duties.
>
> 4. ...This job [nourishment room] requires an ability to read English, to understand spoken English should changes be called in and the ability to speak English if questions arise....
>
> * * *
>
> 6. Ms. Farrell felt complainant lacked the ability to speak and understand spoken English and the ability to read and write English to the degree required in the formula and nourishment rooms. Initial determination, pp. 2-3. (Complainant's Exhibit 19).

At the hearing, complainant demonstrated an ability to understand certain written material. However, as respondent has pointed out, this is material with which complainant had some pre-existing familiarity. When complainant was faced with the written proficiency test for reclassification to FSW 2, she had to ask Ms. Farrell to administer it orally. With respect to complainant's capacity to speak and understand verbal English, it must be said, based on what transpired at the hearing, that she could communicate only with appreciable difficulty. The nourishment room assignment is more complicated than regular trayline duties. It involves reading charts and instructions for the distribution of special nourishments to residents and handling phone calls providing special instructions and changes.[1] The record does not support a conclusion in the probable cause context that respondent's reasons for its actions as to nourishment room duty and training were pretextual.

The next matter concerns the request that complainant made in February or March of 1984 for a 70% no-split shift FSW schedule with more days off, in order to accommodate difficulties she had been encountering in schedul-

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[1] This work also must be distinguished from the more mechanical activity of pouring "nourishments" in or near the nourishment room which was sometimes referred to by witnesses as nourishment room work or assignments.

ing English classes. Ms. Farrell told her that no such schedule existed and that she did not anticipate one being available in the future. Subsequently, complainant wrote a letter to the CWC Director, requesting a change to a 50% eight hour day, schedule, citing tension headaches and her schedule of English classes. This letter was accompanied by a letter from her doctor (complainant's Exhibit 5) which stated that a reduction in hours was needed from a medical standpoint. Ms. Farrell then told complainant there were no 50% shifts with eight hour days available, and suggested she accept a 50% schedule with five hour days. Complainant accepted such a schedule, effective May 13, 1984.

Complainant compares her situation with that of three non-foreign employes. She argues that while the usual number of days off for employes on 70 hour schedules was four per pay period, Margaret Smith and Diane Kelly were on a 70% schedule yet received six days off per pay period. However, respondent denies, and it has not been established, that these employes were similarly situated to complainant. The record established that Margaret Smith was assigned to the nourishment room [2] and that the staffing demands of the nourishment room were responsible for her schedule and the resultant number of days off, at least until August of 1984, when Ms. Farrell revised the schedules of part-time workers, at least in part due to changes in the tray line system. These changes included putting both Ms. Smith and Diane Kelly on schedules that included more days off. At this time, both Smith and Kelly were 70% employes while complainant was a 50% employe pursuant to her request, which had been accompanied by a doctor's recommendation that her hours be reduced for medical reasons.

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[2] As discussed above, respondent had a non-discriminatory reason for not granting complainant's request for this assignment.

These circumstances do not give rise to an inference of discrimination from the fact that Smith and Kelly had six days off per pay period.

The complainant also cites the case of Joe Hrenek, a FSL who in 1983 requested and was granted two 50% FSL positions. He subsequently requested a permanent 80% position because he wanted more days off. This request was denied because there were no 80% permanent positions. However, he was given and accepted the option of reducing his hours from 40 to 32 per week in 1984. Complainant contends that Farrell's willingness to "accommodate" Hrenek's request is probative of discrimination because her request was not similarly "accommodated."

The Commission is unable to agree with this proposition because of the lack of comparability of the two employes. The complainant was in a 70% position and requested a different kind of 70% position. Ms. Farrell denied the request for the reason that no such vacancy existed. It simply does not follow that because Farrell found a way to permit Hrenek to in effect reduce his schedule from 100% to 80% that this is somehow probative of discrimination in Farrell's denial of complainant's request for another 70% position without split shifts and with more days off. Also, complainant was permitted to reduce her hours from 70% to 50% in 1984 without actually changing positions.

In conclusion, there is little if anything on this record that would suggest that the respondent's rationale for the denial of complainant's request was pretextual.

In August 1984, complainant learned that Margaret Smith and Diane Kelly had the same kind of schedule [3] she had requested and been denied in March of that year. Complainant contends in her posthearing brief that she

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[3] Their schedules included nourishment room duty.

then requested of Farrell such a schedule, which was denied. The complainant's brief further asserts that Ms. Farrell testified that the reason she gave for the denial was that she was not on an eight-hour day, and that this was inconsistent with her statement to the investigators as reflected on page 6, paragraph 15, of the initial determination -- that an applicant schedule was posted for these 70% no split shift assignments and that complainant failed to sign the posting.

The record reflects that at the hearing, Ms. Farrell testified that she did not provide complainant with a 70% no split shift schedule in August 1984 because, as discussed above, Smith and Kelly were 70% employes while complainant was a 50% employe pursuant to her request of earlier that year (which had been supported by a medical statement recommending reduced hours). She did not state that complainant came to her after learning of Smith and Kelly's schedules to ask for such a schedule.

Ms. Farrell further testified that she did not make the statement to the investigators reflected in paragraph 15 of the initial determination, that the initial determination was erroneous in that regard, and that after she first had seen the initial determination she pointed out the error in an in-house memo.

Complainant testified at the hearing that after she had learned in July, 1984, that Smith and Kelly had been assigned these 70%, no split shift assignments, she asked Ms. Farrell why they (and not she) had gotten those jobs, and was told that it was because she (complainant) had gone back to 50% employment. This testimony is completely consistent with Ms. Farrell's testimony.

Based on this evidence, it can only be concluded that the initial determination was incorrect in attributing to Ms. Farrell the rationale

that complainant did not get a 70% no split shift assignment in August 1984 because she had not signed a posting for these positions. Furthermore, there does not appear to be any basis for complainant's contention that Ms. Farrell's stated rationale was that complainant was not on an eight hour day pattern, and complainant's attempts to undermine the factual foundation for this rationale are inapposite.

Complainant's brief also points out that complainant had expressed an interest in such a 70% schedule in March 1984 before she went on a 50% schedule, and goes on to argue that Ms. Farrell "...could have checked records and would have learned that Connie had worked well over 40 hours per pay period in almost every pay period since she had accepted the 50% position." Complainant's post-hearing brief, p. 14. This argument rests on hindsight, and ignores the fact that there were no available 70% positions at the time. The Commission can discern no evidence of pretext with respect to the respondent's rationale for its actions in connection with the Kelly and Smith positions.

The next matter concerns the denial of a 50% FSL position. This occurred in 1981. Prior to complainant's employment at CWC, the institution had developed a policy of not allowing employes to be hired in two positions in different pay ranges due to problems with scheduling, vacation, and pay. For this reason, Ms. Farrell denied complainant's request to work in a 50% FSL position as well as in a 50% FSW position.

Complainant never applied for or took another FSL examination after the original, pre-employment, FSL examination in March, 1981. Complainant's name never appeared on any list of FSL candidates to be interviewed by Ms. Farrell after 1981. Like many other CWC FSN employes, she was

assigned to do FSL level work from time to time. Also, from time to time, FSL's were given assignments to perform FSW level work.

Based on these facts, it seems clear that so much of the complaint (84-0090-PC-ER) as relates to denial of the 50% laborer position is untimely, §§230.44(3), 111.39(1), Stats. However, complainant contends that there was what amounts to a continuing violation:

> It is not only the 1981 denial of Connie Boyle's application for a FSL position that constitutes discriminatory conduct. The continual assignment of Boyle to that higher-paying position at a lower pay rate after denying the position to her is part of this continuing offense. This continued through the years 1981-1986. It included the aggravating incident in March of 1986 when Ms. Hrenek was given Ms. Boyle's tray-line assignment at his FSL rate and she was forced to do his laborer work at the lower pay rate. It also included Farrell's act of allowing Linda LeFaber to transfer from a FSW position to a FSL position in the summer of 1985. Thus the acts of discriminatory treatment were well within the 300 day limitation period. Complainant's posthearing brief, pp. 19-20.

In the Commission's view, the matters complainant cites do not amount to acts of discrimination. It was not unusual for FSW's and FSL's to occasionally do work normally performed by the other classification. In the instance cited involving Mr. Hrenek, he had signed up for overtime as a FSW and could not have been forced to come in for overtime as a FSL.

As to Ms. LeFaber's purported "transfer" from an FSW to an FSL position, the Civil Service Code would not permit a transfer between positions in two distinct pay ranges, such as this. §ER-Pers 15.01, Wis. Adm. Code. Therefore, regardless of how the transaction may have been characterized colloquially, it was not a transfer. In her reply brief, complainant accedes that this transaction undoubtedly was a promotion, but contends that, notwithstanding, the transaction was part of the continuing pattern of discrimination.

> Boyle was first told by Farrell that she could not do the job, then that there would be scheduling problems having two 50%

> positions, and finally, simply denied the opportunity to exchange one for the other. In 1985, Linda LaFaber, too, was obviously certified, was probably not told she could not do the job, and was probably not told there would be scheduling problems and was promoted to an FSL, unlike Boyle in 1981... (emphasis in original) Complainant's post-hearing reply brief. p. 7.

There was no way under the civil service code that the respondent could have permitted complainant to have "switched" from an FSW to an FSL position unless the complainant had passed an exam and been among those certified for consideration for promotion. The Commission fails to understand how respondent's action in promoting LeFaber to FSL in 1985 could be considered an act of discrimination with respect to complainant in the context of complainant's asserted continuing violation theory.

In any event, neither the complainant's foregoing assertions, nor her contention that Farrell told her in 1981 that her English was not good enough for a Food Service Laborer job, would give rise to a continuing violation, so as to permit the Commission to review respondent's actions regarding FSL jobs in 1981. See, e.g., Murphy v. Phil. Gas Works, 34 FEP Cases 1463, 1466 (ED Pa. 1984); Erdmann v. Bd. of Ed., Union City Dist., 541 F. Supp. 388, 34 FEP Cases 1373, 1374, 1375 (D.N.J. 1982):

> ...Repeated denials of employment or promotion to an individual applicant such as plaintiff do not constitute a continuing violation unless the denials were based upon some allegedly discriminatory practice, policy, or procedure utilized by the employer in making its employment decisions, and the plaintiff has brought a timely complaint of a present violation based on the employer's use of that same practice, policy or procedure....

The next matter has to do with the incident which occurred in August 1983 when complainant was assigned to finish up pouring duties in the nourishment room while the other employes working there took a break. Inasmuch as this incident was not one of those noticed for hearing or covered by the initial determination, presumably it is included as evidence of an alleged pattern and practice of discrimination.

On the day in question, complainant was scheduled to work from 5:30 a.m. - 10:00 a.m. After she reported to work, her immediate supervisor asked her to work overtime and to report to the nourishment room at 11:00 a.m. to assist with the pouring. The workers who had already been assigned to nourishment room pouring duties were on a later day shift than complainant. They were short-handed and were running behind in that activity, and they also had been scheduled to wash dishes after lunch. In order that those employes could have a chance to eat lunch and still wash the dishes, the supervisor released those employes for their lunch break, to proceed from there to dishwashing, and asked complainant, who was considered an "extra" employe with respect to that crew, and who was not scheduled to wash dishes, to stay in the nourishment area to finish the pouring at the time the others went on break. At this point, complainant tried to tell Ms. Yanke that she had had only one break since 5:30, and that everyone was supposed to continue puring until this was finished and then take a break together. However, Ms. Yanke did not understand her. Complainant continued with the work alone until about 2:00 p.m. when she was almost finished but became sick to her stomach and had to stop. She went to the supervisor's office where she told supervisor Ada Zentner she felt too sick to continue. Ms. Zentner told her to eat and not worry about the job.

The record concerning this incident provides little, if any, indication of discrimination or discriminatory animus on Ms. Yanke's part. The usual routine was that the employes assigned to pouring in the nourishment area worked together until the job was completed, and then took a lunch break before going to another area to wash dishes. On the day in question, this crew was shorthanded, which was why complainant was given overtime to help them. Inasmuch as complainant was not part of the contingent that was to continue with dishwashing, there was a basis for Ms. Farrell to have asked complainant to continue pouring so the other employes would be able to break, for lunch before going to dishwashing, rather than to proceed with the usual routine and have them all continue until done with the pouring and then go on break. The latter course would have involved the possibility that the other employes would not have had time to eat lunch before the dishwashing began.

While Mr. Yanke's statement about foreigners certainly constitutes evidence of a discriminatory animus, it is an insufficient basis for a conclusion that complainant was discriminated against on this occasion in light of all the circumstances of record.

The next matter concerns management's response to complainant's injury to her index finger she suffered on January 1, 1986. The next day when she reported to work she was assigned to the adaptive equipment station on the trayline. At this time, her supervisor was not aware of her injury. She reinjured her finger right after starting work, and it started bleeding again. She then went to the supervisor who helped her bandage the finger. Complainant did not request a change of assignment but finished her shift. She then went to the health department where the nurse took care of her finger, called the supervisor's office, and told them complainant should

avoid dirty work, or work that would involve banging or hitting the finger, because of her injury. The next day (January 3d), complainant was assigned to work 10:00 a.m. - 2:30 p.m. Before reporting to work she returned to health service, where her finger was treated. The doctor on duty called the supervisors' office, and advised that the job complainant had been assigned the previous day had aggravated her injury, her wound was worse than it had been the day before and was open and bleeding, and that she should be reassigned to a different job, and that the finger should be kept out of water. Complainant was assigned the entire shift to the beverage and specials station. This station involves removing beverages and fruits from a refrigerator and placing them on trays, removing trays from refrigerators, and cleaning up afterwards, which involved mopping, scrubbing tables, and placing trays in the dish machine, and some exposure to water.

Complainant contends that she was treated differently than similarly situated non-foreign employes. In her post-hearing brief, she asserted that a co-worker, Beulah Bouche, testified that: "...she had had a finger injury in 1986, and that she was automatically switched to an easy station, as are other employes when they are injured." p. 23. However, Bouche testified that an employe would be reassigned without a request only if the supervisors were aware of the employe's situation. She also testified that when she injured her finger in 1986, she was sent to the charge nurse and the charge nurse called the supervisor to tell her that Bouche should not be assigned to heavy work, and she thereafter was reassigned to a different station.

Furthermore, while complainant contends that the beverage and specials station to which she was assigned on January 3d was problematical with respect to her finger, the record does not reveal that there were other

assignments available that would have been less problematical. Ms. Bouche testified only that there were jobs on the trayline that would have been easier than adaptive equipment for someone with an injured finger, and that after she had been reassigned from the dessert station to the starter position as a result of the call from the charge nurse, she requested and was granted reassignment back to the dessert station, because she thought this would be easier. Complainant also called as a witness the institution doctor who examined complainant on January 3d and recommended that she not be reassigned to the adaptive equipment station. While she testified that she was familiar with the work performed in the food service area, she was never asked whether she thought complainant's assignment to the beverage station on January 3d was problematical. Finally, Ms. Farrell testified and it is uncontradicted, that employes with bandages on their fingers are required to wear rubber gloves or rubber finger bandages over the bandages.

Therefore, there is no probable cause to believe that complainant's treatment when she injured her finger involved disparate treatment on the basis of national origin.

Complainant contends that she often has been denied overtime hours. She contended that despite the fact that she had signed up in advance on the unscheduled volunteer list for the weekend of July 20 and 21, 1985, she learned on July 18th that two other employes, Endres and Christiansen, were forced in on those days. She contends that she and Endres attempted on June 18th to effectuate an exchange for July 21st only to be told that no one was needed for that day, after all. However, complainant subsequently (July 19th) was asked to work for Coleen Winer, who was being forced in to work on July 21st.

However, there was a local agreement between management and the union, which was reached sometime before this occurred, that with respect to scheduled overtime (known more than 24 hours in advance), if there were no volunteers available on the scheduled overtime volunteer sheet, management would force in employes in reverse order of seniority as opposed to using the unscheduled overtime volunteer list.

The existence of this local agreement was not seriously disputed. Complainant contends that on July 15, 1985, another supervisor saw her name on the unscheduled overtime list and asked her to work on July 17, 1985. While this action appears to have been at odds with the local agreement, it does not mean that the local agreement did not exist.

Complainant also contends the local agreement described by management was irrational. However, as pointed out by Ms. Farrell, if employes were to be taken off the unscheduled overtime list to fill scheduled overtime, there would be less likely to be employes available on the unscheduled overtime list to fill in for last-minute absentees, and it sometimes was very difficult to contact employes to force them in for unscheduled overtime.

Therefore, the respondent's actions with respect to handling overtime on the weekend in question was attributable to the operation of the local agreement combined with some unforeseen changes in the leave of absence status of another employe, and there is nothing to suggest pretext.

The next matter involves complainant's attempts to get a three day weekend pattern. The issue for hearing was noticed in terms of "Denial of 3-day weekend shifts in 1984 and 1985," which was essentially the language used in the statement of proposed issues submitted by complainant's counsel on January 6, 1987: "Denial of three-day weekends in 1984 and 985 -

National origin and retaliation...." However, the way the case was tried and briefed, this issue appears to consist of two elements -- the denial of a three day weekend shift per se, and, after such a shift was granted in 1985, the denial of a three day weekend schedule with Fridays off.

As to the first element, the record reflects that complainant requested a three day weekend shift in November 1984 and the request was granted with a Saturday, Sunday, and Monday off pattern. This went into effect in January 1985 when all the shift changes were implemented. Complainant contends that she should have been granted a three day weekend shift automatically on the basis of seniority before this, and that she should have been given a three day weekend with Fridays off after this when such schedules opened up.

Complainant cites two positions that were vacated in 1985 that had Friday-off patterns -- Donna Squires in January 1985, and Dorothy Koch in December 1985. Complainant also contends she should have been given the schedule vacancy into which Ms. Squires was hired in mid 1984. As to Ms. Squire's schedule after her termination, respondent contends that this was posted and, after neither complainant nor anyone else signed for it, it was filled by hiring a non-foreign person from outside the institution. However, both complainant and Ms. Bouche testified that they did not see any such posting although they were sure they would have had it been posted, because they were always looking for such postings. Ms. Bouche also testified that if there had been such a posting, complainant's co-workers would have brought it to her attention because it was common knowledge she (complainant) wanted such a schedule. The respondent never produced a copy of such a posting.

A further part of respondent's rationale for not giving complainant Ms. Squire's schedule was that Ms. Farrell did not know until July 1986, that complainant wanted Fridays off, and that thereafter such a schedule was arranged. The factual basis for this rationale was contested not only by complainant's testimony, but also indirectly by Ms. Bouche's testimony that it had been common knowledge that complainant wanted a three day weekend schedule with Fridays off. This suggests complainant frequently made her wishes on this subject known, and she certainly had demonstrated a readiness to make her schedule requests known to management.

Given the lighter burden of proof obtaining in a probable cause determination, it can be concluded that the respondent's rationale for not offering complainant Ms. Squire's schedule was pretextual, and therefore there is probable cause to believe that complainant was denied this schedule because of national origin and retaliation.

As to the Dorothy Koch schedule, and the schedule into which Ms. Squires was hired, the parties' contentions and the evidence basically parallel that associated with the Squires' post-termination schedule, and the Commission reaches the same conclusions.

The Commission cannot find pretext with respect to the assignment of three day weekends to Margaret Smith, which respondent defended as dictated by institutional needs, since she was assigned to the nourishment room and her scheduling involved different program considerations than other employes.

The complainant's reference to a vacancy in 1982 is outside the scope of the issues and apparently untimely as well.

Complainant did not address the issue of "assignment to multiple tasks" in her posthearing brief. To avoid any possible confusion, the

Commission will note that there is nothing on this record that would suggest discrimination with respect to this issue.

ORDER

So much of this charge of discrimination (Case No. 84-0195-PC-ER) that relates to respondent's failure or refusal to give complainant a three day weekend shift in July 1984, and a three day weekend shift with Fridays off in January 1985 and December 1985 is referred to Commission staff for conciliation and possible hearing on the merits, along with the issue in Case No. 84-0090-PC-ER with respect to which probable cause was found in the initial determination issued August 12, 1985.

Dated: _____,1987 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

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DONALD R. MURPHY, Commissioner

_____
LAURIE R. McCALLUM, Commissioner

Parties:

Tzu-Yueh (Connie) Boyle
3918 Rockwell Drive
Madison, WI 53714

Tim Cullen
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707