

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 STEVEN LEE KLOEHN, \*  
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 Complainant, \*  
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 v. \*  
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 Secretary, DEPARTMENT OF \*  
 HEALTH & SOCIAL SERVICES, \*  
 \*  
 Respondent. \*  
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 Case No. 86-0009-PC-ER \*  
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INTERIM  
ORDER


This matter is before the Commission following the issuance of a proposed decision and order by the hearing examiner. Both parties have filed objections and arguments with respect to the proposed decision and order, which the Commission has considered. The Commission has also consulted with the examiner.

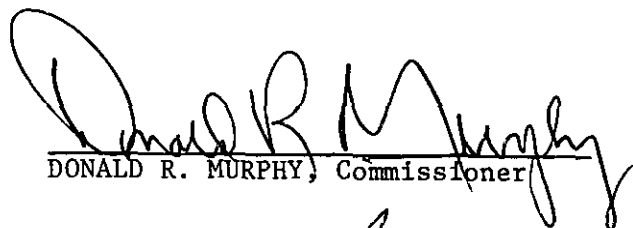
The Commission adopts the proposed decision and order, a copy of which is attached hereto and incorporated by reference, as its final ruling with respect to probable cause. The Commission notes the concern complainant raises concerning his view that the proposed decision implies there must be a corroborating witness to alleged advances by a supervisor towards a

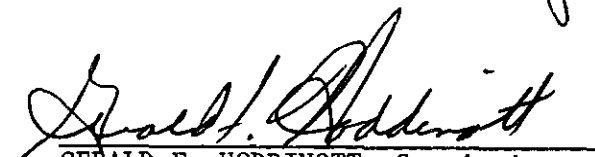
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complainant in sex harassment cases. Since the Commission does not read the proposed decision as so implying, it need not address further complainant's request for an additional conclusion on this point.

Dated: September 8, 1989 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

AJT:gdt  
JMF01/1

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Secretary, DHSS  
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complainant's direct supervisor. This was complainant's first experience of being supervised by a female.

3. The Aide 5 position formerly held by complainant was considered by WRC management to be in treatment, while the CO 5 position was considered to be in security. However, the positions have a good deal of similarity in terms of duties. As an Aide 5, complainant's performance was evaluated as excellent by his supervisor, Marc Christian.

4. Complainant and Ms. Lyon were co-workers of equal rank for a period of time in 1979-80 at DCI. During this period, Ms. Lyon twice asked complainant to go out with her, and complainant declined.

5. On two occasions in January and February, 1985, while Ms. Lyon was supervising complainant, she asked complainant to go out with her and complainant declined.

6. Following the second occasion of complainant declining her invitation, Ms. Lyon's demeanor toward complainant changed. Prior to that time, while Ms. Lyon on occasion instructed complainant or counseled him regarding mistakes, her demeanor toward him was warmer and more endearing than was consistent with simply a professional relationship and was less businesslike than her relationship with the other lieutenants she supervised. After that time, Ms. Lyon's demeanor toward complainant changed and she exhibited a negative, hostile type of attitude toward him.

7. The foregoing finding was supported by testimony as to his observations by Marc Christian, a unit chief and Psychologist 2. In 1986 and 1987 he had been involved in disciplinary situations related to his having provided false information to institution management. He is a personal friend of complainant.

8. Complainant's probation was terminated effective March 25, 1985, on the ground of inadequate performance. Ms. Lyon was responsible in effect for this transaction although the institution director officially effectuated the termination as appointing authority based on Ms. Lyon's recommendation.

9. Ms. Lyon's rationale for recommending complainant's termination was largely summarized in a Performance Planning and Development report form (PPD) (Respondent's Exhibit 6). The expectations part of this form was filled out in a meeting between Ms. Lyon and complainant on February 6, 1985. The results part was filled in by Ms. Lyon on March 11, 1985. Ms. Lyon's appraisal, and the underlying facts as developed at the hearing of this matter, are set forth hereafter, with each negative "performance expectation" and "result" from the PPD followed by the related findings based on the evidence presented at the hearing.

10.

"Performance Expectation

Result

By 3/15/85 become knowledgeable about WRC mission, unit programs, staffing patterns and all officers posts.

Expectations not met. On 3/18/85 you asked for OT when it wasn't needed for 3rd shift on 3/26/85."

Complainant on March 18, 1985, requested that the administrative lieutenant (Trattles) assign an officer to overtime for the March 26, 1985, shift because complainant foresaw it being shorthanded. Lt. Trattles informed him that no overtime would be needed. No overtime was scheduled for the shift in question. Complainant's request was the result of a lack of understanding or misunderstanding of the schedule, and that after approximately three months on the job this should not have been a problem. It was not uncommon for both probationary and permanent lieutenants to make occasional mistakes in scheduling overtime that resulted in the unnecessary

payment of overtime, and the consensus of the lieutenants who testified was that occasional errors of this nature were not serious performance problems and had not resulted in disciplinary action. However, there was no direct evidence that Ms. Lyon was specifically aware of any of these incidents, and the Commission finds she was not.

11.

"Performance Expectation	Result
Supervise officers on assigned shifts, insure that all posts are covered, and coordinate security with unit staff, assigning and directing officers as needed to carry out mutual assignments. (i.e., assist staff in handling emergencies and/or problem solving)	Expectations not met adequately. Did not follow Security Director directions in coordinating with Food Services."

Ms. Lyon had instructed the lieutenants, including complainant, at a February 1, 1985, meeting, that they were not to call inmates to the dining room for meals; rather, this was to be done by the food service aides. Complainant misunderstood that the restriction applied to lieutenants rather than just CO 1's and CO 2's and subsequently violated the directive. This resulted in food service filing a complaint with security and Ms. Lyon counseling complainant. After that, complainant complied with the directive.

12.

"Performance Expectation	Result
Complete PPD's of assigned officers in a timely manner, alerting the Security Director in instances where results do not meet expectations.	Expectations met now, but PPDs had to be redone."

Sometime in mid-January, 1985, complainant completed PPD's for the 6 or 7 officers assigned to his supervision and turned them in to Ms. Lyon

for her review. Within a day or two thereafter she returned them to him, telling him they needed to be more specific. Complainant redid the PPD's and this time they were acceptable to Ms. Lyon. Ms. Lyon provided instruction at a lieutenant's meeting held February 1, 1985, as to how she wanted the PPD's done. This meeting was subsequent to the first time complainant turned in the PPD's. A number of the other lieutenants had to redo PPD's. However, unlike complainant, these lieutenants did not complete all their PPD's before turning them in to Ms. Lyon for review. Rather, they turned in the first PPD, presumably to see if they were "on the right track." None of the other individuals who had to redo PPD's was disciplined, counseled, or received negative comments in their PPD's as a result thereof.

13.

"Performance Expectation	Result
Assign CO staff to posts, extra duty, and conduct meetings (e.g., shift meetings), training sessions with CO's to train, convey information, and direct CO's as necessary to carry out WRC Security programs.	Expectations not met. Violated WRC policies and procedures by not following WRC count policy and procedures."

Complainant did not violate WRC inmate count policy and procedures.

14.

"Performance Expectation	Result
Accurately record on shift report any unexpected absences of CO (i.e., sick leave, absence due to inclement weather, etc.) and note whether overtime was required.	Expectations not met. Shift reports had to be returned and for lack of information and lack of accurate information."

During the initial part of his probation, appellant made a number of mistakes on shift reports, as did many other lieutenants, both probationary and permanent. His performance in this performance area during this period can be characterized as no worse than average when compared to these other

lieutenants. After the February 6, 1985, PPD meeting with Ms. Lyon, when she counseled him regarding this subject and advised him his work in this area would be subject to intensive review for the next two weeks, he made no more errors on shift reports during his remaining period of employment as a lieutenant. On February 20, 1985, Ms. Lyon evaluated his work in this area as "meets expectations." None of the other lieutenants had problems with shift reports raised as issues in their evaluations, including Lt. Shaffer, who was also a probationary lieutenant and who had a pattern of erroneous shift reports during this period.

15.

"Performance Expectation

Result

By March 15, 1985. Document potential or actual security breaches to the Security Director independently or as directed with complete and accurate verbal and written reports.	Expectations not met. I have not received any verbal or written reports on these matters."
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There were no security breaches of which complainant was aware or should have been aware that he did not report. He did report some actual or potential breaches through the medium of shift reports.

16.

"Performance Expectation

Result

Keep accurate records on tool and key control, inmate counts and other security functions.	Expectations not met. Allowed inmate to move before/during count time without authorization from Security Director."
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This is the same allegation as was made with respect to the performance expectation set forth in Finding #13, above. Complainant did not allow an inmate to move before or during count time without the authorization of the Security Director.



17.

"Performance Expectation	Result
By 2/20/85 provide accurate and complete verbal and written reports (e.g., shift reports) security projects, letters or memos for the Security Director and complete security manuals and procedures as directed by the Security Director.	2/20/85. Expectations not met. After close monitoring reports improved. Other reports not completed, such as the list of security mirrors needed for the WRC. Timesheets and shift reports have been inaccurate."

This allegation of inadequate performance pertains to three areas: mistakes on shift reports, switching shifts without authorization, and a related inaccurate timesheet, and failing to prepare a report on security mirrors as directed. As to the shift reports, see Finding #14, above. With respect to the unauthorized switching of shifts, complainant and Lt. Julson switched shifts on one occasion on January 5th and 6th, 1985, without obtaining Ms. Lyon's authorization, in violation of policy. This switch also resulted in incorrect timesheets. Ms. Lyon counseled complainant concerning this incident, and no further violation of this policy occurred. As to the security mirrors report, complainant was given this assignment by a note from Ms. Lyon dated February 20, 1985. There was no deadline or time frame for completion given. Complainant needed to work with the Treatment Unit Chief Marc Christian in order to complete this assignment. Complainant encountered logistical difficulties setting up a meeting with Mr. Christian due to different shift assignments, but they agreed to meet as soon as their schedules permitted. They, in fact, were meeting on this subject on March 18, 1985, when complainant was given a notice of respondent's intent to terminate his probationary employment. Another probationary lieutenant, Lieutenant Nelson, was given a key control project by Ms. Lyon which took him seven months to complete. He did not report his progress except when questioned by Ms. Lyon during his PPD

sessions, approximately three months apart, yet never received any negative feedback or negative comments on his evaluations as a result. Lt.

Oestreich, who was at WRC from April - October, 1985, and who was on probation during all or part of that period, was assigned the fire plan project that complainant had not completed by Ms. Lyon. He reported his progress to Ms. Lyon from time to time, and never finished this project. He never received any negative comment from Ms. Lyon or adverse mention in his PPD in connection therewith.

18.

"Performance Expectation	Result
Operate as a contact person for security areas as assigned, including following through with recommendations needed, changes, etc. to the Security Director.	Expectations not met. To this date has not met with me to discuss duty area."

Performance Expectation	Result
Assist in the development of overall WRC Security plans and and carry them out as needed including disturbance, work stoppage, fire and other contingency plans, assure that these plans meet acceptance standards and procedures legally and departmentally. Make recommendations for the security budget as assigned or as recognized.	Expectations not met. Did not provide any information until directed by Admin. Lt."

Both of these items refer to complainant's fire plan assignment. He was assigned this project near the beginning of his probationary employment. There was no target date or parameters for completion. Although complainant did not initiate any meetings with Ms. Lyon to discuss the status of this assignment, he did discuss its status with her on several occasions when he met with her for other reasons. Complainant was instructed by the Administrative Lieutenant (Trattles) to turn in a written

report, and he did so on March 18, 1985. Lt. Oestreich was given the task of completing the fire control plan after he transferred to WRC in April 1985. He had not completed the project by October 1985, when he transferred out of WRC, although he had provided Ms. Lyon periodic progress reports. (Lt. Oestreich was on permissive probation following his transfer.) He never received any negative feedback from Ms. Lyon with regard to the fire plan. Lt. Nelson, who began his probation the same time as complainant, took about seven months to complete this project. He never made specific progress reports to Ms. Lyon besides discussing it with her during PPD sessions. He never received any negative feedback from her concerning this project.

19.

"Performance Expectation	Result
By 3/15/85 effectively direct implementation of security policies, recommend changes needed for security policies, CO post orders, and CO shift patterns for adequate coverage.	Expectations not met. Not following security policies, not aware of shift patterns."

This item concerns the movement of inmate Lezine during count and the mistaken request for overtime, see Finding #10 and #13, respectively.

20.

"Performance Expectation	Result
By 3/15/85 complete daily personal security checks, equipment inspections and recommend and initiate changes or correct discrepancies between the policy and actual situations.	Partially met. Completed checks, but failed to correct discrepancies in security policies."

This item also concerns the movement of inmate Lezine during count, see Finding #13, above.

21. Ms. Lyon also contended that she based her termination recommendation on complainant's poor attitude. She stated that complainant displayed a lackadaisical attitude, did not take her counseling seriously, and seemed uninterested in making needed changes in his performance. She contended that this poor attitude was particularly manifested at the March 19, 1985, pretermination hearing, where complainant downplayed the importance of the performance problems she identified and showed little interest in improving his performance. The Commission finds that complainant's attitude was average in relationship to the other probationary lieutenants, and that his attitude manifested at the March 19, 1985, pretermination hearing, which was held on about 15 minutes notice, was not poor but reflected his disagreement with some of the charges and his beliefs that some of the charges involved relatively petty matters. She also mentioned his negative attitude toward a changed key control policy. However, this negative reaction was shared by most of the other lieutenants.

22. Ms. Lyon further contended that she based her recommendation for termination in part on occasional observations of complainant engaging in non-work related conversation and otherwise "goofing off," and on reports or complaints from other lieutenants (Shaffer, Trattles, Nelson and Schneider) that complainant was not working hard. The Commission finds that Ms. Lyon did on occasion observe complainant "goofing off." However, of the four lieutenants who allegedly gave Ms. Lyon negative reports about complainant, Lts. Schneider and Nelson denied having made such remarks or that they believed complainant was not pulling his share of the load or was deficient in his overall performance. Lt. Trattles was not asked whether he made any negative comments about complainant to Ms. Lyon. However, he testified that complainant had a habit of "goofing off." Lt. Shaffer was

not called as a witness. On this record, the Commission finds that Ms. Lyon did not have any significant degree of negative feedback concerning complainant from his peers.

23. Lt. Schneider testified that in his opinion, complainant's performance was "real adequate," and as good as the other probationary lieutenants. Lt. Nelson testified that in his opinion, complainant's performance was adequate. Lt. Julson testified that in his opinion, complainant's performance was equal to the other probationary lieutenants. Lt. Trattles testified that in his opinion, complainant had a good deal of potential if he could overcome his habit of "goofing off." The Commission finds based on this record that complainant's performance as a probationary lieutenant was about on a par with the other probationary lieutenants during complainant's tenure, none of whom were terminated by Ms. Lyon.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b), Stats., PC 2.06(3), Wis. Adm. Code.
2. Complainant has the burden of proof of establishing that there is probable cause to believe, as defined by §PC 1.02(16), Wis. Adm. Code, that respondent discriminated against him on the basis of sex in connection with his probationary termination.
3. Complainant having sustained his burden, it is concluded there is probable cause to believe that respondent discriminated against him on the basis of sex in connection with his probationary termination.

#### DISCUSSION

The general framework for analysis of a "quid pro quo" sex harassment case is as follows:

" ... In order to recover, plaintiff must initially bear the burden of establishing a prima facie case. She must demonstrate (1)

that F.O. Thacker made sexual advances toward her; (2) that submission to these advances was a term or condition of plaintiff's employment with defendant; (3) that plaintiff's refusal of these advances was the motivating factor for her termination; and (4) that members of the opposite sex were not affected in the same way by the alleged conduct ... If plaintiff meets this burden, defendant must respond by articulating legitimate, non-discriminatory reasons for the termination of plaintiff's employment. Plaintiff then has the opportunity to demonstrate that the reasons articulated by defendant for the dismissal are pretextual. The ultimate burden of persuasion rests with plaintiff...." Hall v. F.O. Thacker Co., 24 FEP Cases 1499, 1503 (N.D. GA 1980) (citations omitted).

Additionally, in certain cases there can be an issue as to whether the employer is responsible for the acts of its supervisor who allegedly was involved in the discrimination. Respondent has raised such an issue in this case.

Since this case is before the Commission for a ruling on probable cause rather than on the merits, complainant's burden of proof is less than the "preponderance of the evidence" test that prevails at a hearing on the merits. The definition of "probable cause" is set forth at §PC 1.02(16), Wis. Adm. Code, as follows:

"'Probable cause' means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation or unfair honesty testing probably has been or is being committed."

Complainant has established the first element of a prima facie case. He testified that Ms. Lyon asked him out on two occasions when they were the same rank at DCI approximately five years earlier, and twice at WRC. Ms. Lyon denied that this occurred. Both witnesses' testimony was credible. However, complainant had some indirect corroborating testimony from Mr. Christian, Psychologist 2, who testified that Ms. Lyon's demeanor toward complainant at DCI was affectionate in nature until after complainant declined her second request for a date, when her demeanor toward him became cold. Respondent correctly points out that Mr.

Christian's credibility was substantially weakened by the facts that he was a personal friend of complainant's and that he had recently been involved in two disciplinary matters involving his dishonesty. However, this matter is being heard at the probable cause stage, where complainant's burden of proof is less than on the merits, and notwithstanding these credibility problems with Mr. Christian's testimony there is sufficient evidence at this stage for a finding that these overtures occurred.

Respondent argued that the alleged incidents at DCI were too remote to be considered. However, they are probative of Ms. Lyon's state of mind toward complainant. Respondent also argued that there was evidence that Ms. Lyon was treating complainant the same as the other lieutenants during the period before he declined her invitations, because she was counseling him, correcting his mistakes, etc. However, it is not reasonable to infer that because a supervisor is fond of or romantically inclined toward a subordinate that she would cease to function as a supervisor toward him with regard to the provision of guidance, counseling, correction of mistakes, etc.

The second element of the prima facie case that complainant must establish is that these advances were a term or condition of his employment. This is closely related to the third element, that his refusal of these advances was a motivating factor for his termination. Complainant has established these elements by showing that relatively shortly after he declined Ms. Lyon's requests for dates his probationary employment was terminated notwithstanding the opinion of a number of his peers that his performance was at least average for a probationary lieutenant.

Complainant has established the fourth element of a prima facie case, because there was no evidence that any female probationary lieutenants were treated in the same way.

As noted above, in some sex discrimination cases a form of respondeat superior must be established to hold the employer liable for the acts of its supervisor. In the instant case, respondent has argued a necessary element of liability is absent, since Ms. Lyon was not the appointing authority, and the WRC superintendent was actually responsible for complainant's termination.

Under the Fair Employment Act as it applies to the state, the agency or department is considered the employer, §111.32(6)(a), Stats. Obviously, the state as employer can only act through its supervisors, see Crear v. LIRC, 114 Wis. 2d 537, 542-543 (Ct. App. 1983). It would be an artificial distinction to limit liability only to cases where the supervisor who was allegedly involved in harassing the employe was also the official appointing authority, as opposed to a situation like this where the alleged harassing supervisor could only make a recommendation on termination to the appointing authority. Furthermore, under Title VII, "every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employe...." Meritor Savings Bank v. Vinson, 477 U.S. 57, 76, 91 L. Ed. 2d 49, 65, 106 S. Ct. 2399, 40 FEP Cases 1822 (1986) (concurring opinion) (citations omitted).

Complainant having established a prima facie case, respondent has satisfied its burden of going forward by articulating a legitimate, non-discriminatory rationale for terminating complainant's probation, as set forth in the PPD, and also based on Mr. Lyon's personal observations of complainant and the negative feedback she received from the other lieutenants.



At this point, the burden shifts to complainant to show that respondent's rationale for termination is pretextual. The Commission will address pretext with respect to each point on which respondent relies.

Respondent's reliance on complainant's March 18, 1985, error in requesting overtime for March 26, 1985, was not shown to be pretextual. While it is true that it was not uncommon for lieutenants to make errors in scheduling overtime without negative repercussions, it was not established that Ms. Lyon was aware of those errors.

Respondent's reliance on the food service incident was also not shown to be pretextual. While complainant was not the only lieutenant to violate this policy, and there were three written complaints by food service about Lt. Schneider violating the policy during the same time frame without any negative repercussions by Ms. Lyon, the significance of this point is undermined by the fact that Lt. Schneider was not on probation.

With respect to complainant's work on the PPD's, while initially they were not prepared to Ms. Lyon's satisfaction, it must be remembered that they were turned in prior to the lieutenant's meeting where Ms. Lyon provided instructions as to what she wanted, and that other lieutenants had similar kinds of problems without any negative feedback from Ms. Lyon. Respondent attempted to undermine complainant's assertion that the PPD's were completed prior to the February 1st meeting by pointing out that the two PPD's in evidence were not signed by the employes until February 27th and March 3rd. However, the record is not inconsistent with the possibility that it took this long for the PPD's to be returned by Ms. Lyon and for the meetings with the employes to be set up. Since it is found that complainant originally prepared the PPD's prior to the time when Ms. Lyon instructed the lieutenants that she wanted more specificity than

previously had been the case, it appears to be pretextual to fault complainant for not having completed the PPD's properly. Another indication of pretext is the fact that many of the other lieutenants had to redo PPD's but did not get negative reactions from Ms. Lyon. Respondent contends that their cases can be distinguished from complainant's because they first turned in one PPD to see if they were on the right track, and then did the rest once they had Ms. Lyon's reaction. While complainant may have made more work for himself by doing the PPD's as he did, his approach was not in violation of policy or instructions, and respondent's distinction seems marginal at best.

Respondent's concern about the violation of the count policy appears at a number of performance expectations. Based on this record, it has to be concluded that this point was pretextual. Complainant testified that as far as he knew he never violated the count policy. The only evidence produced by respondent that this had occurred was the hearsay provided by Ms. Lyon, who testified that she learned of the violation by reports from Lts. Bartow, Julson, and Trattles. Lt. Bartow was not called as a witness. Lt. Julson did not remember having observed complainant violate the count policy or having informed Ms. Lyon of that. Lt. Trattles was never asked about these points. Inasmuch as there was no direct evidence that the count policy was violated, there was no verification of the hearsay evidence that complainant had violated the policy from those who presumably could provide verification, including two witnesses who actually appeared and testified, and complainant denied any violation, it is concluded that complainant has sustained his lesser burden of proof at the probable cause stage and established that respondent's reliance on this factor was pretextual.

With respect to mistakes on shift reports, it is unquestioned that complainant made a number of such mistakes during the early part of his probation. It is also unquestioned that after his February 6, 1985, PPD session with Ms. Lyon, and through the termination of his employment as a probationary lieutenant, he made no further errors and in fact was evaluated by Ms. Lyon in this area on February 20th as "meets expectations." The fact that respondent relied on this performance area as a basis for termination after complainant had resolved his initial problems, had brought his work up to an explicit "meets expectations" by Ms. Lyon, and then had made no further errors, is strongly indicative of pretext, and leads to the determination that respondent's reliance on this point was pretextual, particularly in light of the fact that Lt. Shaffer, another probationary lieutenant, made numerous errors throughout the period in question without negative repercussions.

Respondent's reliance on complainant's failure to have documented "potential or actual security breaches" also is pretextual. There was no evidence in the record that there were any actual or potential security breaches that complainant failed to report, and it is undisputed that in his shift reports he reported on a number of such items.

Complainant was involved in an unauthorized switching of shifts on one occasion in early January, 1985, and respondent's reliance on this failure to adhere to policy was not pretextual.

Complainant did not complete the report on security mirrors, as respondent alleged. However, it must be kept in mind that when Ms. Lyon gave complainant this assignment on February 20, 1985, she did not impose a deadline or timetable for completion, and complainant had difficulty meeting with Mr. Christian due to their shift assignments, but was meeting

with him on March 18th when complainant was given a notice of intent to terminate. Also, there was evidence that other lieutenants took a long time to complete projects without receiving negative repercussions. Under these circumstances, and considering complainant's lesser burden of proof at this stage of the proceeding, this aspect of respondent's rationale for termination is also pretextual.

Complainant was also directed to prepare a report with respect to the institution's fire plan. He received this assignment near the beginning of his probationary period. Again there was no deadline or time frame for completion. He did not make any specific progress reports to Ms. Lyon, although the project was discussed a few times. He submitted a written report to her on March 18, 1985, but only after having been directed to do so by Lt. Trattles. Some indication of pretext is provided by the facts that Lts. Nelson and Oestreich worked on their projects for extended periods without negative feedback from Ms. Lyon. However, complainant failed to establish that his progress on his project was comparable to theirs. Also, he had this assignment for longer than he had carried the security mirror assignment. It cannot be concluded that respondent's reliance on this performance area in support of termination was pretextual.

Ms. Lyon also testified that she based the termination recommendation in part on complainant's lackadaisical attitude and seeming indifference to her counseling and directives. She particularly cited his demeanor at the March 19, 1985, pretermination meeting where he allegedly belittled the significance of the criticisms of his performance, gave short responses and did not manifest a willingness to try to "mend his ways." Lt. Schneider, who attended the pretermination meeting as an observer at complainant's request, testified that complainant's demeanor was not out of line or

unprofessional. In light of the facts that this meeting was held on very short notice, there was little specificity provided with respect to some of the charges and complainant was facing termination of employment, it is not surprising that some of complainant's responses were brief and that he tried to downplay the significance of some of the charges. Complainant was placed in a classic "Catch 22" situation where he could either accede to the accusations against him or stand accused by management of exhibiting a recalcitrant attitude. While Ms. Lyon testified that she would not have recommended complainant's termination if he had shown a willingness to change at this meeting, complainant did not know this and was obviously trying to defend himself against termination. Therefore, while there is no reason to doubt that complainant occasionally exhibited a poor attitude on which management could legitimately rely in deciding on whether to terminate his probation, reliance on his attitude during the pretermination meeting is pretextual.

Ms. Lyon also stated that she based the termination recommendation in part on observations she made of complainant engaged in non-work related conversations and complaints from other lieutenants about complainant not doing his fair share of work. The first point is supported by Lt. Trattles' comment that complainant had a penchant for "goofing off," and there is no reason to question that complainant was so engaged from time to time. However, two of the four lieutenants who allegedly complained to Ms. Lyon specifically denied having done so, and in general defended complainant's approach to his work. Lt. Trattles did not testify that he had made negative comments of this nature to Ms. Lyon. This aspect of the record is indicative of pretext.

Another factor bearing on the question of pretext is the testimony of certain of the lieutenants who provided opinions about the level of

complainant's performance. Three of the four lieutenants were of the opinion that complainant's performance was at least adequate. Lt. Trattles' opinion was that complainant had a lot of potential if he could overcome his tendency to "goof off." The picture that comes through based on this and the entire record is that complainant was not without faults, but that his level of performance was about on a par with the other probationary lieutenants during this period. However, complainant was the only one who was terminated.

In conclusion, there is enough evidence on this record to lead to a conclusion that respondent's rationale for terminating complainant was pretextual. As has just been noted, the complainant was not without his faults, and respondent had at least some grounds for criticizing his performance. However, complainant presented a good deal of evidence that his work was comparable in many respects to that of his peers. Complainant also established that many of the specific points relied on by respondent in support of his termination were unfounded. Of particular significance in this regard is the alleged violation of count policy, which formed the basis for several failed expectations on complainant's PPD. This allegation was supported only by hearsay, which was not substantiated by two of the three alleged sources of the information who testified and presumably should have been able to have provided such substantiation. Also of particular significance is that two of the three lieutenants who allegedly complained to Ms. Lyon about complainant denied that they had done so, while the third was a witness but did not testify on this subject. Another telling point is that respondent relied on complainant's shift report errors after complainant had made no mistakes after this area was discussed at the February 6, 1985, PPD session, had been evaluated by Ms. Lyon as

"meets expectations" on February 20th, and had made no mistakes since then. At the same time, another probationary lieutenant made repeated errors in shift reports throughout this period yet received no negative mention. For these, as well as the other reasons discussed above, the Commission concludes there is probable cause to believe that complainant's probationary employment was terminated because of his gender and his refusal to acquiesce in his supervisor's romantic overtures, and he would not have been terminated in the absence of this factor.

ORDER

The Commission having concluded there is probable cause to believe discrimination has occurred, the initial determination of "no probable cause" is reversed, and this matter is to proceed to conciliation and, if necessary, a hearing on the merits.

Dated: \_\_\_\_\_, 1989 STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner