STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * * * *

MICHAEL J. SADLIER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent,

Case No. 87-0046, 0055-PC-ER

* * * * * * * * * * * * * * * * * * *

DECISION AND ORDER

A proposed decision and order was issued in this matter on December 8, 1988. The complainant filed written objections to the proposed decision and requested oral argument before the Commission. Complainant's request was granted and oral arguments were heard on March 17, 1989.

After consulting with the hearing examiner and considering the various arguments, the Commission adopts the proposed decision and order as the final decision and order in this matter with the addition of the following language to the findings of fact and to the opinion section. A copy of the proposed decision and order is attached.

Revision to Findings of Fact

The last sentence in finding 53 is modified to read: "The union did not inform Lincoln Hills management of the press conference." The revision clarifies that the union had no specific obligation to inform management of the press conference.

Addition to Opinion

The Commission adds the following comments to the opinion section of the proposed decision and order.

In her oral arguments, counsel for the complainant argued that the legislative history of the whistleblower law suggests that the presumption of retaliation is applicable to all discipline imposed within certain time periods against a whistleblower. The language of the proposed decision and order suc-

cinctly explains the Commission's interpretation of the prerequisites for applying the presumption of retaliation. Proposed decision, pages 46 - 49. A reading of the language of both §§230.80(2) and 230.85(6), Stats., does not generate any ambiguity which would permit the Commission to resort to an examination of the legislative history. Marshall-Wisconsin Co., Inc. v. Juneau Square Corp., 139 Wis. 2d 112 (1987). The conclusion that there is no ambiguity is further supported by the absence of any indication as to the duration of any presumption that would apply to disciplinary actions which fall within the language of §230.80(2)(intro), Stats., but do not fit within any of the four paragraphs thereunder. If the Commission were to conclude that all disciplinary actions were entitled to a presumption, there is no basis for deciding whether the disciplinary actions falling solely within the language of §230.80(2)(intro), Stats., would be entitled to a one year presumption or a two year presumption.

Even if the Commission could consider the legislative history, counsel's own description of that history tends to support a conclusion that certain disciplinary actions are not entitled to a presumption. Counsel argued that the first dozen drafts of the bill applied a two year presumption to all discipline, and that the following draft differentiated between discipline which had a monetary effect (presumably the more severe forms of discipline) and the other (lesser) forms of discipline. This sequence shows that the drafters intended to make distinctions between various groups of discipline as to the application of the presumption of retaliation. If the intent were merely to differentiate between that discipline entitled to a two-year presumption and all other discipline, the language in §230.85(6)(b), Stats., would have read as follows:

> (b) Paragraph (a) applies to a disciplinary action under §230.80(2)(a) which occurs or is threatened within 2 years, or to any other disciplinary action under §230.80(2)~~(b),(c) or (d)~~ which occurs or is threatened within one year, after an employe discloses information under §230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

The complainant also argued that the proposed decision and order applies the wrong standard of judgment to the complainant's charge. Complainant argued that in reviewing disciplinary actions under the whistleblower law, the Commission must apply the just cause standard because otherwise the employer could violate the employment agreement[1] and still not violate the whistleblower law.

While in many whistleblower cases, as with other claims based upon a retaliation theory, it is appropriate to consider the just cause issue in determining whether there is some type of substantial basis for the disciplinary action imposed, that consideration will occur in the context of a determination of whether the reasons articulated by the agency for taking its action were pretextual. A conclusion that there was just cause for the imposition of discipline does not necessarily mean that the discipline was not imposed, in part, in retaliation for prior protected activities. Similarly, a conclusion that there was no just cause does not necessarily mean that the discipline was retaliatory. For example, an employer may have reasonably relied entirely on a statement by one witness in deciding to discipline an employe. When the matter reaches arbitration, the witness is unavailable which results in a finding of no just cause. Complainant's argument would require the Commission to conclude that the discipline was retaliatory because of the conclusion as to just cause. This argument fails to recognize the distinction between the scope of a typical arbitration and a complaint of whistleblower retaliation.[2]

Therefore, while the issue of just cause can be an appropriate consideration at the analytical stage of determining pretext, the ultimate issue in

---

[1]The bargaining agreement covering the complainant's position reads, in part:

> The parties recognize the authority of the Employer to suspend, demote, discharge or take other appropriate corrective disciplinary action against employes for just cause. Article 4, Section 9, Paragraph 1.

[2]When the arbitrator has specifically considered and addressed an employe's theory that the discipline was in retaliation for protected whistleblower activities, the Commission would be required to give the arbitrator's award preclusive effect under §230.88(2)(b), Stats. See, Sorge v. DNR, 85-0159-PC-ER, 11/23/89.

whistleblower cases is whether retaliation occurred, not whether there was just cause for the imposition of discipline.

ORDER

The respondent's actions are sustained.

Dated: March 30, 1989 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Michael J. Sadlier
W6275 Alery Road
Tomahawk, WI 54487

Patricia Goodrich
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

MICHAEL J. SADLIER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 87-0046, 0055-PC-ER

* * * * * * * * * * * * * * * * *

PROPOSED DECISION AND ORDER

These matters were filed as complaints of retaliation under §101.055(8), Stats., ("public employe safety and health" law) and §230.83, Stats. ("whistleblower" law). A hearing was held on the following issues;

Whether respondent retaliated against the complainant in violation of §§101.055(8) and/or 230.83, Stats., with respect to any of the following actions:

a. Denial of complainant's request for publication of a thank-you note in the institution newsletter, on March 31, 1987;

b. The decision not to allow inclusion of the union steward or attorney requested by the complainant to represent the complainant at an investigative meeting held on April 4, 1987;

c. The decision to deny complainant pay status for the period he was in attendance at the investigative meeting on April 4, 1987;

d. His ten day suspension from April 25 to May 1, and May 6 to May 9, 1987 for unauthorized distribution of literature on the institution grounds;

e. His supervisor's response to complainant's call for help on April 6, 1987;

f. The decision to investigate complainant's activities relating to an incident on April 14, 1987 involving the removal of a mattress from a resident's room;

g. The decision to substitute a day of suspension for a previously scheduled day of vacation on May 5, 1987;

h. The decision to deny complainant admittance to the institution grounds during the period of his 10 day suspension.

The parties filed post-hearing briefs.

FINDINGS OF FACT

1. Lincoln Hills School (hereinafter "LHS") is a correctional institution for juveniles located in Irma, Wisconsin, and run by the Department of Health and Social Services, Division of Corrections, Bureau of Juvenile Services. LHS is a secure correctional facility. Entrance to the facility is through a gatehouse. The population is made up of adolescents of both sexes whom courts have found to be delinquent pursuant to Ch. 48, Stats.

2. At all times relevant to the proceeding, James Kramlinger has served as the Superintendent of LHS.

3. Mr. Kramlinger reports to John Ross, the Director of the Bureau of Juvenile Services. Mr. Ross also supervises the superintendent of the other state correctional institution for juveniles.

4. Mr. Ross reports to Mike Sullivan, Deputy Administrator of the Division of Corrections and Mr. Sullivan reports to Stephan Bablitch, Administrator of the Division of Corrections.

5. LHS is organized into units which consist of 3-4 cottages. There are a total of 12 cottages at LHS. Nancy Meier, LHS security director, serves as the unit manager for M Cottage in the security unit. Students are placed in M Cottage after they have failed in all of the other less restrictive environments at the school. Ms. Meier is directly responsible for the activities of each cottage in her unit. In addition to the unit managers, individual shifts of employes are supervised by shift supervisors.

The shift supervisors move from one cottage to another during the course of their shift in order to respond to situations as they arise in each cottage.

6. Theodora Ellenbecker is the Personnel Manager at LHS.

7. Complainant is a Youth Counselor 2 (also referred to as YC 2) and is usually assigned to work in M Cottage. Complainant's immediate supervisor is Nancy Meier.

8. The employes at LHS who are in the classifications of Youth Counselor 1, 2 or 3 are represented by the Wisconsin State Employees Union, American Federation of State, County, and Municipal Employees, Local #6. Complainant has served as the President of that union since approximately February of 1986. Dave Heffernan is the Vice President of the Union and Robert Cannady, at all times germaine to this action, was a member of the Executive Board of Local 6, and for a time served as chairperson of the union's Health and Safety Committee.

9. The relationship between Local 6 and the management at LHS has been strained since approximately 1982. Local 6 and management met on a monthly basis for discussion purposes. During the monthly union/management meeting on April 9, 1986, complainant read a prepared statement condemning management "for their attitude and their adversarial relationship with line staff." Mr. Kramlinger voiced disagreement with the complainant's conclusions and stated that he (Mr. Kramlinger) would only remain at the meeting for those topics raised by management. Once three management items were discussed, Mr. Kramlinger left the meeting, leaving 8 management representatives present. Complainant then stated that due to Mr. Kramlinger's absence, the meeting could no longer continue. All 8 representatives of the union then left the room. Beginning in July of 1986, Mr. Kramlinger

commenced the practice of not attending every second union/management meeting.

10. Complainant has aggressively pursued his duties as union president. He has filed numerous grievances in furtherance of union interests and has frequently confronted management when the interests of the union and management have collided.

11. Management views the complainant as an important source of the strained relationship between union and management. Complainant filed a legal challenge to Ms. Ellenbecker's appointment as LHS Personnel Manager. Mr. Kramlinger considered complainant to be conducting himself in a manner inconsistent with the institution's goal of providing rehabilitation to incarcerated juveniles. During one confrontation with Ms. Ellenbecker, complainant pounded his hand on Ms. Ellenbecker's desk so hard that her nameplate fell off.

12. Residents of M Cottage are, at any given time, the most dangerous students at LHS. Students are moved into M Cottage upon committing a major rule violation. Students in M Cottage's maximum security wing are locked in their rooms 24 hours a day and have only basic privileges -- a mattress, soap, toilet, toilet paper, etc. When a student violates the behavioral rules which apply to the cottage, some of those privileges may be rescinded. If a student becomes agitated, he may yell and pound on the room's door, windows or walls. This behavior can range from low-intensity to high-intensity and can include threats made against fellow students or LHS personnel. Such behavior can last for days or weeks.

13. If a student's behavior becomes, in the opinion of a YC, too extreme or too extended, the YC may request a shift supervisor to authorize placing the student in restraints which bind the student to the bed-frame

in a spread-eagle position. This is not done to punish the student but to protect the student and LHS employes from harm and to calm the situation. Placing a student in restraints is a last resort. The YCs are required to ask the shift supervisor or some other supervisor for permission to place a student in restraints in order to ensure that restraints are used only when necessary and thus avoid legal problems. Both the YC and the supervisor exercise discretion to determine on a case-by-case basis whether a student should have some or all of his privileges removed or should be placed in restraints.

14. Depending on whether the complainant was or was not on duty in M Cottage, one of the shift supervisors, Donald Lutzke, on some occasions provided different levels of supervisory support to the staff in M Cottage. For example, Mr. Lutzke once failed to promptly respond to repeated requests by staff to intervene in an incident involving an out of control resident while complainant was on duty. On another occasion, when complainant was not on duty, Mr. Lutzke, who was already on the premises of M Cottage, intervened by ordering a resident placed in restraints even though staff felt that restraints were inappropriate.

15. In July of 1986, complainant received a letter of reprimand for insubordination for failing to return to his work post or to obtain an extension after being permitted to be away from his work post for a specific period to conduct union business. Complainant grieved the discipline.

16. By letter dated October 13, 1986, complainant was suspended for 3 days for failing to obtain prior approval before conducting union business during his scheduled shift and for making a statement to a co-worker that was considered to be threatening and harassing. Complainant grieved the discipline.

17. During September of 1986, Local 6 issued its first union newsletter. Subsequent issues were distributed monthly or less frequently. At the union-management meeting following the first newsletter, Mr. Kramlinger indicated his dissatisfaction with the newsletter and stated that the LHS mail system could not be used for distributing the newsletter given its content.

18. Mr. Kramlinger issued a memo dated October 16, 1986 to the complainant, regarding the newsletter. The memo provided in part:

> I feel that we must abide by the Union contract, Section 10: Mail Service which specifically states the content of mailings that may be distributed in the existing interdepartmental and/or intradepartmental mail systems. I believe that the Union newsletter does not qualify and therefore I am denying permission for distribution of this newsletter in our mailing system.
>
> * * *
>
> Of course, all persons have a right to freedom of speech as long as they are not violating any work rules or the laws of Wisconsin and therefore the newsletter can certainly be distributed outside the institution mailing service.

The complainant filed a grievance regarding this policy.

19. During the course of his three day suspension on October 16, 17 and 18, complainant represented union members in this grievance process.

20. The management of LHS publishes the LHS Daily Bulletin. This bulletin is published five days per week and lists all new residents, transfers within the institution and various announcements. Bulletins for October 20 and 21 included the following notice:

> I want to thank all of the staff that helped defray the cost of my unanticipated three day "vacation." Your generosity was overwhelming and more than covered my monitary [sic] losses. Your concern give [sic] a new meaning to the word solidarity. Thank you again and "Catch ya later."
>
> Mike Sadlier

21. Prior to the appointment of Mr. Kramlinger as LHS superintendent, the State decided to update the locking system in place at LHS. The new locking system was electronic in nature and was designed to allow, among other things, a youth counselor stationed in the control room at the center of a cottage to open all the doors simultaneously in the event of a fire. The new system added fire sensors into each room. The project also called for new doors for each room and other modifications/renovations to the cottages. The old system required a door-to-door unlocking. Soon after Mr. Kramlinger was appointed as superintendent, one of the new locks was installed as a sample in the Administrative Building/gatehouse. During a meeting on November 17, 1986, with the architect and contractors selected to install the locks in all the cottages, Mr. Kramlinger noted that the sample lock was a "continuing problem due to persistent and apparently unsolved malfunctions." Mr. Kramlinger raised concerns about having the same problems occur throughout the system once installation of the entire new system was completed. In January of 1987, the contractors commenced installation of the new locks in G cottages. G cottage was vacated during the renovation.

22. On January 26, 1987, complainant filed a notice of claim with the Attorney General's Office arising from the three day suspension imposed in October of 1986. Complainant alleged, inter alia, that LHS management sought "to discredit the plaintiff to such an extent that his employment would be terminated" and that the suspension was in retaliation for prior complaints.

23. On February 3, 1987, the union newsletter was again distributed through the LHS mail system without prior approval from management. A

disciplinary investigation was commenced regarding the distribution. (See Finding 32)

24. On February 11, 1987, and after consulting with John Ross and other DOC officials, Mr. Kramlinger issued a second directive on distribution of documents within LHS. The memo was directed to all LHS staff and read, in part, as follows:

> Materials have recently been distributed within the institution that distort facts, slander individuals, and contain potentially libelous statements. Materials of this kind are totally inappropriate, border on being vicious, and are contrary to the good order and mission of the institution.
>
> I want to make it clear to all staff that from this time forward no material will be distributed or allowed on the institution grounds by any person in any form or by any method unless it has specific prior approval from me or my designee. This includes all newsletters, memos, and any other written documents. Any materials distributed without approval on institution grounds will be considered unauthorized.

Complainant filed a grievance regarding the directive.

25. Also on February 11th, Mr. Kramlinger, a representative of the architect and a representative of the Division of State Facilities Management conducted an inspection of the renovation of G Cottage. The inspection showed, inter alia, that there were "lock malfunctions at a total of 9 doors (out of 25 total, a poor percentage....)" However, the architect's representative certified that the work was "substantially complete" and that all defective or incomplete work was expected to be completed by February 13. Mr. Kramlinger also raised a concern that the location of the new smoke sensors in the cottage rooms could allow them to be used by a student to commit suicide.

26. As a consequence of the February 11th distribution memo, complainant and another employe entered Mr. Kramlinger's office on February 12th and complainant placed his briefcase on Mr. Kramlinger's desk.

Complainant then demanded that Mr. Kramlinger inspect the contents of the briefcase but said if he did perform the inspection, complainant would file suit for violation of his 4th Amendment privilege against unreasonable search and seizure. After Mr. Kramlinger declined to conduct the inspection, complainant left.

27. Girls from A Cottage moved into the renovated G Cottage on February 14th. Once A Cottage was vacated, renovation work commenced in Cottage A.

28. By memo dated March 3, 1987, Mr. Kramlinger distributed to all LHS staff copies of a two page memo prepared by the LHS staff nurse on the topic of hepatitis. The memo described the various types of hepatitis, how it is spread and courses of treatment and it identified high risk groups.

29. The students of LHS publish a regular newsletter called the Lincoln Hills Express. The Express is distributed to LHS students. The March 13th issue included an interview with Mr. Kramlinger in which he discussed the lock project. In the story, Mr. Kramlinger provided information that some students were able to defeat the old lock system, to enter other rooms by "carding," i.e., by inserting a piece of cardboard or other similar object between the door and door frame to force open the latch. Mr. Kramlinger also explained in the article that the beepers worn by staff go off when they are tilted or when the alarm button is pressed. Mr. Kramlinger's conduct in disclosing the information to the student conducting the interview was inconsistent with Mr. Kramlinger's own directive issued on February 5, 1985, which prohibited youth counselors from sharing with students information relating to the beepers. Most students were aware before the appearance of the article that the old locking system could be carded and had some knowledge of how the beepers worked.

30. After the girls moved into G Cottage, there were few problems involving the locking system. On March 15, 1987, the girls moved from G Cottage into the recently completed A Cottage. Boys from B Cottage moved into G Cottage once it had been vacated by the girls.

31. Mr. Kramlinger met with complainant and two other youth counselors on March 18th. During the meeting, Mr. Kramlinger admitted that he had made a mistake by discussing carding doors and beepers with the student newsletter but stated that most, if not all of the students already knew the information. One youth counselor mentioned that a student had said that the new locking system installed in G Cottage could also be carded. Mr. Kramlinger asked for the name of the student so he could be contacted.

32. On March 18th, complainant received a letter of suspension for violating the October 16, 1986 distribution directive when the union newsletter was distributed on LHS grounds on February 3, 1987. Nancy Meier, along with Jerry Westerhouse, another LHS unit manager, investigated the February 3rd distribution. During the investigation, those employes management felt may have been involved in the distribution refused to answer management's questions and invoked the 5th Amendment. LHS management asked DOC personnel in Madison how to respond. DOC personnel in Madison replied that since there was no possibility of this becoming a criminal matter, use of the 5th Amendment to the U.S. Constitution was inappropriate. Two options were identified: (1) insist that the employes answer the questions and discipline them up to and including discharge if they still refused to reply, or (2) apply the last sentence of Article 2, Section 10, Paragraph 3 of the collective bargaining contract to hold the Complainant, as union president, responsible for the use of the mail system

to distribute the newsletter. The latter option was chosen because it was less onerous. Ms. Meier recommended that complainant be suspended for five days, based on progressive discipline. However, respondent decided to suspend the complainant for three days, March 26, 27 and 28. The complainant grieved the suspension.

33. The union contract provides that the union's use of institution mail services is the responsibility of the union president or a designee of the local. Complainant was suspended in March of 1987 because he was union president.

34. Any suspension or discharge of a LHS employe is approved by DOC management in Madison. After an investigation that is conducted by the institution and a recommendation from institution management, the level of discipline must be approved by the respondent's Office of Human Resources, then by Mr. Ross, Director of the Bureau of Juvenile Services and then by the Deputy Administrator (Mike Sullivan) and Administrator (Steve Bablitch) of the Division of Corrections. The Administrator has final authority as to the imposition of discipline.

35. Robert Cannady, a Youth Counselor 2, served as health and safety officer for Local 6 during the period of January, 1987 through April of 1987. On March 23rd, Mr. Cannady made an "official union request for information" from Ms. Meier as to her knowledge of Mr. Kramlinger's interview in the March 13th student newsletter. Also on March 23rd, Mr. Cannady delivered a memo to Mr. Kramlinger which provided:

> I would like immediate response to what actions are being taken regarding discovery of razor blades around some cottages. The main question being "Will there be any shakedowns of cottages, school, etc."? Also, what actions are being taken to control the careless discarding of materials by the roofing contractors?

> Are you well aware -- there are numerous security problems with the new electronic locks being installed. What actions are being taken to address these problems?

36. Mr. Kramlinger responded by memo also dated March 23rd. In his memo, Mr. Kramlinger identified steps that had already been taken to recover razor blades and other sharp instruments found around cottages receiving new roofs. Mr. Kramlinger identified two problems that had been encountered with the locking system: 1) certain keys issued to students in G Cottage were opening too many locks and 2) a lock cylinder had fallen out of a door. Mr. Kramlinger indicated that the causes of the problem were still under investigation but that the matter was being attended to. Mr. Kramlinger first learned of these lock system problems early in the morning of March 23rd.

37. After having received complaints by union members of problems with the locking system, complainant decided on March 23rd to inspect the new system.

38. At approximately 11:30 a.m. on March 23, 1987, Sadlier, in his capacity as President of Local 6, contacted Personnel Director, Theodora Ellenbecker, and informed her that he was on LHS grounds for the purpose of inspecting the locking system in A and G cottages. He further informed her that Terry Cook-Sygelski, a co-worker and a member of the Union's Health and Safety Committee, would be accompanying him on the inspection. Ellenbecker informed him not to disrupt the cottage routine but indicated that he could talk to counselors at the cottages.

39. Complainant and Ms. Cook-Sygelski started their inspection in G Cottage. Ellenbecker attempted to contact them by telephone in G Cottage but was informed that they had already left and had proceeded to A Cottage. While in A Cottage, complainant was contacted by Nancy Meier, Security

Director. Meier informed complainant that he had not received permission to be in that cottage and to report immediately to the administration building. Complainant, in his discussion with Ms. Meier, indicated that there was a major security problem and told her that as the Security Director, she should join him in inspecting the cottages to show concern for the issues. After Ms. Meier had informed complainant that he must report back to the administration building immediately, he and Ms. Cook-Sygelski did so. Once back in the administration building, complainant and Ms. Cook-Sygelski prepared a series of grievances and abnormally hazardous task reports.

40. An Abnormally Hazardous Task Report (hereinafter referred to as "AHTR") is a form designed by the Wisconsin Department of Employment Relations for the purpose of identifying "an abnormally hazardous or dangerous task." This is the first time that AHTR's were filed at LHS. AHTR's filed by the complainant on March 23, 1987 raised the following contentions: (1) the respondent had failed to provide a safe work environment with respect to the exposure of the employees to AIDS and hepatitis; (2) the newly installed locking system was faulty and created a danger to both the students and the employees; and (3) the patrol vans were unsafe because they were not furnished with cages to prevent passengers from attacking the driver of the vehicles and because tire irons and tools were not secured and could be used as weapons by students who were being transported.

41. In addition, there were five grievances filed on March 23rd. The issues that were grieved were as follows: (1) Complainant and Mr. Cannady alleged that the respondent failed to provide a safe work environment with respect to the possible exposure of employees to AIDS and hepatitis; (2)

Complainant and Ms. Cook-Sygelski alleged on behalf of the Union that the newly installed locking system was faulty and created a danger both to students and employees; (3) Complainant and Ms. Cook-Sygelski alleged that the materials suitable for weapon manufacture such as razor blades, roofing materials and shards were being discarded on the LHS grounds; (4) Complainant and Ralph Gibson complained that the patrol vans were not furnished with cages to prevent passengers from attacking the driver of the vehicle and that the tire tools were not secure and could be used as weapons by students who were transported in those vans; and (5) Complainant and Mr. Heffernan complained about the Superintendent's interview with the school newspaper.

42. These grievances and the AHTR's were submitted through the usual procedure as set forth in the Union contract. At the time he delivered the grievances and AHTR's to Ms. Ellenbecker and Ms. Meier, complainant informed them that the union "was going to have to make a public disclosure," go to the media and file a complaint with DHSS Secretary Cullen.

43. Neither the complainant nor Ms. Cook-Sygelski were investigated or disciplined as a consequence of their inspection on March 23, 1987. On March 29th, complainant grieved that he and Ms. Cook-Sygelski were ordered out.

44. At all relevant periods, LHS policy required all staff to obtain permission in order to be on on institution grounds while off duty.

> All personnel will notify/check through Communications Center when on grounds before or after their regular scheduled shift. Line staff will seek advance approval from their supervisor to be on grounds before or after their normal working hours. Policy Manual #11.34, Sec. XI

45. By memo to Mr. Kramlinger dated March 24, 1987, Mr. Cannady stated that the union's inspection on the prior day had resulted in finding:

> that students were able to unlock room doors other than their own. In one case, a student's lock fell completely out of the wall.... Upon inspection of A Cottage, it is also our opinion that those locks are also suffering serious disfunction with the potential of a student or staff beeing trapped in a room.

Mr. Cannady also commented that Ms. Meier's action of foreshortening the union's inspections indicated that management was not concerned about health and safety matters.

46. Mr. Cannady met with Ms. Meier and then with Mr. Kramlinger about his concerns. Mr. Kramlinger decided to conduct his own inspection of the locking system with a member of the LHS maintenance staff and invited Mr. Cannady to accompany them.

47. Later on March 24 and after completing the inspection, Mr. Kramlinger drafted a memo to the DHSS facilities specialist in charge of the LHS project. Mr. Kramlinger listed eight items causing "great concern" and requiring "immediate attention." Among those items listed was that a strip of metal slipped between the door and jam would unlock the door immediately, that student keys operated additional doors and that doors had warped:

> In summation, some of these problems may be fixed without any large time or holdup periods, but most are going to require "Back to the Drawing Board" answers and for this reason we are holding up the door and lock portion of this contract until these problems are fixed.

48. Mr. Kramlinger lacked the authority to halt the construction project.

49. A grievance hearing for a group grievance filed by Mary Williams had been scheduled for March 26, 1987, which was one of the complainant's

days of suspension for distributing the February newsletter. At some time prior to the 26th, Ms. Williams decided to withdraw the grievance and so informed Ms. Ellenbecker who advised Ms. Williams to also inform the complainant. On March 26th, complainant showed up at the LHS gate and telephoned Ms. Ellenbecker from the hallway adjacent to the gatehouse and informed her that he was at LHS as a grievance representative for the Williams grievance. Ms. Ellenbecker told him that the grievance had been withdrawn and therefore there was no meeting. She also said that since he was on suspension he should not be on-grounds. Notwithstanding the fact that the grievance hearing was cancelled, the complainant noted that he had previously been permitted to serve as a grievance representative while suspended and insisted that the issue be addressed. Ms. Ellenbecker agreed to seek guidance from Madison's DOC personnel people and noted that any prior practice that was contrary to her position must have been a mistake. Several days later, Ms. Ellenbecker contacted Michael Frahm, the DOC's employment relations specialist and asked him complainant's question. Mr. Frahm contacted DER because the issue raised by complainant was one of first impression in his experience. DER's response was that a person on suspension could represent someone as a personal representative at a grievance hearing but not as a union representative. Complainant filed a 2nd step grievance on this issue on March 29, 1987. The grievance was denied by Ms. Ellenbecker on April 8th. Complainant sought verification of the policy regarding representation at grievance hearings from Sanger Powers, Personnel Manager of DOC, on April 29th. Mr. Powers responded that a suspended employe could serve as a personal representative at a grievance hearing if requested by the grievant.

50. Between March 24 and 27, complainant contacted a reporter for the Milwaukee Sentinel newspaper regarding Mr. Kramlinger's interview with the student newsletter and problems encountered with the new locking system.

51. As a consequence of Mr. Kramlinger's concerns as indicated in his March 24th memo, a meeting of contractors, the architect and LHS and DHSS representatives was convened on March 27th at LHS. Discussions covered twelve problems with the new system. Those present agreed that three identified problems with the locks and lock/controls had to be corrected before work would proceed beyond B Cottage and before work on B Cottage would be accepted. Mr. Cannady was provided a copy of the minutes of the meeting along with a cover memo prepared by Nancy Meier with an update of events between March 27 and April 1. Mr. Kramlinger was dissatisfied with the conclusions reached at the March 27th meeting and scheduled a follow up meeting for April 10.

52. Mr. Kramlinger was out of town on vacation for the period from March 31 through April 4, 1987. Ms. Meier served as acting superintendent during this period.

53. Sometime prior to March 31, 1987, Local 6 decided to schedule a press conference at LHS regarding the new locking system. The union contacted media representatives and informed them that the press conference would be held at noon. The union failed to inform LHS management of the press conference.

54. Shortly before noon on March 31st, Mr. Meier, as acting superintendent, received a telephone call from a television station inquiring as to the time of the press conference. Ms. Meier, who had no prior knowledge of the press conference, contacted David Heffernan, the union vice-president, who informed her that he and the complainant would arrive at LHS in a short

time. Ms. Meier indicated she wanted to see both the complainant and Mr. Heffernan when they arrived. When they arrived at the institution, Ms. Meier informed them that the press conference could not be held on LHS grounds, including the upper parking lot located just outside the entry gate. The press conference then took place on the road running in front of LHS.

55. The union had, on several prior occasions, conducted press conferences on institution grounds.

56. At some time prior to March 31, 1987, Louise Dobizl Fowler, the LHS employe responsible for the printing of the LHS Daily Bulletin, had been instructed to bring items brought in by persons other than a manager for publication in the bulletin to either Mr. Kramlinger or Ms. Ellenbecker for approval prior to publication.

57. On March 31, 1987, Ms. Fowler asked Ms. Meier, as acting superintendent, if a note from complainant should be published in the April 1, 2 and 3 issues of the Daily Bulletin. The note read:

> I want to thank all the staff members that generously contributed to defray the cost of my unanticipated 3 day vacation.
>
> Mike Sadlier

58. By memo dated March 31st, Ms. Meier wrote the complainant as follows:

> I am returning the attached note which was submitted to Louise Fowler for printing in the institution bulletin. The institution bulletin will not be used for the purpose of publicizing any information that remotely pertains to a staff discipline matter.

Ms. Meier placed her response in a sealed envelope that was placed in the complainant's mail box at the institution. The envelope was addressed to the complainant.

59. Television and radio stations broadcast stories about the new locking system later on March 31st. The Wausau Daily Herald, an evening newspaper, ran a story on the LHS lock project in its March 31st issue. The Herald article, stated in part:

> [Complainant] said the union plans to file a "whistleblower" complaint with state health and social services secretary Tim Cullen.
>
> The complaint will include allegations that Lincoln Hills Superintendent James Kramlinger provided information to the student newspaper on how to defeat he old locking system and also tried to stop Sadlier from inspecting the new lock system.

60. Ms. Ellenbecker contacted one of the radio stations that had broadcast a report and indicated that the report was not entirely accurate. The following day, after contacting Ms. Meier, the station reported LHS management's view of the locking system.

61. On April 2, 1987, Ms. Meier and Ms. Ellenbecker learned that copies of complainant's Bulletin publication request (Finding 57) and Ms. Meier's response (Finding 58) had been distributed to LHS cottages and had also been distributed in the administration building. On April 3rd, Ms. Meier scheduled a series of investigative interviews for later that day regarding unauthorized distribution of Ms. Meier's March 31st memo to complainant.

62. At complainant's investigatory meeting on April 3rd, the complainant demanded that he be represented by Bruce LaMere who was not working that date and who was not present at LHS. Complainant demanded that the meeting be postponed until Mr. LaMere could attend. In the alternative, complainant demanded that his attorneys be notified and that they be allowed to be present. Ms. Meier, who was conducting the meeting, denied the requests knowing that other union representatives were available in the hallway outside the meeting. After Ms. Meier voiced her ruling, Mr.

Heffernan promptly appeared to serve as a recorder but not as complainant's union representative. During the course of the investigative meeting, complainant demanded that Ms. Meier and Mr. Westerhouse, who was also present, inspect the contents of complainant's briefcase. Complainant noted that Mr. Kramlinger had declined to inspect his briefcase earlier. Complainant was asked whether he had distributed copies of Ms. Meier's March 31st memo in the institution. Complainant refused to admit or deny that he had distributed the documents, invoking the 5th Amendment privilege against self-incrimination.

63. Since June 24, 1985, the supervisor's manual prepared by the respondent has included the following information regarding representation of employes during investigatory interviews:

> An employe's right to representation during an investigatory interview is well established by case law and state collective bargaining agreements.
>
> - a represented employe has the right to be represented by a designated local union grievance representative (or union-paid field representative if a local representative is not available): (1) if the employe has reasonable grounds to believe that the results of the interview may be used to support disciplinary action against him/her; and (2) if the employe requests a representative. (If the potential work rule violation could result in criminal charges against the employe, the employe's personal attorney may also attend but strictly as an observer and not a participant in the discussion.) Normally, an employe who is merely being questioned about what s/he may have witnessed in regard to an incident involving another employe would not have reason to believe that s/he may be disciplined; however, if the witness requests representation, his/her request should be granted.
>
> - A non-represented employe has the right, if requested, to be represented by a representative of his/her choice (i.e., an employe in a supervisory position may select another non-represented employe, a personal attorney, or other non-employe representative; an employe in a non-supervisory position may select any employe, a personal attorney or other non-employe representative).

64. Also on April 3rd, Ms. Meier and Mr. Westerhouse conducted an investigatory hearing with Sue Berg, a Youth Counselor in H Cottage. Ms. Meier had previously received a statement from the assistant unit manager for H Cottage, Mark Bye, who reported that he had asked Ms. Berg on April 2nd how the thank you note document had reached the cottage and that she had stated that "it had been delivered to her by Mike." Immediately prior to the commencement of the April 3rd investigatory hearing, Ms. Berg indicated that she wanted the complainant to serve as her union representative. Ms. Meier denied the request because the complainant, who was the subject of the investigation, would have had a conflict of interest if he were to also act in the role of representative for a witness. Complainant vociferously argued that he should be allowed to act as Ms. Berg's representative.

65. Once complainant was not allowed to participate as Ms. Berg's representative, he demanded overtime pay for himself and Ms. Berg. Ms. Meier denied the request out of anger caused by complainant's aggressive behavior at the investigatory meetings. Ms. Meier immediately realized that her decision was erroneous but she continued with the Berg meeting.

66. During the Berg investigative meeting, Ms. Berg was asked if the complainant had handed her a copy of the March 31st thank you memo. Ms. Berg first said she didn't know. Then after conferring with her union representative, she invoked her 5th Amendment privilege against self-incrimination. After she was advised by Ms. Meier that she could not invoke the 5th Amendment privilege in a non-criminal matter, Ms. Berg changed her response to "I don't remember."

67. Immediately after the investigative interview, Ms. Meier went to the office of Ms. Ellenbecker where she admitted she had made an error in

denying overtime pay to complainant and to Ms. Berg and asked if the error could be corrected. However, complainant had already filed a grievance on the issue. The grievance requested management to grant Ms. Berg 1/2 hour of pay at the overtime rate and the complainant 1/4 hour of pay at the rate of time and one-half. On April 15th, at the first hearing on the grievance, management agreed with the employes' position and granted the relief sought.

68. On April 5th, Mr. Kramlinger returned to his home near LHS from an out-of-town vacation. He read a copy of the Wausau Herald article, learned that there had been television coverage of the locking system and that the complainant had been investigated for unauthorized distribution of materials. Mr. Kramlinger was upset about the adverse publicity on the locking project because it damaged his credibility in dealings with the contractors for the renovation project.

69. The complainant was informed when he came on shift at 3:00 p.m. on April 6th that he had to attend a predisciplinary meeting concerning the April 2nd distribution of the Bulletin publication request and Ms. Meier's response.

70. On April 6, 1987, during the 7:00 a.m. to 3:00 p.m. shift, student M.G. was delivered to M Cottage. He was very disruptive when he arrived, then he quieted down. When he was disruptive, a few other students would join in. This behavior was not at a major level of disturbance during that shift, but things were getting progressively worse. No supervisory staff were contacted by the YC staff on that shift to obtain authorization to strip students' rooms or restrain any students.

71. Working on the 3:00 p.m. to 11:00 p.m. shift with the complainant in M Cottage on April 6, 1987, were Ken Bishop and Pat Myers. Pat Myers

had 17½ years of experience as a YC at LHS and had worked at M Cottage many times over the years before the night of April 6, 1987.

72. Early in the 3:00 p.m. shift, complainant contacted Donald Lutzke, the shift supervisor, at least twice and complained that student M.G. was out of control and asked that he be placed in control status or be restrained. Mr. Lutzke visited M Cottage and spoke with M.G. but did not restrain him or place him in control status.

73. Late in the afternoon of April 6, 1987, Ms. Meier was attempting to contact the shift supervisor on duty, Mr. Lutzke, to determine if enough YCs were available so that complainant could be relieved at M Cottage and attend the predisciplinary meeting on the April 2, 1987 distribution of the note.

74. Immediately after paging Mr. Lutzke, Ms. Meier received a telephone call from the complainant who told her Mr. Lutzke was at M Cottage. Mr. Lutzke had been called down to M Cottage by complainant to remove parts of a plastic tray from a student's room. He did so, and counselled the student to control his behavior. Complainant, however, told Ms. Meier that M Cottage was out of control and complained that Mr. Lutzke was not doing anything about it. Ms. Meier called Mr. Lutzke to the telephone and told him that the complainant thought the cottage was out of control. Mr. Lutzke did not agree. Although Ms. Meier did not know it at the time, Mr. Myers who was working in M Cottage as relief on that day, also did not consider the cottage to be out of control. Ms. Meier called Mr. Lutzke to her office and again asked him if there was a problem in M Cottage that would interfere with the April 2, 1987 distribution predisciplinary meeting. Mr. Lutzke, after describing the situation said there was no problem and that he would replace the complainant. It was not uncommon for Ms.

Meier to hear background noise over the phone indicating disruptive behavior in M Cottage; she heard no such noise during her telephone conversations with the complainant. Ms. Meier again telephoned the complainant, told him that she did not believe the cottage to be out-of-control and that she wanted complainant to report to her office for the predisciplinary meeting.

75. Meier took no independent action to ascertain the status of M Cottage. She did not use the monitors that were available through the communications center on another floor of the Administration Building that would have allowed her to listen to the noise level in the hallways of M Cottage. During the telephone conversations with complainant and Mr. Lutzke, Ms. Meier did not hear background noises that might have indicated that the cottage was out of control.

76. Complainant subsequently left M Cottage because he was not feeling well and went to LHS Health Services. The nurse on duty checked complainant's blood pressure and found it to be extremely high. The nurse recommended that the complainant be taken directly to the hospital. Ms. Meier learned of this and arranged for complainant's transportation.

77. At 7:30 p.m., approximately two hours after complainant left work, a student in M Cottage was placed in restraints. At 8:10 p.m., a second student was placed in restraints and at 10:20 p.m., a third was placed in restraints. All three were students who complainant had been complaining about while he was on duty.

78. M Cottage was not out of control while complainant was on duty.

79. Complainant was on sick leave from April 6 to April 14, 1987, due to high blood pressure and stress.

80. Complainant subsequently alleged to Mr. Kramlinger that Ms. Meier and Mr. Lutzke did not respond appropriately to his assertions that M Cottage was out of control on April 6th. Mr. Kramlinger investigated the allegation and concluded that it was not supported by fact.

81. On April 10, 1987, the Department of Health and Social Services received two whistleblower disclosures filed by complainant. In one disclosure, complainant contended that the purchase of a new electronic locking system for LHS was a substantial waste of public funds and that staff and inmates had been placed in danger by the failure of LHS management to deal with the security problems created by the system. In the second disclosure, complainant contended that Mr. Kramlinger's interview in the student newsletter constituted mismanagement and violated security procedures at LHS. Although dated March 27th, the disclosures were mailed by complainant on April 9th. The disclosures were referred to Jennifer Donnelly, Secretary Cullen's Executive Assistant, who is responsible for the processing of such disclosures sent to Secretary Cullen's office.

82. Ms. Donnelly did not investigate any of the charge made in the above-referenced disclosures before issuing a letter to the complainant on May 12, 1987, which said that "the information [complainant] disclosed merits further investigation."

83. No one in Secretary Cullen's office ever contacted anyone in the Division of Corrections in 1987 about the complainant's charges. No one in the Department of Health and Social Services investigated the complainant's charges in 1987 because Ms. Donnelly's secretary removed the complaints from Ms. Donnelly's desk and filed them away where they were forgotten until the first week of February, 1988.

84. Complainant provided copies of his disclosure to every member of the union executive board, to a local television station and to a reporter for the Milwaukee Sentinel.

85. A union-management meeting was held on April 14, 1987, and the locking system was discussed. Management's minutes of the meeting provide, in part:

> Mr. Kramlinger covered the three major problems -- keying, the way the locks are wired and the warping of doors. Discussion followed on the meeting held with the contractors, the architects, and LHS staff (including Union Representative Bob Cannady as a Health and Safety Committee member). Although Mr. Kramlinger has requested the project be stopped in light of the many problems we were experiencing, he was informed this was not feasible because of the contract.

86. Whenever a student is moved into the maximum security wing at M Cottage, they are placed into a room with a mattress and the clothes they are wearing but very little else. Once it is determined how they are responding to their new status, additional items may be added to their room.

87. Only shift supervisors (or higher level supervisors) may decide to temporarily remove ("strip") items from a student's room.

88. On April 14, 1987 while on duty in M Cottage, complainant investigated water in the hallway of the maximum security wing. Complainant entered the room of resident DF who had just been placed in temporary confinement in M Cottage because of inappropriate behavior in another cottage. While in DF's room, DF threatened the complainant and complainant picked up the mattress which was sitting on the floor in water and backed out of the room with the mattress in front of him for protection. Complainant then left the mattress in the hallway. When DF continued to act inappropriately, the shift supervisor, Dale Myers, was called. When he arrived, Mr. Myers went into DF's room with complainant and stripped

everything else from the room. Mr. Myers noticed that DF's mattress was already in the hallway. Mr. Myers was called to another cottage but he returned later to question the complainant and the other youth counselors on duty about the mattress outside DF's door. Mr. Myers subsequently filed a report about the incident and complainant's conduct was investigated.

89. Complainant attended a predisciplinary meeting conducted by Ms. Meier and Mr. Westerhouse on April 17th regarding the April 2nd thank-you note distribution incident. Complainant was represented by Mr. Heffernan at the meeting. Complainant refused to admit or deny that he had made the distribution. After the meeting, Ms. Meier and Mr. Westerhouse recommended to Mr. Kramlinger that complainant be suspended for 10 days without pay.

90. Based upon their investigation of the April 2nd distribution, LHS management concluded:

a. Complainant arrived early for his 3 to 11 shift on April 2nd;

b. Ms. Meier's memo was placed in a sealed envelope in complainant's mailbox;

c. Complainant used the copy machine in the LHS business office prior to 3:00 p.m. and told staff there that he had made 10 copies and would pay for them later;

d. Complainant was in the staff commons area prior to the start of his 3:00 p.m. shift and copies of Ms. Meier's memo with complainant's thank you note attached were distributed prior to the start of the 3:00 p.m. shift;

e. Copies were placed in cottage mail boxes and in the commons area;

f. Mr. Bye's statement indicated that complainant had hand delivered the document to Susan Berg in H Cottage;

g. Mr. Kramlinger had denied complainant's assertion that Mr. Kramlinger had, at some point, stated that the February 16th memo setting forth the distribution policy would not be enforced.

91. After April 17, 1987, Mr. Kramlinger recommended to DOC officials in Madison who were involved in the disciplinary process that complainant be suspended without pay for 30 days. Mr. Kramlinger recommended 30 days because the complainant had previously received a letter of reprimand and two suspensions for insubordination and showed no sign of correcting his behavior. Mr. Kramlinger concluded that the only way to get the message across was to impose a heavy suspension.

92. Michael Frahm, who works in respondent's Office of Human Resources and advises the DOC decision-makers in, inter alia, situations involving discipline of DOC employes, felt the 30-day suspension recommendation was excessive and that a 5 day suspension would be appropriate. DOC's institution's disciplinary recommendations are normally what Mr. Frahm considers to be "at the high end." Often a 10 day suspension is recommended by the institution where a 3 to 5 day suspension or a reprimand is more appropriate.

93. Mr. Frahm discussed Mr. Kramlinger's recommendation with John Ross, Director of the DOC's Bureau of Juvenile Services and Steve Bablitch, Administrator of DOC. Mr. Bablitch, as final decision-maker, believed based on LHS' evidence that the complainant had distributed the note and approved the imposition of a 10-day suspension of the complainant for that distribution.

94. No one in LHS's local management or DOC's Madison management, when discussing the complainant's proposed discipline, made any statement or comment to Mr. Frahm or Mr. Ross about the complainant's actions concerning the locking system, filing AHTR's or grievances or about his statements to the media.

95. While Mr. Ross visits LHS on a regular basis and Mr. Bablitch visits less frequently, their information as to the operation of LHS is primarily obtained via contacts with Mr. Kramlinger.

96. At the time he made the decision to suspend the complainant for 10 days, Mr. Bablitch was not aware that the complainant had engaged in any protected activities including the grievances or AHTR's described in Finding 40 and 41, whistleblower disclosures, or contacts with the press.

97. At the time the complainant's level of discipline was being considered, Mr. Ross was aware that complainant had gone to the press about the lock project.

98. On April 23, 1987, complainant was presented with a letter suspending him for 10 days without pay for violating Work Rule #1 by distributing the thank you note and Ms. Meier's responsive memo on April 2nd, contrary to Mr. Kramlinger's directive dated February 11, 1987. The suspension letter provided in part:

> This is official notification of disciplinary suspension of ten (10) days without pay for violation of Department of Health and Social Services Work Rule #1, to wit:
>
> > On Thursday, April 2, 1987, you distributed a memo sent to you by your supervisor, Nancy L. Meier, Unit Manager, with a bulletin notice request transposed onto that memo. The distribution took place in the commons area of the Administration building and copies placed in some of the cottage mailboxes prior to the 3-11 shift.
>
> This memo was sent to you in a sealed enveloped by your supervisor which was placed in your mailbox.

> Prior to your scheduled 3-11 shift on April 2nd, you notified the Business Office that you had run off 10 copies on the copy machine and you owed the institution $1.50. After reporting to the cottage for shift, you called the Personnel Department and requested a note be left on Carol Sczygelski's desk to bill you for the copying.
>
> At approximately 3:30 p.m. on April 2nd, Mark Bye, Assistant Unit Manager, found a copy of the memo in question on the H Cottage clipboard. In questioning one of the staff members as to how the memo got down to the cottage, the counselor responded the memo had been delivered to her by you.
>
> On February 11, 1987, I issued a memorandum indicating material distributed without approval on institution grounds would be considered unauthorized. This memo was sent out to all staff.
>
> Your distribution of the memo in question on April 2nd is contrary to the directive given on February 11, 1987.
>
> The days you will be suspended are as follows: April 25, 26, 27, 29, 30 and May 1, 6, 7, 8 and 9, 1987. You are to report to work for your regularly scheduled 7-3 shift on May 10, 1987.

Complainant grieved the suspension.

99. Some time prior to April 23, 1987, complainant had filed a request for leave without pay due to "work related stress and hypertension." On April 23rd, Mr. Kramlinger granted paternity leave to the complainant for a period commencing May 15, 1987 and ending August 15, 1987. The applicable collective bargaining agreement required management to grant paternity leave requests for periods up to 6 months.

100. On April 24th, respondent proceeded to actively investigate the complainant's conduct on April 14th, i.e., the "mattress" incident.

101. April 25 was the first day of suspension for Sadlier. On that day, Heffernan sent a memo to all employes of LHS. He was concerned about the reaction of the Union employes at LHS to the suspension of complainant over the April 2nd distribution of the thank you note/memo. In his memo, Heffernan urged that people remain calm:

> By now, most of you are aware that Mike Sadlier, our union president, has been placed under a ten day suspension from work.

> Several of you have approached stewards, executive board members and myself with suggestions and demands for a variety of actions to be taken in support of Mike.
>
> We all share in the unhappiness about what happened to Mike, but radical actions taken, even with good intentions, will only serve to make matters worse. I urgently request that all people continue to follow a path of caution and restraint. The suspension is being challenged in the proper manner through all contractual and legal channels. Under no conditions can we engage in any form of wildcat, retaliatory actions.

Heffernan did not receive or seek administrative approval prior to the distribution of this memo because during a prior conversation with Mr. Kramlinger, he had understood Mr. Kramlinger to have permitted distribution of materials which were not defamatory nor contrary to the good order of the institution. LHS management commenced an investigation to determine whether the April 25th memo was distributed without authorization.

102. On April 25, 1987, Phil Thompson, a youth counselor at LHS, heard of the complainant's suspension. Thompson promptly wrote a letter to Mr. Kramlinger concerning the matter. This letter was received at LHS on April 27, 1987. The letter provided in part:

> I am writing to you to clear up a matter that is of grave concern. Mike Sadlier (Union President) was disciplined and given a ten day suspension for a violation that he did not commit. I am referring to the distribution of a Thank You note that was not approved.
>
> I want to make this very clear. It was not he (Mike Sadlier) -- he had no knowledge of this. I saw the copies in the mail box and I personally put them on the table in the commons area. As I went off duty at 3 PM I put one on the bulletin board by Communications.
>
> * * *
>
> P.S. I will take a lie detector test to prove that the above statements are correct.

Mr. Thompson had been unaware of the investigation of complainant because he had been on hazardous duty injury leave. Mr. Thompson returned to work on or about May 25, 1987.

103. Respondent did not halt the running of complainant's 10 day suspension after receiving Mr. Thompson's letter. Mr. Kramlinger assigned Mr. Westerhouse and Ms. Ellenbecker to investigate Mr. Thompson's statement but that investigation was not carried out actively until June 8, 1987.

104. On April 29, 1987, Mr. Heffernan, as union vice-president, wrote Mr. Kramlinger a memo requesting approval to distribute to LHS employes copies of a letter from complainant to John Ross regarding the proposed biennial budget. Mr. Kramlinger responded by denying the request for distribution throughout the institution but permitting the document to be posted on the union bulletin board.

105. The original notice of complainant's suspension set forth April 25, 26, 27, 29, 30 and May 1, 6, 8 and 9 as the days of suspension. Normally, the days a suspension is to be served are determined by the LHS scheduling officer, Mr. Swope. Because the scheduling officer was on vacation, Ms. Ellenbecker, as Personnel Manager, scheduled the complainant's ten day suspension. After Mr. Swope returned to the institution, he identified an inconsistency between the scheduled suspension days and a previously scheduled vacation day for complainant and advised Ms. Ellenbecker. Ms. Ellenbecker in turn contacted Mr. Frahm who then directed Ms. Ellenbecker to alter the dates of complainant's scheduled suspension.

106. By memo dated May 4, 1987 and consistent with Mr. Frahm's directive, Mr. Kramlinger informed the complainant as follows:

> Per your telephone conversation today with Phyllis Henry, your ten (10) days of suspension for violation of work rule #1 have been changed from April 25, 26, 27, 29, 30 and May 1, 6, 7, 8 and 9, 1987 to April 25, 26, 27, 29 30, and May 1, 5, 6, 7, and 8, 1987. You will report to work for the 7:00 AM to 3:00 PM shift on Saturday, May 9, 1987. (Emphasis added)

107. On May 4, 1987, Mr. Heffernan was informed (by memo from Mr. Westerhouse) that his predisciplinary meeting concerning his distribution

of the April 25th memo would be held on May 5th. Mr. Heffernan had previously informed Mr. Westerhouse and Ms. Meier that he wished to be represented by the complainant in this matter.

108. At the time the complainant's suspension was changed from the 9th to the 5th, Ms. Ellenbecker and Mr. Frahm were unaware that Mr. Heffernan's predisciplinary meeting had been scheduled for May 5th and were unaware that complainant was to have represented Mr. Heffernan at that meeting.

109. Because complainant was suspended from work on May 5, 1987, respondent did not allow him to represent Mr. Heffernan at the predisciplinary meeting on that date. Respondent's policy was that only a union representative can serve as a representative of a member during an investigatory meeting or a predisciplinary meeting and that a person on suspension cannot act as a union representative (but can act as a personal representative in those proceedings, i.e., grievance hearings, where personal representatives are permitted).

110. At the May 5th predisciplinary meeting, Mr. Heffernan stated that based on an earlier conversation (after the February 11th memo) with Mr. Kramlinger about the distribution policy, he understood that materials could be distributed in the institution without Mr. Kramlinger's prior approval as long as they were not libelous or contrary to the good order of the institution. Mr. Kramlinger recalled making a statement in a conversation with Mr. Heffernan that he (Kramlinger) was not concerned about things that he considered not slanderous or libelous or contrary to the good order of the institution. Mr. Kramlinger concluded that Mr. Heffernan was not culpable for the April 25th distribution because he (Heffernan) had not understood the distribution policy. Mr. Kramlinger then informed Mr. Heffernan to seek prior approval before <u>any</u> future distribution.

111. Complainant returned to work on May 9th. On May 11th complainant was injured when he was struck in the face by student JR. At the time, M Cottage was being searched room-by-room, for weapons. JR, who was to be handcuffed whenever he was allowed to leave his room, was allowed by shift supervisor Lutzke to leave his room without handcuffs and struck the complainant. Complainant was one of a group of at least six youth counselors in the hallway who were assisting with the search for weapons. Mr. Lutzke received a letter of reprimand for removing the student from his room without taking the necessary security precautions of using mechanical restraints.

112. On May 18, 1987, complainant filed a complaint of retaliation with the Personnel Commission.

113. On June 8, 1987 respondent convened an investigatory meeting with Phil Thompson regarding the statements he had made in his April 25th letter (Finding 102). During the meeting, Mr. Thompson acknowledged that there were 5 or 6 copies of the document containing Ms. Meier's memo and complainant's newsletter note in the union mailbox. He left one copy in the mailbox, put one on the bulletin board and laid the rest on a table in the commons area. After a predisciplinary meeting on July 6, 1987, Mr. Thompson was issued a written reprimand for violating the February 11th memo relating to the distribution of materials. LHS management doubted the credibility of Mr. Thompson's statements but concluded that if they were accurate, the complainant still had distributed at least some of the thank you notes, thereby violating the February 11th directive.

114. Evidence established the following sequence of events relating to the April 2nd distribution of the "thank-you note":

a. On arriving early for his shift on April 2nd, complainant opened the sealed envelope in his mailbox containing the March 31st memo from Ms. Meier.

b. Complainant made 10 or more photo copies of Ms. Meier's memo. Each photocopy also contained complainant's publication request at the bottom.

c. Complainant distributed approximately three of the copies to various cottages, including H Cottage. Complainant left the remaining copies in the union mailbox.

d. When Mr. Thompson completed his shift he checked the union mailbox, found the approximately seven copies, posted one on the bulletin board in Communications, placed four or five on a table in the commons area and left one in the union mailbox.

115. The issue of distribution of materials at LHS continued as an item of controversy during the summer of 1987. The union repeatedly asked for clarification and requested that if employes were going to be disciplined for violations of the prohibitions set forth in the memos described above, a formal policy should be established. A draft policy proposal was posted from July 9, 1987 to July 20, 1987.

116. Mr. Kramlinger, the complainant, Mr. Marty Beil, Executive Director of Council 24, and Mr. Michael Sullivan, Deputy Administrator of DOC met in Madison in early August of 1987 to address the poor relationship between LHS management and the union. The only agreement reached was that most of LHS' management would attend union-management meetings and the union would tone down the confrontational tone at such meetings. During the meeting, Mr. Kramlinger made the comment that he was pretty annoyed about what happened when the union took the lock project problems to the

media and stated that the union should not have gone to the media and should have allowed the respondent's personnel in Madison to address the issues before going to the media.

117. On August 12, 1987 several copies of the union newsletter were pinned to the union bulletin board with an invitation to staff to take copies and read them. The newsletter contained material Mr. Kramlinger felt were personal attacks on some LHS employes. Mr. Kramlinger ordered Mr. Heffernan to remove the copies of the union newsletter from the union bulletin board. Mr. Heffernan did so. Mr. Kramlinger sent a memo to the parties in the earlier negotiations in August, 1987, saying that the posting of the union newsletter and the invitation to take one and read it violated the LHS distribution directive but that Mr. Heffernan had denied that the newsletter had been posted with his knowledge or approval. Mr. Kramlinger asked for another meeting of the parties to the earlier negotiations in August, 1987.

118. On or about September 1, 1987, Mr. Heffernan submitted two items to Mr. Kramlinger in order to obtain his permission to distribute them throughout the grounds at LHS. Mr. Kramlinger allowed the items to be distributed with certain restrictions. Mr. Kramlinger also approved distribution of the union's October, 1987 newsletter.

119. On September 29, 1987 Council 24 of the Wisconsin State Employes' Union, the local union, the complainant, Mr. Heffernan and Mr. Phillip Thompson filed an unfair labor practice (ULP) complaint with the Wisconsin Employment Relations Commission (WERC). This complaint attacked the February 11, 1987 distribution directive.

120. Complainant returned to work at LHS from his paternity leave on October 15, 1987.

121. The December, 1987 issue of the union newsletter contained material considered by LHS management to be derogatory. The newsletter was distributed on LHS grounds in staff mailboxes without prior approval. LHS management sought to investigate to determine who distributed the newsletter. LHS management concluded that Mr. Heffernan, Mr. Cannady and the complainant were directly involved in the distribution of the December, 1987 union newsletter on LHS grounds. No discipline has yet been imposed on Messrs. Heffernan, Cannady and the complainant regarding the December, 1987 distribution. Action on the results of the disciplinary investigation have been held in abeyance pending resolution of the ULP claim. Mr. Kramlinger has recommended that complaint be discharged from employment for his role in the December distribution.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§101.055(8), 230.45(1)(g) and (gm), Stats.

2. The complainant has the burden of proof as to all matters except as to the claim of whistleblower retaliation arising from the imposition of the ten day suspension.

3. The complainant has failed to sustain his burden.

4. The respondent has the burden of proof as to the claim of whistleblower retaliation arising from the imposition of the ten day suspension.

5. The respondent sustained its burden.

6. The respondent did not retaliate against the complainant in violation of the whistleblower law or the public employe safety and health law as to any of the actions that are the subject of these complaints.

OPINION

As noted above, complainant alleges that eight separate actions taken by the respondent constitute illegal retaliation under the public employe

safety and health law (§101.055(8), Stats.) and under the whistleblower law (§230.83, Stats.).

Whistleblower Law: Prima Facie Case Analysis.

The whistleblower law prohibits retaliation against state employes who have made a protected disclosure of improper governmental activities. The method of analysis is described in Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88, as follows:

> The method of analysis applied in prior Whistleblower retaliation cases is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). This analysis is modified where the complainant is entitled to a presumption of retaliation pursuant to §230.85(6), Stats.
>
> To establish a prima facie case for a claim of retaliation under the Fair Employment Act, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case No. 79-28-PC, (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95, (6/25/82) at p. 5. Similar standards apply to a claim of retaliation under the whistleblower law except that the first element is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in §230.81, Stats.; b) whether the disclosed information is of the type defined in §230.85(5), Stats.; and c) whether the alleged retaliator was aware of the disclosure. As to the second and third elements, the definitions of "disciplinary action" in §230.80(2), Stats., replaces the term "adverse employment action" when reviewing a whistleblower complaint.

Respondent contends that merely filing a grievance[1] does not invoke the protection against retaliation:

> Section 230.81(a), Stats., provides that in order for an employe to obtain protection under §230.83, Stats., he or she must first disclose the information in writing to his or her supervisor. The Respondent maintains that to allow an employe to meet this requirement by filing a contract grievance form which does not indicate on its face that it is a whistleblower disclosure would frustrate the intent of the legislature to establish an orderly procedure for dealing with whistleblower disclosures and affording protection to state employes. It would also frustrate the intent of the legislature that contract grievances dealing with whistleblower disclosures be dealt with separately from §230.85 actions.
>
> * * *
>
> The Complainant thinks §230.80, Stats., et seq., allows him to use the contract grievance procedure to meet the §230.81(1)(a), Stats., procedural requirement. The Respondent does not because of the language of §§230.81(1)(b), 230.82 and 230.88, Stats. Accordingly, an ambiguity exists, legislative intent is at issue and resort may be had to the legislative history and the statutes' language to determine just what that intent is. Respondent's brief, pp. 25 and 26. (Emphasis added)

Respondent then proceeds to make arguments based on the legislative history of 1983 Wisconsin Act 409, the whistleblower law. However, external aids to construction, such as resorting to legislative history, are used only to determine the meaning of an ambiguous statute. An ambiguous statute is one which reasonably informed persons could construe in two different ways. Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W. 2d 354 (Ct. App., 1987). The fact that the parties disagree concerning a statute's meaning does not render the statute ambiguous. Grace Episcopal Church v. City of Madison, 129 Wis. 2d 331, 385 N.W. 2d 200, (Ct. App., 1986). A review of the

---

[1] Despite the fact that complainant contends that his grievances and AHTR's were protected disclosures, respondent's arguments that no protected disclosures were made are premised solely on the complainant's grievances and do not address the AHTR's. See respondent's brief, pp. 25 through 30.

provisions of subch. III, ch. 230, Stats., simply does not generate any ambiguity as to whether a contractual grievance must indicate, on its face, that it is a whistleblower disclosure in order to generate any protection from retaliation.

As noted above, the language of §230.81(1)(a), Stats., only requires that the employe "[d]isclose the information in writing to the employe's supervisor." If there were any additional requirements for making a disclosure, they would presumably be found in either the statutory section entitled "Employe disclosure" (i.e., §230.81, Stats.) or in the section devoted to definitions (i.e., §230.80, Stats.). Neither of these provisions even arguably establishes a requirement that an employe specifically identify any disclosure as a disclosure under the law. Section 230.81(1)(b), Stats., gives the employe an alternative route for disclosure but does nothing to impose a condition on employes using the route under (1)(a) of that section.

Section 230.82, Stats., is entitled "Processing of information" and establishes a procedure to be used by agencies for processing disclosures under §230.81(1), Stats. However, there is no penalty specified for any agency failing (or declining) to follow the processing procedure. Any agency which does not perceive certain documents as a §230.81(1), Stats., disclosure, will obviously not follow the procedures set out in §230.82, Stats., for processing a disclosure. But as long as the agency is not going to be penalized for not processing the disclosures according to statute, one cannot read into the statute requirement that disclosures be clearly identified as whistleblower disclosures.

Respondent also refers to §230.88, Stats., in support of its contention that the statute is ambiguous. That section provides, in part, as follows:

> 230.88 Payment of award, judgment or settlement; effect of order, arbitration award or commencement of court action. (1) PAYMENT. Any award, judgment or settlement obtained by an employe under this subchapter shall be paid from the funds appropriated under §20.865(1)(a), (g) and (q).
>
> (2) EFFECT. (a) A final order issued under §230.85 or 230.87 which has not been appealed and for which the time of appeal has passed binds all parties who were subjected to the jurisdiction of the commission or the court and who received an opportunity to be heard. With respect to these parties, the decree is conclusive as to all issues of law and fact decided.
>
> (b) No collective bargaining agreement supersedes the rights of an employe under this subchapter. However, nothing in this subchapter affects any right of an employe to pursue a grievance procedure under a collective bargaining agreement under subch. V of ch. 111, and if the commission determines that a grievance arising under such a collective bargaining agreement involves the same parties and matters as a complaint under §230.85, it shall order the arbitrator's final award on the merits conclusive as to the rights of the parties to the complaint, on those matters determined in the arbitration which were at issue and upon which the determination necessarily depended. (Emphasis added)[2]

The focus of §230.88, Stats., is clearly on enforcing the statute's protection against retaliation rather than on the method of making disclosures. The language of §230.88(2)(b), Stats., suggests that employes who are subject to a collective bargaining agreement do not lose any rights created by the statute and that such employes may continue to utilize their contractual grievance procedure as previously. The statute does not impose a requirement that disclosures in the form of grievances be specifically identified as disclosures under the whistleblower law.

---

[2] The reference to complaints under §230.85, Stats., is to complaints filed with the Personnel Commission alleging retaliation for having engaged in activities protected under the whistleblower law.

The respondent's statutory analysis would require the Commission to read into §230.81(1), Stats., certain language which simply is not there. There are, in fact, policy considerations in favor of having a requirement that all disclosures under the whistleblower law be clearly identified as such. Such a requirement would make it easier for agencies to process disclosures. But to add such a requirement is the responsibility of the legislature rather than a matter of interpretation within the authority of the Personnel Commission. The Commission concludes that the statute is unambiguous and does not impose a requirement that all disclosures , made under the whistleblower law and made in the form of a grievance, indicate on its face that it is a whistleblower disclosure. Also, see Canter-Kihlstrom v. UW-Madison, 86-0054-PC-ER, 6/8/88.

Findings 40 and 41 summarize the contents of the grievances and AHTR's filed by the complainant on March 23rd. All four AHTR's and four of the five grievances filed on that date relate to information "gained by the employe which the employe reasonably demonstrates.... a danger to public health and safety" and, therefore, fall within the definition of "information" in §230.80(5), Stats.

The final grievance, in which complainant and Mr. Heffernan complained about the superintendent's interview in the student newspaper, is more accurately described as an allegation of mismanagement rather than an allegation of a "danger to public health and safety." Any damage to security, and therefore any threat to safety, occurred upon the distribution of the student newsletter. No further damage to security or threat to safety could reasonably be expected to occur from the same article. Complainant's grievance on this point merely pointed out complainant's disagreement with the prior conduct of the superintendent.

The definition of "mismanagement" is found in §230.80(7), Stats., and reads:

> (7) "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques. (Emphasis added)

The complainant's final grievance related only to one action by Mr. Kramlinger (the interview with the student newspaper) rather than to "a pattern" of actions. There is no indication that Mr. Kramlinger's interview was one of a series of interviews made by institution employes which provided security information to the LHS residents. Therefore, this grievance did not constitute a protected disclosure because it did not meet the definition of "mismanagement" (and, as a result, the definition of "information"). Complainant's contacts with the media on March 31st were also protected activities pursuant to §230.81(1)(intro), Stats.

Finally, in relation to the first element of a prima facie case, there is no question that, with those exceptions noted below, the alleged retaliators all knew of complainant's protected activities at the time they effectuated the adverse employment actions. The exceptions are that at the time the 10 day suspension was imposed, neither Mr. Ross nor Mr. Bablitch were aware of complainant's actions of filing the March 23rd AHTR's and grievances and Mr. Bablitch was unaware that complainant had gone to the press on March 31st.

To establish the second element, the complainant must establish that "disciplinary actions" were taken against him. See §230.83(1), Stats., and §230.80(8), Stats. Pursuant to §230.80(2), Stats.:

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or

> in part, of a penalty, including but not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
>
> (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
>
> (c) Reassignment.
>
> (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award. (Emphasis added)

The Commission recently issued a decision interpreting the introductory language in this subsection. In Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88, the Commission concluded that certain limitations placed on the complainant in that case by the supervisor of the Oshkosh Job Service Office did not constitute a disciplinary action where the complainant worked in a division other than the Job Service Division, the complainant worked out of an office in Appleton, the duties and responsibilities of the complainant's position did not necessitate frequent contacts with the Oshkosh Job Service Office and the office supervisor's limitations did not prevent but only rerouted the contacts. The Commission applied the doctrine of ejusdem generis and reasoned:

> The general term "penalty" [used in the §230.80(2) (intro), Stats.] must be interpreted in the context of the specific terms used within the definition, each of which has a substantial or potentially substantial negative impact on an employe.

Eight separate incidents serve as the basis for the instant complaints. One of them, the suspension, is clearly identified as a disciplinary action pursuant to §230.80(2)(a), Stats. All of the other actions must be reviewed in terms of the standard set out in Vander Zanden. Of the remaining seven incidents, four meet the standard of "substantial or potentially substantial negative impact on the employe":

1) The denial of complainant's request for a union steward or attorney at an investigatory meeting could have an effect on the outcome of the investigation and could generate discipline.

2) The absence of a response to complainant's April 6th requests for assistance could have resulted in an unsafe situation in M Cottage where complainant was working.

3) The substitution of a suspension day for a vacation day on May 5th did not cause any net change in complainant's vacation hours nor a net change in the complainant's suspension days. The substitution was merely a rearrangement of the vacation and suspension days. However, one consequence of being on suspension rather than on vacation on the day of Mr. Heffernan's predisciplinary or investigatory meeting was that the complainant could not, under existing LHS policy, represent Mr. Heffernan. The change effectively prevented the complainant from carrying out certain of his responsibilities as a union steward and from associating with his co-workers on that date. Given this consequence of the vacation day/suspension day substitution and in light of the rule of liberal construction embodied in §230.02, Stats., the Commission concludes that the net effect on the complainant was substantial.

4) The decision not to permit complainant to represent another employe at a grievance hearing while complainant was in suspension status had a significant negative effect on the complainant for the same reasons as expressed in 4), above.

The three incidents which do not meet the Vander Zanden standard are:

1) The denial of the thank you note publication request. Any effect on the complainant was minimal and could have been remedied by thanking the individuals in another manner.

2) The denial of pay status for the April 4th investigative meeting was only for 1/4 of an hour. (Respondent's Exhibit 11a) Even if the respondent had not subsequently reversed its decision, the effect on the complainant was deminimis and did not fall within the scope of "substantial."[3]

3) The decision to investigate the April 14th mattress incident. This decision had no inherent negative impact on the complainant. The decision to investigate could have lead to the imposition of discipline against the complainant but any such discipline would have been among those actions specifically listed in §230.80(2)(a), Stats. A decision to investigate does not have the potential of negative impact that, for example, a reassignment might have. A reassignment is neutral on its face but, in many cases, will still have a substantial negative impact on an employe. This is the potential impact referred to in the Vander Zanden decision and the decision to investigate does not generate it.[4]

The final element of a prima facie case requires the establishment of a causal connection between the protected disclosure and the disciplinary action. Section 230.85(6), Stats., provides:

---

[3] The complainant successfully grieved this action and on or about April 15, 1987, complainant was granted 1/4 hour of pay at the rate of time and one-half. Once that occurred, the issue of the April 4th denial of pay status became moot.

[4] Although the Commission has concluded that the decision to investigate the mattress incident was not a penalty under the whistleblower law, this opinion addresses the remaining steps in the analytical framework as to this claim.

> (6)(a) If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.
>
> (b) Paragraph (a) applies to a disciplinary action under §230.80(2)(a) which occurs or is threatened within 2 years, or to a disciplinary action under §230.80(2)(b),(c)or(d) which occurs or is threatened within one year, after an employe discloses information under §230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

The net effect of the presumption was explained by the Commission in Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88, as follows:

> The §230.85(6) presumption operates to shift the burden to the respondent to rebut the presumption that the disciplinary action was retaliatory by a preponderance of the evidence. This appears to short-circuit part of the McDonnell-Douglas-type analysis. Once the presumption is present, it supplies not only what is in effect a prima facie case, but also a presumption that the disciplinary action was retaliatory -- i.e., the analysis moves directly to what is in effect the pretext stage. At this point, the respondent is required to rebut the presumption by a preponderance of the evidence. In considering whether the presumption has been rebutted, the Commission looks to all the evidence, including any evidence of pretext or retaliatory intent adduced by the complainant.

Respondent argues that the complainant in the instant case is not entitled to the presumption of retaliation.

A reading of §230.85(6)(b), Stats., establishes that the presumption is only applicable to certain "disciplinary actions." The presumption applies to a suspension or other disciplinary action specifically listed in §230.80(2)(a), Stats., occurring within 2 years of certain disclosures. The presumption also applies to those disciplinary actions listed in §230.80(2)(b),(c)or(d), Stats., occurring within 1 year of certain disclosures. Of the six "disciplinary actions" which serve as the basis for the

instant complaints, only one, the ten day suspension, is a disciplinary action listed in paragraphs (a) through (d). All of the other actions fall within the general language of 230.80(2)(intro), Stats. ("any action... which has the effect, in whole or in part, of a penalty"). Therefore, the presumption is inapplicable to them.

Another precondition to the application of the statutory presumption of retaliation is that there must be a disclosure "under §230.81 which merits further investigation." Whenever a disclosure is made, the agency receiving the disclosure has 30 days to either determine whether the disclosure "merits further investigation" or to refer the disclosure to another agency for processing. §230.82(1), Stats. Respondent contends that the facts peculiar to the present complaints militate against invoking the presumption:

> As the stipulated facts show, the preconditions the legislature had in mind for the imposition of the presumption under §230.85(6) were not in fact met. No investigation of the facts were done yet a letter went out saying, albeit very equivocally, that the true whistleblower complaint merited further investigation. The Personnel Commission is faced with a dilemma. While under such circumstances it would be very unfair to the LHS managers whose professional reputations and careers are at stake here to apply the presumption when it did not have to be but for an error committed by the DHSS' Secretary's office, can the Personnel Commission excuse such an error? The Respondent suggests that this set of facts is unique and will not be repeated; it suggests that the fair and reasonable resolution would be to issue an order requiring DHSS to cease and desist from the procedure that allowed such a result to come about (in short, to investigate the merits of every true whistleblower disclosure) and decline to apply the presumption against LHS' and DOC's management.

The parties stipulated that Ms. Donnelly did not investigate the complainant's disclosure before she issued the complainant a letter stating that the information "merits further investigation." (Finding 82) The

timing of the letter suggests that Ms. Donnelly issued it because the 30 day period for initially processing the disclosure was about to run out.

The complainant is entitled to the presumption of retaliation as to the imposition of the ten day suspension, but not as to any of the other actions at issue in these complaints. Nothing in §230.85(6), Stats., suggests that before the presumption of retaliation can apply, the Commission must carry out a substantive review of the disclosure to see whether the information disclosed "merited further investigation" as that phrase is defined in §230.80(6), Stats. The statutory language clearly indicates that the Commission is only to look at whether the agency found the information merited further investigation rather than the adequacy of that finding. The Commission lacks the authority to issue the "cease and desist order" requested by the respondent.

The presumption of retaliation is only one method of establishing causal connection in the context of a prima facie case. Here the complainant was found to have engaged in protected activities on March 23rd and 31st. The close proximity in time between these dates and the refusal to grant him a steward on April 4th, the response to his call for assistance on April 6th and the decision to investigate the April 14th mattress incident is sufficient to establish the third element of the prima facie case as to those actions.[5] The prior notice to LHS management that Mr. Heffernan desired complainant to serve as his representative at the May 5th predisciplinary meeting was sufficient basis for the third element of the prima facie case as to the respondent's actions in substituting the suspen-

---

[5] Complainant was suspended or on leave on March 26, 27 and 28 and from April 6 to April 14. As noted above, the Commission has found that the decision to investigate the mattress incident did not constitute a penalty under the whistleblower law.

sion day for vacation day and in denying admittance to the facility on May 5th.

The complainant has, therefore, established a prima facie case as to his claims under the whistleblower law relative to issues b, d, e, g and h as listed on page one of this decision.

Public Employe Safety and Health: Prima Facie Case Analysis

Section 101.055(8)(a), Stats., prohibits retaliation against a public employe who has exercised a right afforded by §101.055, Stats., related to occupational safety and health. Complainant meets the definition of a public employe and respondent is a public employer as those terms are used in that subsection.

In analyzing claims arising under the public employe health and safety provisions, the Commission has applied the same basic analysis as used for claims of retaliation under the whistleblower law, except that there is a different standard of causation.

In Strupp v. UW-Whitewater, 85-0110-PC-ER, 7/24/86, aff'd by Milwaukee County Circuit Court, Strupp v. Pers. Comm., 715-622, 1/28/87, the Commission held that under §101.055(8)(a), Stats., an adverse employment action

> may be based in part on [the] protected activity, so long as the protected activity was not a "substantial reason" for the [adverse employment action], or if it can be said that the [adverse employment action] would have taken place "in the absence of" the protected activity.

The Commission based its holding on the language of §101.055(1), Stats., directing that the rights under the law were to be the equivalent to those available to private sector employes under OSHA. Therefore, Section 101.055(8)(a), Stats., identifies various rights which, once exercised, entitle the employe to protection from retaliation. Here the complainant has alleged, that he engaged in protected activities on March 23, 1987 when

he prepared various grievances and AHTR's and on March 31, 1987 when he disclosed to the media information that was similar to that information in the March 23rd grievances and AHTR's. As was noted in the initial determination in this matter:

> [One] category of protected activity referred to in the statute is the exercise of "any other right related to occupational safety and health which is afforded by this section." A review of §101.055, Stats., generates a list of rights expressly afforded by the statute including a right to request DILHR to conduct an inspection, a right to accompany DILHR's inspector during the course of the inspection, and a right to review the employer's records of work-related injuries and illnesses and the records from monitoring employes exposures to toxic materials and harmful physical agents.
>
> In addition to these very specific rights, the introductory subsection to §101.055(1), Stats., provides:
>
> > (1) INTENT. It is the intent of this section to give employes of the state, of any state agency and of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employes in the private sector under the occupational safety and health act of 1970 (5 USC 5108, 5314, 5315 and 7902; 15 USC 633 and 636; 18 USC 1114; 29 USC 553 and 651 to 678; 42 USC 3142-1 and 49 USC 1421).
>
> The provision of the federal Occupational Safety and Health Act of 1970 that relates to the prohibition of retaliation is found in 29 USC 660(c)(1) which provides:
>
> > No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.
>
> This provision is similar but not identical to the retaliation prohibition in §101.055(8)(a), Stats., quoted above.
>
> The regulations that have been promulgated relating to discrimination against employees exercising rights under the federal Occupational Safety and Health Act have interpreted the reference in the federal law to "filing any complaint...under or related to" the Act as protecting employees who lodge complaints about occupational safety and health matters with their employers:

> 29CFR§1977.9(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

This regulation was upheld in Marshall v. Springville Poultry Farm, Inc., 5 OSHC 1761 (M.D. PA., 1977).

Even though the Wisconsin law does not specifically provide protection to an employee "filing any complaint...under or related to" the law, the statement of legislative intent indicates that the Wisconsin law relating to public employees should be interpreted in such a way as to provide the same "rights and protections" as are granted under the federal law to employees in the private sector. The fifth category of protected activity listed in §101.055(8)(a), Stats., ("any other right related to occupational safety and health which is afforded by this section") should be interpreted broadly so as to include rights that are implicit within the section such as the right to lodge complaints with the employer.

In 29 CFR §1977.12, federal regulations interpreting the phrase "any right afforded by this chapter" discuss rights that exist "by necessary implication" including the right to be interviewed by investigators:

> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

> Just as under the federal regulations certain rights exist by necessary implication, so too does the right of a public employee in Wisconsin to complain of occupational safety and health matters to the employer without fear of retaliation including both complaints of unsafe conditions and requests for protective measures. To conclude otherwise would force public employes to file a formal complaint directly with DILHR whenever an occupational safety and health question arises before giving the employer an opportunity to consider the matter. Nothing in the statute suggests that a grievance directed to management and relating to a health or safety concern cannot constitute the exercise of a right under the law.

The subjects of the grievances and Abnormally Hazardous Task Reports filed by the complainant are described in Findings 40 and 41. All of the grievances and AHTR's, with the exception of those relating to Mr. Kramlinger's interview in the student newspaper, were premised on complaints of unsafe conditions and requests for protective measures. As such they are protected activities under public employe health and safety provisions.[6] The grievance relating to Mr. Kramlinger's interview did not relate to an ongoing safety condition. It referred only to a single instance of prior conduct by Mr. Kramlinger and there was no indication that the conduct represented a policy by LHS management of keeping the students informed of sensitive security information. Complainant's comments to the media on March 31st were also protected conduct. Donovan v. R. D. Anderson Construction Co., Inc., 552 F. Supp. 249, 253 (D. Kansas, 1982).

The analysis of the second and third prima facie case elements for the public employe safety and health claims are similar to the whistleblower

---

[6] The respondent has not specifically argued that the complainant did not engage in protected activities under §101.055, Stats. To the extent that no specific provisions have been adopted under OSHA regarding the matters raised in complainant's AHTR's and grievances, the matters would fall within the general duty clause [section 5(a)(1)] of OSHA which has a triggering standard of causing "death or serious injury."

such a presumption, the complainant has established a causal connection as to his public employe safety and health claim arising from the ten day suspension by the proximity in time between the protected actions and the imposition of the suspension.

As noted above, once the complainant has established a prima facie case, the burden shifts to the respondent to articulate legitimate, non-retaliatory reasons for the personnel actions. Then the burden shifts back to the complainant to show that respondent's articulated reasons were pretextual. The exception to this analysis is the whistleblower claim

applies and the burden is on the respondent to rebut the presumption. The six incidents remaining in issue are analyzed below individually. Unless otherwise noted, the analysis refers to both the claim under the whistle-blower law and the claim under the public employe safety and health law.

1. The decision not to allow inclusion of the union steward or attorney requested by the complainant to represent the complainant at an investigative meeting held on April 4, 1987.[7]

Complainant contends that respondent retaliated by not permitting him to be represented by Mr. LaMere, who was not on LHS grounds that day during the investigative meeting. (Finding 58) Complainant also contends that his request that "his attorneys be notified and allowed to be present" (Brief, page 29) was denied for reasons of retaliation. In support of his contention, complainant cites Article IV, Section 9, Paragraph 3 of the applicable collective bargaining agreement:

> An employe shall be entitled to the presence of a designated grievance representative at an investigatory interview (including informal counseling) if he/she requests one and if the employe has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

Complainant argues that there is no language in the contract specifically granting the agency authority to dictate who shall and who shall not serve as a designated representative of the local union.[8] This argument is undermined, at least in some respects, by the existence of a department-wide policy, as expressed in the respondent's manual for supervisors

---

[7] While the agreed upon issue refers to April 4th, all evidence indicates that the meeting was scheduled for an conducted on April 3rd.

[8] It should be noted that the instant complaints are not actions filed to enforce contractual rights but are actions alleging retaliation for engaging in protected activities.

(Finding 63), regarding an employe's right to representation in an investigatory interview. That policy notes that a non-represented employe has the right "to be represented by a representative [including a personal attorney] of his/her choice," but that a represented employe has the right "to be represented by a designated local union grievance representative... if the employe requests a representative." There is nothing in the policy that indicates the represented employe has the choice to select either a personal attorney or a local union grievance representative who is unavailable at the time of the investigatory hearing. In addition, Ms. Meier testified that LHS policy allows represented employes to utilize union representatives who are available. The complainant failed to produce any evidence that on other occasions, the respondent had permitted represented employes to delay an investigatory hearing so that the employe could be represented by either a personal attorney or by a union representative who was unavailable at that time. The respondent also had a non-retaliatory policy reason for denying the complainant's requests: the respondent wished to promptly carry out its investigation of complainant's conduct. Complainant's actions during the investigatory meeting show that he was interested in delaying that procedure. The complainant has failed to meet his burden of proof as to this claim.

2. Complainant's ten day suspension from April 25 to May 1, and May 6 to May 9, 1987 for unauthorized distribution of literature on the institution grounds.

In evaluating this claim, complainant suggests that the Commission apply a series of seven questions listed in Municipal Labor Relations in Wisconsin, (published by the State Bar of Wisconsin, 1979 and edited by Charles Mulcahy) for determining just cause for discipline. Just cause is

not the standard to be applied, however, in claims arising under the whistleblower law and the public employe safety and health law.

It is important to view the suspension as two separate decisions: the decision to impose a ten day suspension and the decision not to halt or modify the suspension once Mr. Thompson came forward and admitted he had distributed many of the copies of the offending document (Finding 102).

Mr. Kramlinger had repeatedly indicated, prior to complainant's protected activities, that he was strongly opposed to the union's (at least occasional) practice of distributing union newsletters in the institution via the institution mail system. Immediately after the first newsletter was distributed, Superintendent Kramlinger expressed his disapproval at a union management meeting (Finding 17) and by memo (Finding 18), which prohibited distribution of the newsletter via the LHS mailing system.

When in February, 1987, the newsletter was distributed a second time via the LHS mail system, Mr. Kramlinger commenced a disciplinary investigation (Finding 23) and issued a second directive stating that no material could be "distributed or allowed on institution grounds" without prior approval. (Finding 24). The union grieved both the October and the February memos and did what it could to disrupt the investigatory process by having its members invoke the 5th amendment privilege in response to questions. Complainant further showed his disagreement with the policy when on February 12th, the day after the second memo was issued, he demanded that Mr. Kramlinger inspect the contents of his briefcase but promised to file suit for violation of his 4th amendment privilege if Mr. Kramlinger were to conduct the inspection. When the respondent had completed the investigation of the February, 1987, newsletter distribution, the decision was made to discipline the complainant, due to his position as union

president, even though there was no evidence that the complainant was actually involved in the distribution. Ms. Meier, who conducted the investigation, recommended a 5 day suspension. Respondent decided to suspend him for 3 days.

In analyzing these claims, it is necessary to remember that the appropriateness or inappropriateness of Mr. Kramlinger's October 16th and February 11th memos are not in issue.

In addition to the distribution policy, the antagonism between the complainant and management also clearly preceded the complainant's protected activities. It was this antagonism which prompted complainant, in late January of 1987, to file a notice of claim with respect to his October, 1986 three day suspension. Prior to the complainant's protected activities on March 23rd and 31st, the complainant believed that LHS management sought to discredit him "to such an extent that his employment would be terminated" and believed that the October, 1986 three day suspension was for prior complaints. (Finding 22).

Complainant's protected activities were not significant departures from complainant's previous conduct. Prior to his March 23rd and 31st protected activities, complainant had filed or otherwise participated in numerous grievances. Ms. Ellenbecker testified that during 1986, complainant was either the grievant or grievance representative in 90% of the approximately 120 grievances filed by Local 6. The March 23rd AHTR's were the first AHTR's filed at LHS but they cannot be viewed as significantly different from the grievances in terms of this proceeding. The union, and the complainant had also conducted press conferences at LHS on several occasions prior to March 31st.

Immediately after his protected activities, complainant returned to work from his three day suspension and submitted a written request to have a thank you note placed in the LHS Daily Bulletin. Ms. Meier denied the request in writing.[9] Ms. Meier's response was removed from a sealed envelope (addressed to the complainant) in the complainant's mailbox and photocopied. Copies of the response and complainant's underlying request were distributed to several cottages and in the administration building. After an investigation, respondent reached those conclusions set out in Finding 90.

The key component in determining that complainant had distributed the copies was a statement filed by Mark Bye who reported that on April 2nd, Sue Berg, a YC in H Cottage, reported that the document in question "had been delivered to her by Mike." (Finding 64) During an investigative meeting the very next day, Ms. Berg first said she didn't know if complainant had given her the memo, then she invoked the 5th Amendment privilege and then she changed her response to "I don't remember."[10] The Commission concludes that Ms. Berg did in fact receive the document from the complainant in light of the clear and timely written report by Mr. Bye, the complainant's vague responses the following day, and the absence of any other explanation for Mr. Bye's report.

The respondent's investigation revealed that the complainant had failed to comply with the language of the February 11th memo to which the complainant had strenuously objected at the time of its issuance. Ms. Meier,

---

[9] The appropriateness of the denial is no longer an issue in this proceeding.

[10] At the hearing before the Commission, Ms. Berg was asked, "Did you ever tell Mark Bye that Mike Sadlier gave you a copy of that document?" She answered, "No, not that I recall, no." (Transcript, page 352)

who investigated the matter, recommended a 10 day suspension. After discussions with Mr. Kramlinger, LHS advanced a recommendation of 30 days to Mr. Frahm in respondent's Office of Human Resources (Finding 92) who considered 5 days to be appropriate. By the time the matter reached DOC Administrator Bablitch, there was substantial insulation between the complainant's protected activities and the decision to impose discipline. Mr. Bablitch made the final decision to suspend the complainant for ten days once he was satisfied that complainant had actually distributed the thank you note. Mr. Bablitch was unaware that complainant had engaged in any of the specific protected activities (i.e. filing grievances, AHTR's or making statements to the media) that are the subject of these complaints, although Mr. Bablitch was aware that the union had been dissatisfied with the safety of the new doors being installed as part of the lock project. No one mentioned complainant's protected activities during the time the level of discipline was being considered. (Finding 94)

A final key factor supporting the respondent's position with respect to the ten day suspension is the prior discipline which had been imposed on the complainant. Respondent had issued a written reprimand in July of 1986 and had suspended the complainant for three days in October of 1986. Both of these actions were based in part on conclusion that complainant was conducting union business on state time. Complainant was then suspended again for 3 days in March of 1987 for violating the October 16th distribution.

All of the above factors support the imposition of the ten day suspension, but the record also includes several factors supporting complainant's contention of retaliation.

On two separate occasions, Mr. Kramlinger admitted being upset about the media's involvement in the lock project. The media involvement resulted from the March 31st press conference. Mr. Kramlinger noted that the adverse publicity damaged his credibility in dealings with the renovation project contractors. During the August, 1987, meeting with union officials, Mr. Kramlinger expressed annoyance that the union had taken the lock project problems to the media rather than allowing the respondent to address the issues first.

In October of 1986, just a few days after Mr. Kramlinger had issued his first distribution memo, complainant had a thank you note published in the Daily Bulletin on two consecutive days. The note was substantially identical to the complainant's publication request in March of 1987. It is unlikely that neither Mr. Kramlinger nor Ms. Meier saw the October note when it was published.[11] It is also difficult to see how the very limited distribution of the March request (and Ms. Meier's response) could be considered to have a worse effect on the good order of the institution than a similar notice appearing in consecutive issues of the Daily Bulletin which were distributed throughout the institution. But the October request must be differentiated in two respects: 1) the October 16th memo had merely prohibited the distribution of the union newsletter while the February 11th memo prohibited distribution of "all newsletters, memos, and any other written documents," and 2) the complainant's October 1986 message was disseminated with the approval, inadvertent or otherwise, of the respondent while no such approval was granted as to the March request.

---

[11] However, Ms. Meier testified that had she been aware of the October note, she would not have permitted its publication in the Bulletin.

Complainant also points to the respondent's failure to discipline Mr. Heffernan for the distribution of his April 25th memo (Finding 101) as indicative of unequal treatment and, therefore, retaliation against the complainant. The key difference between Mr. Heffernan's distribution and complainant's April 2nd distribution is that Mr. Heffernan and Mr. Kramlinger agreed that they had a conversation which reasonably lead Mr. Heffernan to understand that documents which were not libelous or contrary to the good order of the institution could be distributed without prior approval. (Finding 110)

After weighing the above evidence, the Commission concludes that the respondent has met its burden of proof as to the initial imposition of the ten day suspension claim. It is a more difficult question as to whether the respondent's failure to interrupt or modify the ten day suspension, once Mr. Thompson came forward, was retaliatory.[12]

The first day of complainant's ten day suspension was April 25th. On April 27th, Mr. Kramlinger received Mr. Thompson's letter in which he admitted that he had distributed the thank you note by placing copies in the commons area and on the bulletin board. Respondent could not fully investigate Mr. Thompson's letter until Mr. Thompson returned from his hazardous duty leave which occurred on or about May 25th. By then complainant had served the full ten days of his suspension. The respondent ultimately decided to issue Mr. Thompson a letter of reprimand for his role in distributing the thank you note (Finding 113). The respondent concluded that even if Mr. Thompson had distributed some copies of the thank you notes, complainant had distributed other copies and did not alter his ten day suspension.

---

[12] Although not specifically identified as such, this is effectively a subissue of issue d. identified for hearing.

Mr. Ross testified that LHS management doubted Mr. Thompson's credibility and he (Ross) agreed with that judgment. Despite the doubts as to credibility, Mr. Thompson was disciplined for his conduct. Complainant's own discipline, which was based on the same conduct, was not modified. Respondent failed to establish that Mr. Bablitch, who initially determined the level of discipline, was apprised of the evidence relating to Mr. Thompson's conduct as it related to complainant's discipline.[13] By not relying on Mr. Bablitch to sign off on the decision not to revise complainant's discipline, the respondent lost the insulating effect caused by Mr. Bablitch's unawareness of the complainant's protected activities.

Mr. Kramlinger testified that it was irrelevant that complainant distributed fewer items than were originally thought. Despite Mr. Bablitch's unawareness of Mr. Thompson's admissions, this argument is persuasive. The complainant was not charged with violating a policy which established different categories of malfeasance based on the amount of information found to have been distributed. The policy simply prohibited the distribution of designated materials, without qualification as to the degree of the distribution. While it is a somewhat closer question than the one relating to the original imposition of the 10 day discipline, the Commission finds that the respondent has sustained its burden and has overcome the presumption of retaliation applicable to the whistleblower claim arising from the refusal to revise complainant's suspension.

For similar reasons, the complainant failed to sustain his burden of proof as to the public employe safety and health claim relating to the suspension.

---

[13] Joint exhibit 1, page 44.

3. Complainant's supervisor's response to complainant's call for help on April 6, 1987.

The complainant contends that Mr. Lutzke and Ms. Meier failed to properly respond to the situation present in M Cottage on April 6th. (Findings 69 through 80).

Several witnesses offered testimony tending to support these allegations. Ms. Guyette-Popowich, a YC who worked with complainant on a regular basis, testified that Mr. Lutzke was less likely to respond to problems in M Cottage when complainant was on duty than when complainant was not on duty. Mr. Hightower, a YC who had worked at M Cottage during the shift ending at 3:00 p.m. on April 6th testified that even though the cottage was not out of control, it was a "hectic" shift and the students were told that if they continued in their behavior, supervisors would be contacted in order to discipline them. Mr. Hightower also testified that he was not surprised to learn the next day that three of the students were placed in restraints starting at 7:30 p.m. Finally, the complainant testified that the cottage was out of control.

Three witnesses testified to the effect that the cottage was not out of control on April 6th at the time complainant requested assistance. Mr. Lutzke, the shift supervisor, testified that the cottage was not out of control, that he responded appropriately to the students who were causing the disturbance, and that the students did not need restraints. Because the Commission did not find Mr. Lutzke to be a very credible witness, the Commission assigns little weight to his testimony. In contrast, Pat Myers, a youth counselor with over seventeen years of experience who was filling in at M Cottage during complainant's shift, was a credible witness and testified that the cottage was not out of control prior to the time that

the students were placed in restraints. Mr. Myer's testimony is persuasive on this point because he was the only person present who had no clear stake in the outcome of these proceedings. Complainant's only effort to undermine Mr. Myer's testimony was to point out that he was working in M Cottage on relief and was not regularly assigned there. However, Ms. Meier testified that Mr. Myer had worked as relief in M Cottage for years.

The other witness to testify as to the status of M Cottage was Nancy Meier, the unit manager. When complainant contacted her on the 6th and complained that the cottage was out of control and Mr. Lutzke wasn't doing anything about it, Ms. Meier testified she could not hear any background noise over the telephone and it was not uncommon to be able to hear, over the phone, disruptions in a cottage as they occurred. Complainant contends that Ms. Meier should have utilized the LHS communication system which would have allowed her to listen in on the maximum security hallway in M Cottage. Although Ms. Meier could also have taken this step, she did obtain direct input from the shift supervisor on two occasions and had not heard any background disturbances on the telephone which caused her to believe that the cottage was out of control. Her failure to go to the communications center to use the monitoring system cannot be viewed as retaliatory.

Complainant has failed to meet his burden of proof as to this issue.

4. The decision to investigate complainant's activities relating to an incident on April 14, 1987 involving the removal of a mattress from a resident's room.[14]

---

[14] As noted above, the complainant failed to establish the second element of a prima facie case as to the whistleblower claim arising from this action. However, the Commission sets out its analysis of the merits of that claim, in the alternative, as well as addressing the public employe safety and health claim.

Complainant contends that the timing of the investigation of the April 14th incident "indicates that the motives for undertaking it were to harass Sadlier prior to his leave." There is little or no testimony as to the cause of the delay in investigating the incident. Neither party questioned any of the witnesses on this point and, to the extent there was any focus on the April 14th incident during the hearing, it related to what had occurred on that date and why the respondent was concerned upon finding a mattress outside the student's room.

As noted in Finding 84, the student involved in the April 14th incident had just been moved to M Cottage for disruptive conduct where he was placed in a room with almost nothing other than his clothes and a mattress. When Mr. Myer, the shift supervisor, was called in because of additional disturbances by student DF, Mr. Myer found the mattress already outside the room. Existing rules prohibit non-supervisors from removing items such as mattresses from rooms on a temporary basis. In a statement dated April 15, 1987, Mr. Myers filed a written statement (Respondent's Exhibit 18d) which read in part:

> I asked [YC] Bishop who had removed [DF's] mattress, he said Mike. I then got called out of "M" to J. I later returned to M after 8:00 and questioned both [YC] Guyette and Sadlier. Mike said he had removed the mattress. I explained to him that this was not permitted and a very dangerous spot he put himself in. He gave no valid excuse why he entered into the room.
>
> P.S. at no time did anyone get permission from me to enter student [DF's] room and or strip the room.

One week after Mr. Myers filed this report, Ms. Meier issued a memo scheduling complainant for an investigatory meeting on April 24th. (Respondent's Exhibit 18e) Right around the time of the April 14th incident, Ms. Meier had been on vacation outside of Wisconsin. In addition, Ms. Meier and Mr. Westerhouse were spending time during this period on the investigation the thank you note distribution: They conducted a

predisciplinary meeting on April 17th, there were subsequent discussions within LHS and with DOC management in Madison regarding the level of discipline and complainant was presented with the letter of suspension on April 23rd.

Complainant tries to tie in the delay in the commencement of the investigation with his request for a leave of absence which was filed on or about April 15th and approved by Mr. Kramlinger on April 23rd and which commenced on May 15th. Clearly the respondent had an interest in completing the investigation of the April 14th incident before the complainant began an extended period of leave. The respondent accomplished that when, by memo dated May 7th, Ms. Meier informed both the complainant and another YC on duty at the time, Ms. Guyette-Popowich, that there was no cause for further disciplinary action regarding the April 14th incident but that they would meet for informal counseling.

The complainant has failed to sustain his burden of showing that retaliation occurred with respect to the investigation of the April 14th incident. The shift supervisor, Mr. Myers, filed a report the day after the incident. The report raised serious questions about complainant's conduct. The investigation was commenced approximately one week later which was not an unreasonable delay considering Ms. Meier's vacation and her deep involvement at the same time with another investigation. Once the investigation of the April 14th incident was commenced, it was completed before the complainant went on an extended leave. There is no indication that the respondent followed anything other than its standard procedure in responding to the April 14th incident.

5. The decision to substitute a day of suspension for a previously scheduled day of vacation on May 5, 1987.

The complainant contends that the respondent's decision, made after the original suspension letter was issued to exchange May 5th for May 9th as a day of suspension, was intended to prevent the complainant from appearing at Mr. Heffernan's May 5th predisciplinary hearing and was in retaliation for complainant's prior protected activities (Findings 100 through 103).

The record clearly indicates that the complainant was initially scheduled for 10 days of suspension, that a change was made as to May 5th and 9th, and that he ended up serving 10 days of suspension. Because he was in suspension status, complainant was not allowed to represent Mr. Heffernan at the May 5th predisciplinary meeting. (See claim 6, below). While the record is clear as to the first schedule and the last schedule, the record is unclear as to the basis for the change.

The complainant contends that he had originally been scheduled for a day of vacation on May 5th (Complainant's brief, page 46) but that the respondent changed the 5th from a day of vacation to a day of suspension. The respondent contends that complainant had initially been scheduled for vacation on May 9th (Respondent's brief, page 53) and that suspension date was changed from May 9th to the 5th so that complainant would not lose a vacation day. The disagreement of the parties on such a basic fact is troublesome, especially in light of various testimony in the record which

would seem to contradict either formulation of the facts.[15] However, the Commission concludes that it is not necessary to resolve this factual dispute in order to decide the issue of retaliation as to this claim.

The complainant's contention as to this issue hinges on the fact that prior to May 4th, when the suspension dates were modified, he had been identified by Mr. Heffernan as Heffernan's representative for the pre-disciplinary hearing. However, both Ms. Ellenbecker and Mr. Frahm testified that they were unaware of complainant's involvement in the Heffernan proceedings and the complainant failed to undermine their testimony in this regard. Mr. Frahm acknowledged that once contacted by Ms. Ellenbecker, he directed her to change the dates of complainant's suspension so that he was

---

[15] Payroll records for the complainant covering this period were not introduced. Mr. Swope, the scheduling officer, did not testify. The record does reflect that LHS had a policy of scheduling suspensions for a block of time, i.e., consecutive days, rather than intermixing days of suspension with work days or paid leave days.

Complainant contends that he had scheduled vacation for May 5th. The original suspension letter skipped over May 5th and designated 10 days, including, May 9th as a suspension day. Yet at least four times during her testimony, Ms. Ellenbecker indicated that one of the originally designated suspension dates had previously been selected by complainant as a day of vacation. (Transcript, page 463, 464, 466 and 467.) On page 469, Ellenbecker stated: "No, it doesn't look like May 5 was the day in question." Also, Mr. Frahm testified that Ms. Ellenbecker had told him she had (erroneously) scheduled a day of suspension when complainant had already scheduled it as a day of vacation. (Transcript, page 474).

Respondent contends that complainant had scheduled vacation for May 9th. The revised suspension letter identified May 5th as a day of suspension and deleted May 9th as a suspension day. However, both Ms. Ellenbecker (Transcript, page 466) and Mr. Frahm (Transcript, page 473) testified that the modification resulted in the change of a day from a vacation day to a day of suspension.

in suspension status on May 5th.[16] He stated he was unaware that the complainant had intended to be at the institution on May 5th. Ms. Ellenbecker testified that she was unaware that Mr. Heffernan's hearing had been scheduled for the 5th and noted that she had not been involved at all in the Heffernan investigation because she was working on another matter at that time (Transcript, page 442). Mr. Frahm was a very credible witness and he effectively made the decision to modify the suspension dates. Based on Mr. Frahm's testimony alone, the complainant would fail to sustain his burden of proof as to this issue. Ms. Ellenbecker was less credible than Mr. Frahm, but her testimony as to her knowledge of the Heffernan pre-disciplinary meeting was still not directly controverted by other evidence.[17] Respondent also pointed out that LHS management stood to gain little from preventing complainant from representing Mr. Heffernan. Any conceivable benefits from management's perspective, i.e., insuring Mr. Heffernan had inadequate representation or keeping the complainant in the dark about what occurred at the predisciplinary hearing, are speculative. The complainant offered the following arguments:

> The respondent had a strong motivation for preventing Sadlier from being Heffernan's representative. It was very clear that the respondent had decided that Heffernan would not be disciplined in any fashion for his unauthorized distribution. Therefore, two employees who allegedly had done an identical thing would have been together during this disciplinary interview. Heffernan received nothing for the action that he admits to

---

[16] Mr. Frahm testified that he thought he was doing complainant a favor by giving him a vacation day to use at a later date. (Transcript, page 475).

[17] Mr. Kramlinger signed the May 4th letter, drafted by Ms. Ellenbecker, which modified the suspension dates. However, the letter was written in such a way that a casual reader would not focus on the particular dates being modified.

> doing. Sadlier received a ten day suspension for actions he denies doing. Therefore, the respondent was strongly motivated to keep Sadlier out of the meeting with Heffernan in which Heffernan was going to be exonerated from any disciplinary consequences for his action.

If the respondent had, as of May 4th, already decided not to discipline Mr. Heffernan under the distribution policy and if this result was viewed as being inconsistent with the suspension of the complainant, keeping the complainant out of Mr. Heffernan's predisciplinary hearing would do nothing to undercut or defuse the inconsistency. Complainant and Mr. Heffernan were both officers of Local 6 and Mr. Heffernan was already on record as opposing the 10 day suspension imposed against the complainant. Mr. Heffernan would be expected to inform complainant of any conduct by the respondent (including statements during or results of the May 5th predisciplinary meeting) that was inconsistent with the suspension imposed against the complainant. Complainant's absence from Mr. Heffernan's May 5th predisciplinary hearing would not effectively interfere with the transfer of this information.

The complainant has failed to sustain his burden as to this claim.

6. <u>The decision to deny complainant admittance to the institution grounds during the period of his 10 day suspension.</u>

All of complainant's arguments under the hearing "Denial of Admission to Grounds" (Complainant's Brief, page 47) relate to the circumstances surrounding the grievance hearing scheduled for March 26, 1987. (Finding 45). Respondent's arguments also focus on the events of that date (Respondent's Brief, page 56). The March 26th incident occurred during complainant's <u>three day</u> suspension. Yet, the issue for hearing clearly refers to the denial of admittance to LHS during complainant's <u>10 day</u> suspension which ran from April 25th through May 8th. Therefore, the Commission does

not address the merits of complainant's arguments relative to the incidents on March 26th other than to the extent the events of March 26th may serve to provide a perspective for considering the respondent's actions during the subsequent 10 day suspension.

The only time the complainant was denied entry to institution grounds during the 10 day suspension would have been on May 5th when he was not allowed to represent Mr. Heffernan in an investigatory meeting. (Finding 105) Complainant clearly was in suspension status on the May 5th. It is also clear that the proceeding scheduled for Mr. Heffernan was not a grievance hearing but was a predisciplinary hearing, or possibly an investigation hearing. After March 26th when the complainant had questioned Ms. Ellenbecker's statement that complainant would not be permitted to appear as a union representative while on suspension, Ms. Ellenbecker verified respondent's policy in this area by contacting Mr. Frahm who in turn contacted the Department of Employment Relations. That policy (Finding 105) prohibits someone on suspension from serving as a union representative but would still permit a grievant to select a suspended employe to serve as his "personal representative" in a grievance hearing. However, only union representatives are permitted to act as a representative during either a predisciplinary hearing or an investigative hearing of an employe covered by a collective bargaining agreement. Because the May 5th proceeding was not a grievance hearing, the respondent's decision not to permit the complainant to represent Mr. Heffernan was consistent with existing policy.

During the course of the hearing, complainant testified that during the course of his October, 1986 suspension, he had appeared on several occasions as a representative for grievants in grievance hearings held on LHS grounds (Finding 19). This testimony is not necessarily inconsistent

with the respondent's policy as outlined above. Complainant could have appeared at these grievance hearings as a personal representative rather than as a union representative. The only other specific incident described by complainant and relating to this issue was when he represented Mickey Koth (Transcript, page 287). Complainant testified that on an unspecified date he went to LHS and asked to represent Mr. Koth in a grievance hearing. Ms. Meier initially denied complainant's request based on the rationale that the complainant was in suspension status. However, complainant was able to to convince Ms. Meier that he was on a day off rather than on suspension, so complainant was permitted to represent Mr. Koth. The facts of the Koth incident not only are not inconsistent with respondent's actions on May 5th but actually support the respondent's position. As to the Koth hearing, the complainant was in LHS on a day off, not on a suspension day. In addition, the Koth hearing was a grievance hearing and under existing policy, complainant could have represented Mr. Koth as his personal representative.

For the above reasons, the complainant has failed to sustain his burden of proof as to this claim.

ORDER

The respondent's actions are sustained.

Dated:_____,1988 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

KMS:jmf
JMF02/3

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

Parties

Michael J. Sadlier
W6275 Alery Road
Tomahawk, WI 54487

Patricia Goodrich
Secretary, DHSS
P. O. Box 7850
Madison, WI 53707