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LORETTA SNEE,
 Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
 Respondent.

Case No. 92-0030-PC-ER

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This matter is before the Commission on a complaint of age and sex discrimination under the Wisconsin Fair Employment Act against respondents for terminating the employment of complainant. To the extent any of the discussion constitutes a finding of fact, it is adopted as such.

FINDINGS OF FACT

1. The complainant Loretta Snee, a female, was born January 15, 1942.
2. About April 29, 1991 Snee began training as a Correctional Officer at a Correctional Officer Training Academy operated by the Department of Corrections in Oshkosh, Wisconsin.
3. The Correctional Officer training course consisted of five weeks of classroom instruction, seven to ten days of on-the-job training (OJT) and seven to ten days of reclassification training.
4. After completing her initial five week course, on May 28, 1991, Snee was assigned to Goodland Hall, Mendota Mental Health Institution for OJT in security and custody of inmates. Snee remained at Goodland Hall until June 7, 1991, but her actual training was eight days because the two week period included two weekends, one holiday and one day of cross training at another correctional institution.
5. Snee's OJT training supervisor was Lieutenant Osborne Dolsey. Dolsey also was supervisor of the first shift and he assigned various persons to

function as training officer for Snee. Dolsey's date of birth is January 18, 1942.

6. During the course of her OJT training, the particular instruction given Snee each day was based on a printed training schedule prepared by Dolsey. Items on the schedule were checked off by the training officer or Dolsey after being covered by the instructor and a copy of same was given to complainant.

7. Dolsey monitored complainant's progress through discussion with the training officers and Snee, either at the beginning or the end of a shift, during the days he was on duty. In other instances, Snee was monitored by other supervisors.

8. At the end of the two week OJT period, Snee was given a written test. Like an open book examination, the test was not monitored and the information on the examination was available in the room where the test was given. Snee achieved a perfect score of 100 on the test, where a score of 70 was the minimal qualifying grade.

9. Afterwards, Snee returned to the academy where she completed reclassification training and remained until after graduation, when on June 24, 1991, she was transferred and returned to Goodland Hall at MMHI.

10. The security program at Goodland Hall was headed by Captain Robert Schmidt. His department consisted of fifteen officers, including Snee and three supervising officers, commonly known as Lieutenants, who supervised the three security shifts. Schmidt was born in September 1942.

11. Respondent anticipated that Snee, upon her return would begin independent shift work after a brief refresher training of one or two days.

12. Lieutenant Dolsey, who worked with Snee the first two days of her return to MMHI, concluded that Snee functioned like a person with only eight to sixteen hours of training and decided Snee was not ready to work independently.

13. On June 29, 1991 Dolsey discussed with Snee his concerns about her work progress and documented his discussion with her by a memorandum to her of the same date. Dolsey sent a similar memorandum about Snee's progress to supervisors, Schmidt, Schenck and Sims.

14. One of the supervisors involved in the extended training of Snee was Lieutenant Perry Sims, the third shift supervisor. Sims worked

individually with Snee on July 2 and 3, starting anew to teach Snee security officer functions at the three security stations.

15. After instructing and working with Snee two days, Sims had doubts about Snee's ability to perform the work and discussed his concerns with Snee. Later Sims discussed his concerns about Snee's work performance with Dolsey, Schmidt and the Personnel Officer Dennis Dokkens. Sims also wrote memorandums about Snee's work performance to Schmidt and asked Schmidt to personally observe Snee during a day shift.

16. On July 5, 1991 Dolsey met with Snee and reviewed the OJT test with Snee, asking her questions about work. That day Dolsey assigned Snee to the various work stations during the break periods and observed her answering phones and performing other security duties.

17. Lieutenant Dolsey discussed with Snee his concerns about her work performance and advised her she could not remain in training indefinitely. Later, after consulting with other supervisors and discussing the matter with Snee, assigned Snee to work independently on third shift. Lieutenant Sims, third shift supervisor, met with Snee to discuss her third shift assignment. Sims did not actually work third shift but was on call.

18. While Snee was working third shift, Dolsey received information from other officers on third shift that Snee was performing poorly. Frank Schiro, one of the officers on third shift told Dolsey that Snee was not capable of working alone, that he was concerned something serious might occur. Schiro feared he would be blamed for any such incidents because he was the senior officer.

19. Subsequently, the supervisors had several discussions and concluded that Snee should be given an oral examination to determine her ability to perform her job as a security officer at Goodland Hall.

20. A group of four supervisors, Schmidt, Dolsey, Sims and Schenk prepared a list of questions on policy and procedures they determined all officers should know to perform their duties at Goodland Hall. These questions were reduced to a two page document by Sims.

21. At the beginning of the third shift on July 29, 1991, Snee was advised by Sims to meet with him at the close of her shift the next morning.

22. That morning, July 20, 1991, Sims and Dolsey met with Snee in the visiting room, where Snee was told the purpose of the meeting and given the oral examination.

23. After Snee answered the questions, Sims and Dolsey reviewed the questions and Snee's answers with her. They advised Snee that she did not do well and she agreed.

24. Snee had problems with codes for different alert messages and use of proper transmitting systems. Also Snee could not identify many unit telephone numbers, which Snee needed to know to respond quickly in emergency situations.

25. The oral examination given Snee consisted of twenty-three questions and took approximately an hour.

26. Periodically every six months, officers were given oral examinations on emergency procedures, but this particular examination was given because of complainant's extended training period.

27. On the afternoon of July 30, 1991 Schmidt and Sims drafted a letter advising Snee that they intended to terminate her employment on August 2, 1991 and that she was invited to a meeting on August 1, 1991 to respond. The letter was signed by Sims and given to Snee that evening, at the beginning of the third shift by Lt. Schenck.

28. Snee attended the August 1 meeting with union representative Marie Carlin and provided Sims and Dolsey with a document she described as "testimony" in opposition to her termination.

29. Sims and Dolsey read Snee's written testimony, then after discussing the matter alone, informed Snee and Carlin that they would recommend termination.

30. At some point during the August 1 meeting, Sims and Dolsey reviewed with Snee the completed results section of her Performance, Planning and Development Report. Previously, on July 8, 1991 Snee had been provided a copy of her PPD with statements of major job objectives and performance expectations.

31. On August 2, 1991 Snee submitted a letter of resignation addressed to Sims, her third shift supervisor.

32. The next security officer hired by MMHI after Snee resigned was Floyd C. May. May began employment at MMHI October 6, 1991 and completed his probation April 6, 1992. May's date of birth is December 25, 1963.

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b) Wis. Stats.
2. Complainant has the burden to show she was discriminated against by respondent on the basis of age or sex in regard to its decision to terminate her employment with them as a Correctional Officer 1 in 1991.
3. Complainant has failed to sustain her burden.
4. Complainant was not discriminated against as alleged.

OPINION

The issue in this matter before the Commission is whether respondent discriminated against complainant on the basis of age or sex when they decided to terminate her employment with them in August 1991.

In matters involving discrimination under the Wisconsin Fair Employment Act (WFEA) the Commission, in accord with the courts of Wisconsin, follows the method of proof established by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5FEP Cases 965 (1973) and Texas Dept of Community Affairs v. Burdine, 450 U.S., 248, 25 FEP Cases 113(1981). This method of proof requires that complainant must first establish a prima facie case. Then the burden shifts to respondent to provide evidence of some legitimate, nondiscriminatory reason for deciding to terminate complainant. After respondent makes this showing, the presumption of discrimination is removed and the burden shifts back to complainant to prove discrimination or that respondent's articulated reason was pretext. Throughout this process, the ultimate burden of persuasion remains with complainant.

To establish a prima facie case, complainant must prove that she is one of a class of persons protected under the WFEA, that she was qualified for the job and performed it satisfactorily, and that respondent decided to discharge her under circumstances from which it could be inferred that age or sex was not treated neutrally in respondent's decision to discharge complainant.

There is no dispute that complainant has satisfied the first element of her prima facie case. This case centers on elements two and three of a prima facie case, regarding complainant's reason for intending to discharge her.

Complainant argues that evidence presented does satisfy the second element of a prima facie because she was qualified for the position (which is

undisputed) and she satisfactorily performed the duties of that position. In support, she refers to her PPD signed by her July 31, 1991, showing satisfactory results in five out of seven major job objectives. Complainant also states she worked "essentially" alone from July 6, 1991 through July 30, 1991 with "no apparent problems." Complainant also argues that memoranda from one supervisor to another regarding "supposed" incidents of her poor performance, in the record as Respondent's Exhibits 6, 7 and 7a, are not credible with respect to her work performance. She provides the following reasons:

1. They were never shared with her.
2. Respondent's Exhibit's 7 and 7a were sent within 48 hours of the decision to terminate.
3. Respondent's Exhibit's 6, 7, 7a and 8 lack credible evidence of poor performance because: In Exhibit 6, respondent, while criticizing complainant's work performance, found no reason to delay starting complainant to work independently.
4. In Exhibit 7, Dolsey indicates possible movement of complainant to first shift for further observation and probable termination, but that was never done.
5. In Exhibit 7a, Dolsey writes about two incidents, which were not referenced on complainant's PPD as unsatisfactory work performance.

Respondent asserts that complainant failed to establish the prima facie case element of satisfactory job performance and argues that no one testified complainant performed her job well. Also respondent argues that complainant's argument, referencing her work performance of 70% satisfactory indicated on her PPD, ignores testimony that she was failing in comparison with other probationers. Also, respondent argues that although complainant was told she would memorize telephone numbers through usage, unlike others, she failed to do so after weeks of training. In this regard, respondent directs attention to testimony of eight staff correctional officer's including three male supervisors and two women, all testifying to complainant's training as a probationary employee of respondent's.

In rebuttal, complainant argues that testimony of the eight witnesses should be dismissed because it was undocumented, not pertinent, irrelevant,

conjectural or based on personal opinion and failed to prove poor work performance.

About Sean Heiser, she alleges there was no testimony from him about her post-training performance. Lieutenant Sim's testimony she states should be dismissed because he "failed to document any performance-based problems." Sara Britton's testimony regarding complainant reading newspapers or magazines on duty and being unaware of any unfair treatment of complainant by respondent complainant claims was irrelevant. Captain Schmidt's testimony is said by complainant to be troublesome, because he could only recall one day when he observed complainant's performance; the testimony of Frank Schiro and Ralph Watson "unavailing" anecdotes; Jodi Zamzow's testimony irrelevant and Lieutenant Dolsey's testimony confusing, because he saw no reason not to assign complainant to work independently on the third shift, but in retrospect believed her level of performance may have dictated a different approach. Complainant conflates these arguments with those on the issue of pretext.

About pretext complainant asserts no evidence was presented which explicitly demonstrates respondent's decision to terminate her was based on age or sex, but posits respondent's proffered explanation lacks validity. Complainant makes the following arguments:

1. Complainant graduated in the upper half of class of an eight week training academy for correctional officers, including eight days of OJT at Goodland Hall where she received a score of 100% on her OJT examination. Therefore it is unlikely that she would have such difficulty after graduation.
2. Respondent's assertion that complainant received twice the normal amount of training does not appear to be supported by the evidence.
3. After Sims' discussion with the MMHI personnel director July 3, 1991, respondent moved quickly to build a record for termination.
4. Complainant performed her duties without incident from approximately July 6, 1991, until the end of the month.
5. Complainant was given a surprise oral examination which was the basis for respondent's decision to terminate.
6. Complainant was the only female officer older than 40.

7. Respondent's claim of an affirmative action plan does not appear to be supported by the evidence.

Complainant bore the initial burden of establishing a prima facie case of age and/or sex discrimination, but complainant has not done that by failing to produce evidence which shows she satisfactorily performed her duties to respondent's reasonable expectations.

As respondent in its brief points out, while complainant argues that her PPD was 70% satisfactory, it ignores the testimony of eight witnesses that complainant's job performance was poor. Also, complainant's argument ignores the statement on the PPD by her supervisor that she was not meeting job performance expectations.

Complainant's assertion that testimony of eight witnesses is not credible is not supported by the record. In making this argument, complainant elides evidence that complainant was not performing at the level expected of one with her amount of training, claiming poor documentation, but provides no evidence as required. For instance, complainant argues that Lt. Sims' testimony was not credible because it was not specific enough and it was not shared with her. Yet both Sims and Lt. Dolsey testified they advised complainant of their concerns about her work performance.

Also, complainant asserts that Dolsey's testimony is not credible because of several inconsistencies in his actions and statements regarding complainant's work performance. Complainant argues that while Dolsey testified to "numerous failings" of complainant, none were documented, Dolsey never said anything negative about complainant's OJT on her transfer to MMHI and had, in fact, recommended complainant to work alone.

These arguments overlook other testimony by Dolsey, which clearly indicate no inconsistencies in his approach to complainant. Dolsey testified that on June 29, 1991, five days after complainant transferred to MMHI, he discussed with complainant her lack of progress and explained to her she could not remain in training indefinitely. Dolsey testified that he again talked with complainant on July 5, 1991. Complainant then had completed a month of training. He told her it was time to work independently. He gave complainant an oral test, which she passed and he assigned her to the third shift, hoping such action would be a catalyst for improvement. Dolsey testified that subsequent reports by other co-workers of complainant's poor work

performance, resulted in the considerations and actions taken to evaluate complainant that followed. Dolsey testified that as complainant's training officer, he had no responsibility to prepare complainant's Performance Planning and Development Report.

Further detailed discussion of testimony of other witnesses complainant alleges lack credibility is unwarranted. Suffice it to say the record does not support complainant's position. While the testimony of some witnesses regarding specific dates was exposed to more accurate written records, these discrepancies did not impeach substantive testimony regarding complainant's work performance. For example, witness Sean Heiser gave confusing testimony about specific dates he worked with complainant and what constituted OJT, but made it clear that he worked with complainant during her probationary period at MMHI. Similarly, Frank Schiro could not remember specific dates he was off work around July 18, 1991, after the birth of his child, but testified he worked with complainant on third shift seven or eight times. Similarly, complainant calls into question Ralph Watson's testimony about specific times and shifts he worked with complainant, but Watson's testimony regarding complainant's work performance was unequivocal. Watson testified he wanted complainant to succeed, because with complainant's assignments to third shift he would have been released from night shift rotation.

Turning to complainant's arguments that respondent's reasons for its decision to terminate complainant were pretextual, complainant acknowledges no direct evidence was presented demonstrating respondent exhibited age and sex bias in its decision to terminate complainant. Rather complainant points to her successful completion of OJT; claims she did not receive twice the normal training before starting to work alone; asserts that testimony of all witnesses regarding her work performance is not credible; and argues that inferences of pretext may be drawn from the manner respondent developed a record to justify termination.

These assertions and arguments are not convincing. It is clear no evidence was presented demonstrating respondent did not treat age and sex neutrally in its decision to terminate complainant. Most of complainant's arguments on pretext were discussed previously and those conclusions hold true here. However, in addition complainant claims age and sex discrimination can be inferred based on her perfect OJT score, respondent's written record and oral examination justifying termination and the testimony

of Marie Carlin, a union steward during that period. Discussions regarding complainant's inferred claims of respondent age and sex bias follow.

Inferences argued by complainant are not mandated by the evidence. Clearly other inferences may be drawn. With regard to complainant's perfect OJT examination score, the evidence shows the examination process provided complainant access to the answers to the questions. Complainant was given the entire shift to complete the examination and was not monitored. It could be inferred a perfect or near perfect score was readily obtainable.

Addressing complainant's inference drawn from her allegation of a quick build-up of a written record against her, such inference does not withstand the evidence. The evidence shows that Lieutenant Sims consoled complainant after her discussion with Lt. Dolsey, told complainant she could call him at home if needed, gratuitously provided complainant a pocket note book, personally attempted to retrain complainant and began documentation of complainant's work progress on advice of the personnel director. Clearly, the evidence presented regarding Sim's participation in these events at issue does not invoke an inference of age or sex bias against complainant.

Marie Carlin's testimony provides little support for complainant's claims of discrimination. Carlin, a union steward during this period, had no personal knowledge of complainant's circumstances and was not aware of any unfavorable treatment of persons because of age or sex except those expressed to her by complainant. Carlin testified to working on affirmative action committees concerned with the retention of women and minorities, and promoting the development of "buddy" or "mentor" systems. Also, Carlin testified that recently an anonymous employe reported to her that the state wanted to eliminate the older people in the work force. However credible this testimony, it is too obscure to conclude respondent's articulated reason for deciding to terminate complainant was pretextual.

For the foregoing reasons and based on the record, the Commission believes complainant has failed to prove her allegations of discrimination against respondent.

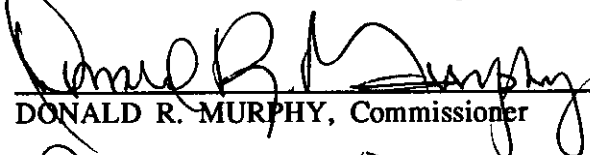
ORDER

Complainant's claim of age or sex discrimination against respondent regarding its decision to terminate her employment as a Correctional Officer 1 in 1991 is dismissed.

Dated: April 17, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:bjn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must

serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95