

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JAMES K. KRUEGER,
 Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
 AND SOCIAL SERVICES,
 Respondent.

Case No. 92-0068-PC-ER

* * * * *

INTERIM
DECISION
AND
ORDER

A Proposed Decision and Order was mailed in the above-noted case on February 27, 1995, after which both parties submitted written arguments to the full Commission. The Commission considered the submitted arguments and consulted with the hearing examiner. The Commission adopts the proposed decision as amended below and as supplemented by additional discussion to address the main arguments raised by Mr. Krueger which were not addressed in the proposed decision.

AMENDMENT

1. Delete the text appearing on page 27 and 28, under the heading "Truesdell's conversation with Mr. Krueger on February 14, 1992:" and replace it with the following text under the same heading:

(See par. 47 of the Findings of Fact.) The focus of this allegation is unclear. It appears Mr. Krueger believes Mr. Truesdell gave him incorrect information about his appeal rights which could be considered as an adverse employment action. However, the record evidence is insufficient to establish the third element of the prima facie case. Specifically, the record does not show that a causal connection existed between Mr. Krueger's filing of grievances in January and February of 1990, and Mr. Truesdell's opinion given more than two years later that Mr. Krueger lacked appeal rights in matters not covered by the grievances filed.

This amendment was needed to correct the reference to the findings of fact and to clarify the decision rationale. In particular, the Commission rejected this claim for failure to meet the third element of the prima facie case (causal connection).

DISCUSSION

Mr. Krueger objected to paragraph #2 of the Findings of Fact on two bases (starting on p. 2 of his written arguments.) First, he emphasized he was not provided the same type of formal training as some other prior incumbents of the evaluator position. The truth of this is recognized in the finding already. Second, he concluded this unequal treatment in regard to formal training demonstrated discrimination. The Commission disagrees. Any decision respondent may have made regarding the level of training Mr. Krueger would receive when he initially took over the evaluator position was a decision made before respondent knew he was handicapped. Training became an issue again two years later as an accommodation issue when respondent determined he could not return to the evaluator position. Training as an accommodation issue is addressed separately in the decision.

Mr. Krueger objected (starting on p. 9 of his written arguments) that the proposed decision failed to decide whether respondent violated union contract provisions in relation to "retention of personnel information" in regard to the reprimand letter he never received. (See Finding of Fact #12) This aspect of the hearing record was not discussed in the proposed decision because it was not a defined hearing issue.

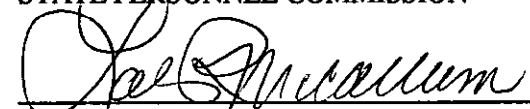
Mr. Krueger wished the proposed decision to contain the employee handbook definition of "voluntary demotion" (starting on p. 21 of his written arguments). The definition given in the handbook indicates that a voluntary demotion is taken at the employe's initiative. Since the demotion offered to him by respondent was not initiated by Mr. Krueger, he concludes that respondent failed to exercise its responsibilities under s. 230.37(2), Stats. Such conclusion is against the weight of credible hearing testimony. Furthermore, the statutory language refers to the hiring authority's duty to either "transfer" or "demote" the employe. The statutory language is not limited to "forced" or non-voluntary demotions, but is broadly stated to potentially include both.

ORDER

That a status conference be scheduled to establish a date for a hearing on the merits in regard to the probable cause portion of this decision, meaning the hearing on the merits will be limited to the question of whether handicap discrimination existed in relation to Mr. Krueger's telephone conversation with Mr. Truesdell (as discussed on p. 25 of the proposed decision); and that the Commission retain jurisdiction over all of the complainant's claims until such time as a final decision is issued on the one claim for which probable cause was found.

Dated April 17, 1995.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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Evansville, WI 53536

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Acting Secretary, DHSS
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STATE OF WISCONSIN

PERSONNEL COMMISSION

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JAMES K. KRUEGER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Respondent.

Case No. 92-0068-PC-ER

* * * * *

PROPOSED
DECISION
AND
ORDER

Mr. Krueger filed a charge of discrimination with the Personnel Commission on March 30, 1992, alleging that respondent terminated him because of his handicap, refused to reasonably accommodate his handicap, and also retaliated against him for activities protected by the Fair Employment Act (FEA), all in violation of the FEA, Subch. II, Ch. 111, Wis. Stats. On September 28, 1993, an Initial Determination (ID) was issued which found No probable Cause existed to believe discrimination occurred as alleged. Mr. Krueger filed a timely appeal.

The parties agreed to a statement of the issues for hearing at a prehearing conference held on January 13, 1994, as shown below:

Whether there is probable cause to believe that respondent discriminated against the complainant based on his handicap and/or retaliated against the complainant for engaging in fair employment activities with respect to:

1. Complainant's termination [on February 26, 1992].
2. Judy Norman-Nunnery's October 1991 order that complainant get a medical evaluation.
3. Patrick Mommaerts/R.F. Truesdell's order to return to work in September 1991.
4. R. F. Truesdell's letter of November 12, 1991, to Donna Rifken.
5. Jan Van Vleck's memorandum to the file of January 27, 1992.
6. Barbara Blatterman's note of February 14 and 17, 1992, and complainant's February 14, 1992 telephone conversation with R.F. Truesdell.
7. Judy Norman-Nunnery's February 4, 1992 letter.

8. Judy Norman-Nunnery's February 18, 1992 letter.
9. Judy Norman-Nunnery's February 26, 1992 letter.

At the same prehearing conference, the parties also agreed to hearing on June 13-15, 1994. The parties were notified which Commission hearing examiner was assigned to this case by Commission form dated April 26, 1994. Mr. Krueger requested postponement of the hearing by letter received by the Commission on May 12, 1994, and such request was denied by letter ruling dated May 11 (sic), 1994. The letter ruling was revoked without objection by letter ruling dated May 24, 1994, due to Mr. Krueger's claim that his inability to prepare for hearing was related to his depressive state. The new hearing dates of November 1-3, 1994, were announced in the same letter.

Extensive conferences occurred on October 21, 1994, at the parties' request and such conferences were tape recorded. Certain procedures were described and the parties reached agreement on some of the hearing evidence including a partial stipulation of facts based upon findings recited in the ID. The initial two days of hearing occurred as scheduled on November 1-2, 1994. Mr. Krueger did not appear timely for the third day of hearing. Within about 30 minutes of the scheduled starting time on November 3, 1994, Mr. Krueger telephoned to request postponement for the stated reason that he felt stress from the hearing to such degree that his sleep patterns were disturbed and he wanted to seek prescription medication. The request for continuance was granted without objection. The final day of hearing eventually was scheduled and held on December 12, 1994, and the record was ready for decision at the close of hearing. Both parties declined the opportunity to submit oral or written arguments after hearing but said they may wish to do so after the proposed decision and order is issued.

FINDINGS OF FACT¹

Background Information

1. Mr. Krueger began working at respondent's Division of Vocational Rehabilitation (DVR) office in Janesville as a counselor for handicapped clients seeking assistance in finding employment. His job classification

¹ Recited facts which were part of the parties' stipulation of facts, are prefaced by the abbreviation: "SF", which stands for Stipulated Fact.

was Vocational Rehabilitation Counselor 3 (VRC-3). On or about July 28, 1989, he transferred to an evaluator position under the same classification. As an evaluator, he tested DVR's handicapped clients and interpreted test results for the DVR counselor assigned to provide services to the client. His duties are generally described in his position description (Exh. C-8), as follows:

Under general supervision, this position will be independent worker responsible for coordinating and providing vocational evaluation services for handicapped person, including but not limited to: comprehensive vocational evaluations, psychometric testing, academic achievement testing, aptitude testing, values testing, personality testing, interest testing, career decision making, and processing vocational computer printouts, to determine the handicapped person's vocational goals. This position will independently select appropriate tests for clients and participate in training of DVR staff in the use of evaluation instruments and evaluation services.

2. A backlog of evaluations existed when Mr. Krueger became the evaluator in July of 1989, due to the prior evaluator taking other employment and the position being vacant for a period thereafter. Mr. Krueger was familiar with some aspects of the evaluator job duties from his work as a counselor, but was unfamiliar with how to determine which type of evaluation test was appropriate in certain circumstances and how to administer tests. Respondent knew of his lack of knowledge in these areas but felt he could learn mainly through on-the-job training as others had in the past. He received no training prior to his first day of work, yet was expected to administer tests to scheduled DVR clients. He later received some training, but less than the amount of training received by at least one prior evaluator.
3. The backlog of evaluations increased after Mr. Krueger took the evaluator position. The cause of the backlog increase was at least threefold. First, Mr. Krueger was unfamiliar with some aspects of the job. Second, his part-time assistant left for other employment leaving the assistant position vacant. Third, he possessed certain work traits which slowed his production. Specifically, he tended to focus on small and sometimes trivial details and found it difficult to see the broader picture. Accordingly, he lacked confidence in his reports and

recommendations and was late producing them. Further details regarding performance problems are noted in par. 12 below, which contains excerpts from a "written reprimand".

4. (SF) On or about January 8, 1990, Mr. Krueger began an approved medical leave of absence. At the time the leave commenced, his supervisor was Rhonda Deneka. During the period of his medical leave, he was under the treatment of several health care professionals, including Dr. Lawrence Wolfensohn and Dr. Stanley Miezio. (See Exh. R-1 & R-6, which are medical slips from various doctors for time off work for unspecified reasons.)
5. Mr. Krueger's medical leave was extended in 6-month increments per respondent's usual procedures. His leave ultimately continued for over two years - until his discharge on February 26, 1992. Mr. Krueger's evaluator position initially remained unfilled. It was later filled by limited term employment (LTE) appointment until a final decision was made that he could not return to the evaluator position.
6. Mr. Krueger was seen by Dr. Susan Olson, a psychiatrist. His general physician, Dr. Ramsey, made the referral to Dr. Olson due to concerns about Mr. Krueger's difficulty with a female supervisor, Ms. Deneka. On January 5, 1990, Dr. Olson conducted an initial assessment of Mr. Krueger. Dr. Olson had a telephone conversation with Ms. Deneka, wherein Dr. Olson recommended that Mr. Krueger take medical leave for one week.
7. On January 12, 1990, Ms. Deneka sent Dr. Olson a letter (Exh. C-9), which acknowledged receipt of Dr. Olson's medical slip dated January 8, 1990, indicating Mr. Krueger required a one week leave. Ms. Deneka's letter further stated as follows:

My concerns regarding Mr. Krueger's work performance include:

- 1) his failure to consistently take verbal and written directions from me.
- 2) his report to a co-worker that he has trouble taking orders from a woman, especially me.
- 3) his threatening behaviors, i.e. statements made to me to the effect that I wouldn't want to be me if he (Krueger) gets mad

because I'm a small person; the ripping of papers, breaking of pencils, clenching of teeth, and pressing of his head when confronted by me with work performance concerns.

4) complaints from clients and from other professional staff on behalf of clients regarding his behavior toward clients (reports that he demeans them, makes them feel guilty, makes them feel they can't face him, makes mis-statements in reports).

I have provided Mr. Krueger with a Confidential Information Release Authorization for his signature, so that I may gain information from you regarding what we can do to help him improve his job performance. I have also informed Mr. Krueger that he must have a written release from you to return to work on 1/16/90. I am hopeful that we may work cooperatively on Mr. Krueger's behalf.

8. Dr. Olson contacted Ms. Deneka on January 13, 1990, after Dr. Olson had an opportunity to meet with Mr. Krueger a second time. Dr. Olson felt she had a professional duty to warn Ms. Deneka that Ms. Deneka was in potential danger of harm from Mr. Krueger, an opinion Dr. Olson formed based on Mr. Krueger's comments during the second visit, as well as the temper and lack of control he displayed. Mr. Krueger told Dr. Olson during the second visit that he was dissatisfied with her services and would not see her again. Mr. Krueger did not know that Dr. Olson had called and warned Ms. Deneka.
9. On January 16, 1990, Ms. Deneka sent Dr. Chicks a letter regarding Mr. Krueger. (Exh. C-10 & R-3) The text of the letter was essentially the same as her letter to Dr. Olson on January 12, 1990.
10. On January 24, 1990, Ms. Deneka sent Dr. Roberts a letter regarding Mr. Krueger and expressed the need for a return-to-work release from Dr. Roberts. On January 25, 1990, Dr. Roberts called Ms. Deneka in response to her letter. He said he met with Mr. Krueger on January 18, 1990, at which time he recommended hospitalization and testing; but such recommendations were rejected by Mr. Krueger. Dr. Roberts expressed to Ms. Deneka his concern for her safety due to the degree of anger Mr. Krueger had towards her. (Exh. C-1)
11. On February 15, 1990, Dr. Miezio sent Ms. Deneka a medical slip (Exh. C-17 & R-9) indicating that Mr. Krueger transferred his medical care to

Dr. Miezio as of 2/13/90, and that his leave should be extended until at least 4/1/90, for unspecified medical reasons.

12. On February 22, 1990, Ms. Deneka sent a letter to Dr. Miezio (Exh. C-17), which attached a "written reprimand" dated January 12, 1990. Ms. Deneka indicated in her letter that the information was being sent to the doctor as background events which appeared to have precipitated Mr. Krueger's medical leave. Ms. Deneka further noted in the letter that the reprimand had not yet been given to Mr. Krueger "as it was felt that his receipt of this information might be too upsetting, given his current situation". The reprimand was for violation of DHSS work rule #1, regarding disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directions or instructions. The reprimand letter stated in pertinent part as follows:

This action is being taken based on the following incidents. On October 11, 1989, I met with you to discuss your not providing vocational evaluation reports or holding staffings within the timeframes of your PPD/Workplan. On October 23, 1989, I again met with you to discuss your continued failure to provide vocational evaluation reports or hold staffings within the timeframes of your PPD/Workplan. During our discussion on October 23, 1989, you verbally threatened me. You said something to the effect that I (Deneka) would not want to be me if you (Krueger) ever got mad, because I (Deneka) was a very small person.

On October 30, 1989, I provided you with a written memorandum clearly outlining my expectations for your becoming and remaining current with your vocational evaluation reports. You failed to meet the deadlines . . . and you did not come to me to discuss any concerns you had in meeting these deadlines.

On November 9, 1989, a pre-disciplinary hearing was held with you and your representative, Mark Flottum, regarding your failure to provide reports as outlined in my 10/30/89 memo. During this pre-disciplinary meeting, a negotiated compromise was agreed to by you which represented an amendment to the reporting/staffing timeframes outlined in your PPD/Workplan. The purpose of this negotiated compromise was to aid you in becoming and staying current in providing vocational evaluation reports and holding staffings.

On November 10, 1989, I provided you with a written memorandum indicating that no disciplinary action would be

taken at this time, and clearly outlined the process and timeframes agreed to by you in our negotiated compromise of 11/9/89. I further advised you in my 11/10/89 memo that failure on your part to improve your performance and fulfill the necessary activities outlined in this memo, would result in disciplinary action.

A second pre-disciplinary hearing was held on 1/5/90, with you and your representative, Ms. Susan Donahue, regarding your failure to comply with our negotiated compromise of 11/9/89. Specifically, you failed to complete and have available the final vocational evaluation report on (S. G.) within the timeframes established in our 11/9/89 negotiated compromise. You had agreed to these timeframes, and did not come to me to discuss any concerns you had in not meeting these deadlines.

* * *

If you believe this action was not taken for just cause, you may appeal through the grievance procedure according to Article IV of the collective bargaining agreement.

13. Mr. Krueger did not receive a copy of the written reprimand until the investigation of the Complaint he filed with the Commission. The reprimand was never given effect and was never placed in his personnel file due to his medical condition, his lengthy leave of absence and ultimate discharge.
14. (SF) On January 30 and February 8, 1990, Mr. Krueger filed three contract grievances including, but not limited to, protesting his supervisor's handling of his request for medical leave and alleging that his supervisor had harassed him because of his handicap.² None of the grievances referred specifically to the Wisconsin Family and Medical Leave Act or the FEA. (Exhs. C-24 & C-25)
15. DVR waived the next step of the arbitration process on both grievances filed by Mr. Krueger. DVR felt the second step could not be done in a timely manner due to Mr. Krueger's leave and resulting absence from the workplace. The waiver allowed Mr. Krueger and the union to determine whether to proceed to the next step. DVR never received further notice about these grievances from the union or Mr. Krueger.

² The grievance document itself does not allege handicap as a motivator and the record indicates respondent was unaware of complainant's handicap at least prior to complainant's leave in January 1990. Also, the stipulation mentions 3 grievances, but only 2 were provided as hearing exhibits.

The only management staff involved with the grievances were Ms. Deneka and Raymond Truesdell, her supervisor.

16. Ms. Enid Glenn became Mr. Krueger's supervisor on March 27, 1990, when she was hired to replace Ms. Deneka, as the Vocational Rehabilitation Supervisor of DVR's Janesville office. Exh. C-28

Mommaerts "order" to return to work in September, 1991

17. On March 19, 1991, Dr. Miezio sent Mr. Truesdell a report indicating that Mr. Krueger was still under his care for medication management and under Dr. Wolfensohn's care for psychotherapy. He recommended extending Mr. Krueger's leave an additional 6 months. (Exh. R-11)
18. On March 29, 1991, Judy R. Norman-Nunnery, DVR Administrator, sent Mr. Krueger a letter (Exh. C-19) indicating that his position had been vacant for over a year due to two 6-month leaves which DVR granted. She indicated that a "final extension" would be granted if Mr. Krueger provided specific information from Dr. Miezio by April 5, 1991. Her letter further stated as follows:

The Division has a responsibility to serve its clients and carry out the agency's mission. Clients are not being served due to your continued leave. Given our current workload needs, we are very reluctant to provide yet another extension of your leave given the scant medical information we have received to date.

19. On April 5, 1991, Dr. Miezio sent respondent a handwritten statement indicating Mr. Krueger would be able to resume his job duties after an additional 6-months leave. His opinion was based upon Mr. Krueger's progress with Dr. Wolfensohn and upon having found a medication which appeared to be having positive impact. (Exh. R-12)
20. On April 8, 1991, Patrick Mommaerts, Acting DVR Administrator,³ sent Mr. Krueger a letter (Exh. C-20) indicating receipt of Dr. Miezio's

³ Ms. Norman-Nunnery was the Administrator of DVR. She took maternity leave for 3 months from March through June 1990, during which time Mr. Mommaerts performed her duties in an Acting capacity. For a period prior to and just after Mr. Mommaerts' assignment as the the the Acting Administrator, he served as DVR's Acting Deputy Administrator. The Deputy position was filled on a permanent basis by Ms. Van Vleck as of July 19, 1991, at which time

extension request dated 4/5/91. (See prior paragraph.) Mr. Mommaerts indicated DVR also would like an assessment from Dr. Wolfensohn who was providing psychotherapy services to Mr. Krueger. Mr. Mommaerts further stated:

We are reluctant to grant you an additional six months leave, given our current workload needs. Our disabled clients are not being served as a result of your absence. We have a greater responsibility to ensure that our clients receive timely rehabilitation services. We will only allow you to be absent until we received additional information on which to make an informed decision as to your request.

21. DHSS needed someone working at full performance in the evaluator position because of the high workload and the counselors' need for evaluations in order to perform their work with DVR clients.
22. (SF) On April 17, 1991, Mr. Mommaerts extended Mr. Krueger's medical leave of absence for a "final extension" until October 7, 1991, at which time Mr. Krueger would be expected to return to work. (Exh. C-21 & R-14) Multiple matters were raised in the letter, including Mr. Mommaerts informing Mr. Krueger that by September 20, 1991, he would have to provide information, from both Dr. Wolfensohn and Dr. Miezio, indicating that:
 - a. Mr. Krueger is medically fit to return to his job duties and is able to function at full performance levels; and
 - b. Identification of any medications that Mr. Krueger would be taking, including information as to how the medications might affect his job performance.
23. As stated in Mr. Mommaerts' letter of April 17, 1991, DVR granted the leave extension up to October 7, 1991, based on Dr. Wolfensohn's report which indicated specifically why Mr. Krueger could not return to work in April 1991, but could return in 5-6 months based on a combination of medication and psychotherapeutic treatment. (Exh. C-21)

Mr. Mommaerts returned to his usual position as Director of Operations and Planning.

24. (SF) On September 16, 1991, Dr. Wolfensohn wrote to Ms. Norman-Nunnery. (Exh. C-3) The letter, which Mr. Krueger submitted to the respondent, stated in part:

Mr. Krueger is currently ready to return to work on a full-time basis. In order to maximize the likelihood of success it is important to help him conceptualize and work at his job differently, preventing a return to the previous sequence which led to many of the problems. Without such change, his tendency for over-investment and perfectionism could make the job literally impossible.

I would like to know the detailed job description which can be used in my treatment sessions with Mr. Krueger, assisting him in gradually developing a more functional style of completing the requirements. As a part of this sequence, special accommodations to assist this transition may be important, although I do not know enough about the job to suggest anything at this time. A short-term plan of accommodation should be developed between Mr. Krueger and his immediate supervisor, a plan which could also be brought into my work with Mr. Krueger.

25. (SF) On September 18, 1991, Dr. Miezio also wrote to Ms. Norman-Nunnery. (Exh. C-4 & R-16) Dr. Miezio's letter stated in relevant part:

I agree with Dr. Wolfensohn's letter to you detailing his recommendations for a return to work plan.

* * *

Tentative recommendations for reasonable accommodations are detailed in Dr. Wolfensohn's letter and might include:

1. Return to part-time work, one week on, one week off.
2. Training of Mr. Krueger in the client evaluation measures before he has to utilize them on the job.
3. Full training of the evaluation assistant before full performance standards apply.

In his letter, Dr. Miezio also identified the medication Mr. Krueger was benefiting from at the time.

26. (SF) On September 24, 1991, Mr. Truesdell, Regional Administrator of DVR's Bureau of Client Services, responded to Dr. Wolfensohn with Mr. Krueger's position description and requested that Dr. Wolfensohn specify in greater detail what accommodations he recommended for Mr. Krueger. (Exh. C-6)

27. (SF) On September 27, 1991, Dr. Wolfensohn sent a response to Mr. Truesdell's letter to Enid Glen, who had replaced Ms. Deneka as DVR's office supervisor in Janesville. (Exh. C-5 & R-17) Dr. Wolfensohn's letter stated in relevant part:

Mr. Krueger is motivated and capable of doing the work required in his position, but problems are encountered . . . He becomes excessively worried and fearful of having a negative impact on the clients if unable to do his job perfectly, including precise predictions. His job then becomes a series of impossible tasks. As I understand it, he needs to become more comfortable with a lower investment in the amount of data necessary and the details within the written report, while still presenting a sound, overall evaluation.

Initially, Mr. Krueger needs additional specialized training with the test being used. Sufficient time must be allocated to meet this goal. Overall, this would serve several purposes. Being more selective about which specific measurements are important for each case, without his feeling tremendously uncertain about what is being done, is crucial. Mr. Krueger and I are trying to develop a more efficient style of producing reports, but he requires more sufficient information. Nevertheless, his serious dedication to the point of excess . . . will interfere unless he can redefine his position in his mind, hopefully that less of a personal investment is satisfactory. From an on-site, supervisory capacity, it is important to selectively reinforce what elements could be omitted without significant loss of quality, an important element which should be part of the training. With additional training, he can also use particular parts of a larger instrument to meet the requirements . . . [I]t might be most helpful to have him return to the workplace on a half-time basis, or working one week and having one week off.

28. Mr. Krueger requested specific accommodations by letter to Ms. Glenn dated September 30, 1991 (Exh. R-18 & R-18), as follows:

Reasonable accommodations needed are:

1. Minimum of 3 months and up to 6 months starting employment working alternate weeks.
2. Training and practice in the administration and interpretation of evaluation instruments before I have to use them upon clients.
3. Thorough and completed training of the evaluation aid.
4. Acquisition of complete administration manuals and interpretation manuals for the evaluation instruments.

29. (SF) On October 2, 1991, Mr. Truesdell wrote to Mr. Krueger (Exh. C-2 & R-19) and informed him not to report to work on October 7, 1991, the date on which his medical leave was to expire. Mr. Truesdell stated that DVR would be reviewing the requests for accommodations and would contact Mr. Krueger when a determination had been made.

Norman-Nunnery order for complainant to undergo medical evaluation

30. (SF) On October 21, 1991, Ms. Norman-Nunnery wrote to Mr. Krueger and directed him to undergo a psychological evaluation and a situational assessment with Dr. Lynch⁴, at respondent's expense. The letter (Exh. R-20) stated in part:

You are being directed to obtain these independent assessments because of continuing concerns that we have regarding your ability to resume responsibilities as a vocational evaluator with the Division.

* * *

The September 16th and 27th letters from Dr. Lawrence Wolfinson [sic] and September 18th letter from Dr. Stanley Miezio indicate you can return to work, preferably with half time status. These recommendations raise concern about the level of supervisory and staff support you will need. We are not able to conclude from Dr. Wolfinson [sic] and Dr. Miezio's letters and recommendations that you are able to return to work at a fully functional level. The letters do not address concerns we had in 1990 about safety and how you deal with others when you are under stress. Additionally, it is not clear whether you are required to continue medication nor what impact the medication, if any, will have on your ability to fully perform your job duties.

31. Ms. Norman-Nunnery requested the additional evaluation because incomplete information had been received from Mr. Krueger's physicians about his ability to return to work at full performance and accommodations needed.

Truesdell's Nov. 12, 1991, letter to Dr. Rifken

32. (SF) Mr. Krueger was not satisfied with the health care provider (Ross Lynch) whom the respondent chose for the evaluation. Respondent

⁴ Dr. Ross K. Lynch is a Rehabilitation Psychologist with Professional Rehabilitation Services, Ltd. in Madison.

subsequently contracted with another provider, Dr. Donna Rifken, to conduct the evaluation. Mr. Truesdell wrote to Dr. Rifken on November 12, 1991. The letter (Exh. C-1) states in relevant part:

The reasons for this independent psychological testing is because of the lack of clear release from his doctors addressing his return to work. Specifically, we are concerned about Mr. Krueger's behavior as it relates to interpersonal relationships with supervision and the interaction with our staff and clients.

On January 12, 1990 the office supervisor [Deneka] received a phone call from a Dr. Olson indicating that the office supervisor should not be alone with Mr. Krueger as he could be explosive. . . .
* * *

The following concerns regarding his return to work were detailed in letters to his doctors: 1) his failure to consistently take verbal and written directions from the office supervisor; 2) his report to a co-worker that he has trouble taking orders from a woman; 3) his threatening behaviors, i.e., statement made to the supervisor, "I wouldn't want to be me if he (Krueger) gets mad, because the supervisor was a small person"; ripping of papers, breaking of pencils and rulers, the clenching of teeth, and the pressing of his head when confronted by the supervisor regarding work performance; 4) complaints from clients and from other professionals on behalf of clients regarding his behavior toward clients.

The above concerns are paramount in our concerns regarding his return and ensuring a safe and non-threatening work environment. His previous supervisor is no longer with the agency, but we do have another female supervisor who has raised some concerns already. These concerns are based on face to face and telephone conversations with Mr. Krueger.

We do not know what type of medication he is on, and if on medication what affect will the medications have on his behavior and performance.

(Emphasis contained in original.)

33. (SF) Attached to Mr. Truesdell's letter to Dr. Rifken was a document titled "Chronological Bases For Directing Psychological and Situational Assessments." (Exh. C-1) It narrated events allegedly occurring between October 10, 1989, and September 27, 1991, relating to Mr. Krueger. In general, the chronology describes Mr. Krueger's behavior in the workplace and also describes Ms. Deneka's contacts with various

health care professionals who had treated him. Mr. Krueger disputes the accuracy of the information in the chronology, particularly as it relates to his alleged behavior. (Mr. Krueger alleges that providing this document to Dr. Rifken was, in itself, a discriminatory act in violation of the FEA.)

34. The events noted in the chronology described in the prior paragraph, occurred as described therein except the entry for January 12, 1990, occurred on January 13, 1990. Ms. Deneka made the chronology entries from 10/10/89 - 2/9/90, after which Ms. Glenn made the entries.
35. (SF) Dr. Rifken, a psychologist, evaluated Mr. Krueger in November 1991. The final report of Dr. Rifken's evaluation was sent to respondent on January 10, 1992. (Exh. R-24) Under the heading "Summary and Recommendations", Dr. Rifken stated:

After having talked extensively with the current supervisor for Mr. Krueger's position, and after having examined the position description forwarded to me by DVR, I can make certain recommendations regarding Mr. Krueger.

Should the Department choose to reinstate Mr. Krueger to his position as vocational evaluator, I would suggest they undertake a period of very specific training. I would recommend that DVR set up a training program for Mr. Krueger that would offer him opportunities to become facile in the testing instruments themselves and especially in the interpretation of the testing results. My sense is that Mr. Krueger is very good at coming up with the testing results but has much more difficulty in organizing the information in order to come to a cohesive conclusion. He tends to focus in on the multitudinous details and needs help in standing back and coming to a general conclusion based on all the data from the tests. Secondly, the training ought to also focus on helping Mr. Krueger organize the testing results of several different testing instruments. Mr. Krueger needs to learn how to come to a final conclusion about an individual's occupational needs based upon data gained from several varied instruments. This ability calls for skills in picking out important information, setting aside unimportant details, and making sense out of several inputs at once. This ability to organize and focus his attention, separating out unimportant factors, is critical to Mr. Krueger's performance on the job. Finally, the training program ought to help Mr. Krueger organize his time and manage it better. He will need help on how to write reports that are to the point, brief, and timely. He will need help on managing his schedule so that he allocates enough time for report writing. When this kind of training is done side by side with a supervisor, it also gives the supervisor a bird's eye view of

what exactly the position requirements are and whether or not the employee can meet those requirements.

I would also recommend that Mr. Krueger's supervisor initially provide frequent check-ins with coaching by the supervisor. Initially I would suggest that these check-ins be less for feedback on performance and more for coaching of performance. Furthermore, I would recommend that the supervisor have a frank discussion with Mr. Krueger during the first few days of re-employment regarding the supervisory relationship. It would be good for the supervisor to acknowledge that there has been some difficult past history and that Mr. Krueger may come in with some negative expectations regarding the supervisor and the relationship with the supervisor. I would suggest that the supervisor directly state her expectation that they will have a cordial and respectful relationship during his tenure in that position. I would also recommend that his supervisor maintain specific and up-to-date documentation regarding Mr. Krueger's performance. I would recommend that any coaching or feedback sessions be documented with a follow-up memo that both can review.

Regarding Drs. Miezio and Wolfensohn's recommendation that Mr. Krueger return to work part-time initially, I recommend that he return on a full-time basis but that his duties and responsibilities be adjusted so that he may have ample time for appropriate training. Then I would recommend that his duties and responsibilities be increased over time.

If Mr. Krueger returns to his position, it is my opinion the Department can also expect the following. The Department can expect that Mr. Krueger's pattern of resistance and hostility to authority figures and supervisors will probably continue. This sort of a pattern is usually longstanding . . . It is unlikely to change . . . Thus, he will undoubtedly require more resources and more patience from the position supervisor. I believe the Department can also expect Mr. Krueger to continue having difficulty with blaming others for difficult situations. This tendency to externalize blame . . . may be less noticeable when there is less stress [but] is likely to become a problem again under more stressful circumstances. Likewise, Mr. Krueger's tendency to become hostile, confrontational and irritable is likely to continue. . . . As with the tendency to blame others, this tendency to irritability or hostility will likely become worse under more stressful circumstances. The Department can also expect that Mr. Krueger will have some difficulty in accepting the coaching and any kind of feedback. He appears to be very sensitive to any kind of criticism and reacts to this criticism by becoming hostile. Thus, as I said earlier, Mr. Krueger will require much more resource and patience from the supervisor than some other employees might require.

Finally, I believe the Department can expect that Mr. Krueger may have a rather uneven performance until he becomes highly comfortable with his responsibilities. He is likely to go through periods of future stress . . . undoubtedly also related to the high work load. I would not be surprised to see Mr. Krueger's interpersonal and performance difficulties return, given the work load expectations of the position. During periods of increased stress, the Department can expect Mr. Krueger to show difficulties in cognitive organizational tasks and in his interpersonal relationships on the job. Thus, on one hand, Mr. Krueger is probably intellectually capable of doing the tasks and has an appropriate high level of motivation and a high work ethic. On the other hand, his tendency to protect himself by blaming others and becoming irritable and hostile with others when he feels criticized or out of control will undoubtedly continue to affect his performance.

Van Vleck's memo to the file on Jan. 27, 1992 (Exh. C-26)

36. (SF) On January 27, 1992, respondent called a meeting of several management personnel to discuss Dr. Rifken's report of her evaluation of Mr. Krueger. One of the individuals who attended that meeting, Janet Van Vleck, DVR's Deputy Administrator, retained typed minutes of the meeting (Exh. C-26 & R-25), which read in part:

Upon reviewing the psychological evaluation report from Dr. Donna A. Rifkin [sic] . . . we determined that the two year accommodation to allow James Krueger to deal with his problems has not resulted in the hoped for outcome. The report indicates he will continue to have the same type of problems he had at that time if he returned to work in the job of an evaluator.

It was determined that we should look at other job options within the division and then within the department. . . . [The respondent] will seek a vacancy which would not be stressful, allows him to be in control, has very limited direction and supervision, limited interpersonal contact with clients, and for which he has the job skills. If a job is found, it will be Mr. Krueger's decision on whether or not he accepts it.

37. The following individuals attended the meeting on January 27, 1992: Ms. Van Vleck; Mr. Truesdell; Ms. Glenn; Mr. Mommaerts; Earl Kielley, Manager of respondent's Bureau of Personnel and Employment Relations; Spring Ferguson, respondent's Affirmative Action Officer; Barb Blatterman, DVR's Personnel Manager; and Paul Harris, respondent's Attorney.

38. Ms. Van Vleck prepared the note of the January 27, 1992 meeting per her usual practice. Specifically, she writes such notes so everyone at the meeting has the same understanding of the meeting and knows their role in taking care of the issue.
39. Ms. Van Vleck recalls that the January 27, 1992 meeting was long. The staff looked at Dr. Rifken's report (Exh. R-24), other available medical reports, and other pertinent documents such as the chronology kept by Ms. Deneka and Ms. Glenn. They discussed whether Mr. Krueger could return to his prior evaluator position. A consensus was reached that he could not. The job already had been vacant for 2 years leaving it undesirable to delay full performance in the position by such actions, for example, as providing one-on-one supervision and re-training for Mr. Krueger over a period of time to determine if he could achieve full performance. Also, Mr. Krueger's chances of achieving full performance appeared unlikely due to Dr. Rifken's report that DVR could expect continuation of many of Mr. Krueger's problems into the future such as resistance to evaluation of his job performance and potential problems dealing with a female heading the office. Dr. Rifken also felt the nature of the evaluator job could pose a problem for Mr. Krueger's successful performance, such as the high workload, the stress level, and frequent client contact. The option of finding Mr. Krueger an alternative position was discussed and Ms. Blatterman was asked to identify vacant positions within Mr. Krueger's geographic area with reference to factors noted in Dr. Rifken's report.
40. Ms. Blatterman checked all of respondent's vacancies within Mr. Krueger's geographic area at the pay range of his evaluator position as well as at one and two pay ranges below. The vacancies were analyzed according to factors mentioned in Dr. Rifken's report. (See Blatterman's worksheet at Exh. R-26, and summary of her findings at Exh. R-27.)

Norman-Nunnery letter of Feb. 4, 1992 (Re: decision that complainant could not return to Voc. Counselor 3 position and offer of demotion opportunity)

41. (SF) On February 4, 1992, Ms. Norman-Nunnery wrote to Mr. Krueger and informed him that, based on Dr. Rifken's report, respondent was not going to allow him to return to the evaluator position. Ms. Norman-

Nunnery stated that, given Dr. Rifken's recommendations in that report, his return to the evaluator position would cause an undue hardship upon DVR because of the need for specific training, indefinite close supervision, difficulty in organizing information, and his resistance to authority. Ms. Norman-Nunnery did offer Mr. Krueger the opportunity to voluntarily demote to a Disability Determination Specialist 1-Trainee (DDS) position in Madison. She enclosed a copy of the position description and told Mr. Krueger he needed to make a decision by February 14, 1992. (Exh. R-28)

42. Ms. Norman-Nunnery made the decision to offer the DDS-1 position to Mr. Krueger. She felt the DDS-1 position would be less stressful and have fewer client contacts consistent with criteria noted in Dr. Rifken's report. The DDS-1 position was the only position available for Mr. Krueger which fit the criteria noted in Dr. Rifken's report.
43. (SF) The DDS position offered to Mr. Krueger was in pay range 12-02. The maximum pay rate of the DDS classification at that time was \$14.017 per hour. According to Ms. Norman-Nunnery's letter, however, Mr. Krueger would eventually be able to attain his former pay.

Blatterman note of February 14, 1992 (Re: complainant's questions about voluntary demotion opportunity)

44. (SF) On February 14, 1992, Mr. Krueger called Ms. Blatterman to discuss the offer of the DDS position. Mr. Krueger told Ms. Blatterman he felt fit to return to the evaluator position. He also indicated he did not know how to appeal respondent's decision that he could not return to the evaluator position. Mr. Krueger told Ms. Blatterman he did not think the offer of a voluntary demotion was acceptable to him. (Mr. Krueger also says that he inquired as to whether it was an option for him to demote to a position as a Vocational Rehabilitation Counselor 1 or 2.)
45. Ms. Blatterman took notes of her February 14, 1992, telephone conversation with Mr. Krueger. (Exh. R-29) Her notes further indicate she offered to make arrangements for Mr. Krueger to meet with a supervisor the same afternoon to answer any questions he had about the demotion position. He said he did not have time that afternoon. She

also gave him Mr. Truesdell's telephone number and suggested that if Mr. Krueger wanted more information, he should call Mr. Truesdell.

Blatterman note of Feb. 17, 1992

46. On February 17, 1992, Ms. Blatterman added the following notation on the notes she took of her telephone conversation with Mr. Krueger on February 14, 1992. (Exh. R-29)

J.K. was also told by me to contact a union representative if he had questions regarding how to appeal and the process.

Feb. 14, 1992 telephone conversation between complainant and Truesdell

47. Very little exists in the record regarding this conversation. Mr. Krueger recalls Mr. Truesdell saying Mr. Krueger had nothing to appeal at the time. (Exh. C-35, p. 9)

Additional Background Information

48. (SF) On February 17, 1992, Mr. Krueger wrote to Ms. Norman-Nunnery and declined the offer to voluntarily demote to the DDS position. (Exh. R-30 & R-33) Mr. Krueger stated in his letter:

I understand my voluntary demoting myself would mean I sought or wished the change and was in agreement with the reasons you present for the alternative. Additionally I have been informed that a voluntary demotion may preclude my appeal of the content of your letter and return to my counselor position as recommended by [Drs. Rifken, Miezio and Wolfinsohn].

49. (SF) Mr. Krueger did not accept the offer of the DDS position (on February 17, 1992) because, at least in part, of the following reasons:

- a. He did not desire a career change, and accepting the voluntary demotion would leave him in a job he did not desire;
- b. He did not understand, and the respondent never made it clear, that the sole option to accepting the DDS position was discharge; and
- c. He did not know, and the respondent would not tell him, how, if he did accept the voluntary demotion, he could appeal the respondent's decision to not allow Mr. Krueger to return to his old position.

Norman-Nunnery letter of Feb. 18, 1992 (Re: extending deadline for considering offer of demotion)

50. (SF) On February 18, 1992, Ms. Norman-Nunnery answered Mr. Krueger's letter of the previous day. (Exh. R-31 & R-34) She informed him that accepting the voluntary demotion would not adversely affect his "appeal rights to the Personnel Commission under the Fair Employment Act . . .[A] voluntary demotion will not preclude your appeal rights under the circumstances . . .". She also extended the deadline for accepting the voluntary demotion to February 20, 1992.
51. (SF) Mr. Krueger did not reply to Ms. Norman-Nunnery's letter of February 18, 1992.

Norman-Nunnery letter of 2/26/92 and Termination

52. (SF) On February 26, 1992, Ms. Norman-Nunnery sent Mr. Krueger a discharge letter. (Exh. R-32) The letter stated in relevant part:

[Y]ou are being terminated as the result of two issues:

- Medical reasons, as determined by a physician in a letter dated January 10, 1992, preventing you from returning to your current job
- Refusal of accepting an alternative position

53. Mr. Krueger would have accepted the demotion opportunity to the DDS position if respondent had told him that termination would occur if he did not accept the DDS demotion.

Additional Information

54. (SF) Mr. Krueger suffers from depression and an obsessive-compulsive condition. There appears to be no dispute among the parties that he is handicapped.
55. Respondent was unaware of Mr. Krueger's handicap at least until his leave of absence began on January 8, 1990.
56. DVR had granted medical leaves for other employees, but no one's leave was as long as the leave time granted to Mr. Krueger.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to s. 230.45(1)(b), Stats.
2. Mr. Krueger is eligible for protection under the FEA due to his handicap. It is assumed for purposes of this decision that he also is eligible for protection against retaliation under the FEA.
3. Mr. Krueger has the burden to show that probable cause exists to believe the alleged discrimination occurred.
4. There is no probable cause to believe that FEA retaliation occurred in relation to any of the 9 hearing issues.
5. There is probable cause to believe that handicap discrimination occurred in relation to Mr. Truesdell's providing incorrect information about Mr. Krueger's appeal rights during a telephone conversation with complainant on February 14, 1992.
6. There is no probable cause to believe that handicap discrimination occurred in relation to the remaining hearing issues (issues other than described in the prior paragraph).

DISCUSSION

Legal Framework at Probable Cause Stage

This is a probable cause decision. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe the respondent probably discriminated or retaliated against the complainant. PC 1.02(16), Wis. Admin. Code. In a probable cause decision, the standard by which evidence is measured is not as demanding as that which is used at a hearing on the merits.

Handicap analysis:

In order to establish handicap discrimination, the record must show the following elements: 1) that complainant is handicapped within the meaning of the FEA, s. 111.32(8), Stats.; 2) that the employer took an adverse employment action against complainant because of his handicap; and 3) that the employer's action was not legitimate under the FEA. See, Samens v. LIRC, 117 Wis. 2d 646, 657-58 (1984), citing Boynton Cab Co. v. ILHR Dept., 96 Wis. 2d 396, 406 (1980).

Liability is not found where the employer establishes that its action was legitimate under s. 111.34, Stats. Specifically, the employer must show that it

took the adverse employment action because complainant's handicap was reasonably related to his ability to adequately undertake the job-related responsibilities of the position. The statutory text is shown below in pertinent part.

(2)(a) . . . [I]t is not employment discrimination because of handicap to refuse to . . . employ . . . or to discriminate against any individual in . . . terms, conditions or privileges of employment if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment . . .

(b) In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job . . . the present and future safety of the individual, of the individual's co-workers . . . may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment . . . of handicapped individuals in general or a particular class of handicapped individuals.

Accommodation analysis: Employers are required to reasonably accommodate an employe's handicap. Section 111.34, Stats., provides in relevant part as shown below.

(1) Employment discrimination because of handicap includes, but is not limited to:

* * *

(b) Refusing to reasonably accommodate an employe's . . . handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

The statute does not define reasonable accommodation as the option desired by the employe. The statute requires only that a reasonable accommodation be made. This is a question of fact to be determined on a case-by-case basis. McMullen v. LIRC, 148 Wis. 2d 270, 276-277, 434 N.W.2d 830 (Ct. App. 1988).

Retaliation analysis: Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of retaliation. If complainant meets this burden, the employer then has the burden of articulating a non-retaliatory reason for the actions taken which complainant may, in turn, attempt to show was a pretext for retaliation. See, McDonnell-Douglas 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).

To establish a prima facie case of FEA retaliation, 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.

Once a prima facie case is established, the burden shifts to the respondent to articulate a legitimate, non-retaliatory reason for the actions taken. If respondent does this, the burden shifts to complainant to demonstrate that the reasons articulated by respondent are a pretext for retaliation.

Analysis of Mr. Krueger's Claim of Handicap Discrimination

It is undisputed that Mr. Krueger is handicapped within the meaning of the FEA. Accordingly, the first element of a prima facie case for handicap discrimination is established. The next step is to determine whether the acts complained of constituted adverse employment actions as required to establish the second element of a prima facie case; and if so, to determine whether the acts were discriminatory under s. 111.34, Stats. Each action complained of is addressed below.

Mommaerts/Truesdell's "order" to return to work in September, 1991: The framing of this hearing issue is awkward. Mr. Truesdell did not order Mr. Krueger to return to work in September 1991. The only letter sent by Mr. Truesdell informed Mr. Krueger not to return to work until an accommodation analysis could be done. (See par. 29, Findings of Fact.) Mr. Mommaerts wrote to Mr. Krueger on April 8, 1991, stating reluctance to grant an additional six months' leave without first obtaining additional information from his physicians to justify such leave. (See par. 20, Findings of Fact.) The Commission concludes it is the Mommaerts' letter to which Mr. Krueger objects. The Mommaerts' letter announced no decision except a need for further medical information. Accordingly, it does not constitute an adverse employment action required for the second element of a prima facie case.

Norman-Nunnery order for Mr. Krueger to undergo medical evaluation: Ms. Norman-Nunnery made a decision that Mr. Krueger would

have to undergo a medical evaluation before respondent would consider returning him to work. The order affected a term or condition of employment and constituted an adverse employment action. The reasons for the order are noted in pars. 30-31 of the Findings of Fact and show the action was reasonably related to Mr. Krueger's ability to adequately undertake the job-related responsibilities of the evaluator position, within the meaning of s. 111.34(2)(a), Stats. Accordingly, the facts and circumstances are not strong enough in themselves to warrant a prudent person to believe that discrimination occurred.

Truesdell's November 12, 1991 letter to Dr Rifken: Mr. Krueger disputed the accuracy of information contained in Mr. Truesdell's letter and in the chronology attached to the letter. The record established such information was correct. (See pars. 32-34 of the Findings of Fact.) Even if Mr. Truesdell's letter were viewed as an adverse employment action (a debatable conclusion), the action was reasonably related to Mr. Krueger's ability to adequately undertake the job-related responsibilities of the evaluator position, within the meaning of s. 111.34(2)(a), Stats. Accordingly, the facts and circumstances are not strong enough in themselves to warrant a prudent person to believe that discrimination occurred.

Van Vleck's memo to the file on January 27, 1992: Ms. Van Vleck's usual practice was to summarize the content of meetings by memo. (See pars. 36-38 of the Findings of Fact.) The memo itself did not constitute a decision regarding Mr. Krueger and, therefore, cannot be characterized as an adverse (or even favorable) employment action. The memo content reflects the preliminary decisions made by respondent that Mr. Krueger could not return to the evaluator position and that a search would be made of available positions for compatibility with Dr. Rifken's report. Mr. Krueger contested those decisions when they became final and, accordingly, are addressed below as separate issues.

Norman-Nunnery letter of Feb. 4, 1992 regarding respondent's final decisions that Mr. Krueger could not return to the evaluator position and offer of demotion opportunity: Both final decisions constituted adverse employment actions. (See pars. 41-43 of the Findings of Fact.) However, such actions were reasonably related to Mr. Krueger's ability to adequately undertake the job-related responsibilities of

the evaluator and demotion positions. The actions were based upon Dr. Rifken's report which accurately reflected Mr. Krueger's abilities and difficulties. Accordingly, the facts and circumstances are not strong enough in themselves to warrant a prudent person to believe that discrimination occurred.

Blatterman notes of February 14 & 17, 1992: (See pars. 44-46 of the Findings of Fact.) Ms. Blatterman's attempts to record the content of her telephone conversation with Mr. Krueger do not constitute adverse employment actions.

Feb. 14, 1992 telephone conversation between Mr. Krueger and Truesdell: (See par. 47 of the Findings of Fact.) The focus of this allegation is unclear. It appears Mr. Krueger believes Mr. Truesdell provided incorrect information about his appeal rights (Exh. C-35, p. 9) which, if true, would involve an adverse employment action. This allegation was not addressed by respondent at hearing.

Mr. Krueger could have filed a complaint regarding Ms. Norman-Nunnery's decision that he could not return to his evaluator position after he received her letter dated February 4, 1992. Since the record does not contain any explanation why Mr. Truesdell provided contrary advice to Mr. Krueger on February 14, 1992, Mr. Krueger has met his burden at the probable cause level of proof to show that discrimination occurred.⁵

Norman-Nunnery letter of Feb. 18, 1992, extending deadline for considering offer of demotion: (See par. 50-51 of the Findings of Fact.) Ms. Norman-Nunnery's decision to extend the deadline for Mr. Krueger to consider the demotion opportunity may have been an employment action, but certainly could not be characterized as an adverse employment action. Rather, the decision favored Mr. Krueger by expanding his opportunity to consider alternative employment. Mr. Krueger's true dispute is with the decisions made that he could not return to the evaluator position and that he was offered a demotion, issues dealt with separately here.

⁵ Exh. C-35 was accepted in the record in lieu of some testimony from Mr. Krueger with the agreed-upon stipulation that the matters recited in Exh. C-35 were accepted as true. The matters addressed in this exhibit were numerous. Respondent's failure to have Mr. Truesdell address the telephone conference of February 14, 1992, may have been an oversight.

Norman Nunnery letter of 2/26/92 and Termination: The hearing issues included the 2/26/92 letter, as an issue separate from termination. The letter itself is indistinguishable as a hearing issue from the decision to terminate Mr. Krueger. (See pars. 52-53 of the Findings of Fact.) The decision to terminate him was an adverse employment action based on: a) his inability to perform the evaluator position which is a nondiscriminatory reason under s. 111.34(2)(a), Stats., and b) his refusal of the demotion opportunity, a decision made by Mr. Krueger and accordingly not an adverse action taken by respondent. Accommodation issues may be posed by these actions and are addressed in the following portion of this decision.

Analysis of Mr. Krueger's Accommodation Claim

Mr. Krueger wanted respondent to return him to the evaluator position apparently with the adjustments he requested on September 30, 1991 (see par. 28 of the Findings of Fact) or with the adjustments suggested by Drs. Miezio and Wolfensohn (see pars. 24 and 25 of the Findings of Fact). Respondent reasonably rejected these options as requiring too much supervisory time and resulting in delayed services to DVR clients. Furthermore, respondent reasonably concluded based on Dr. Rifken's report that significant problems would continue to exist if Mr. Krueger was returned to the evaluator position even if the adjustments suggested by Mr. Krueger and Drs. Miezio and Wolfensohn were met. (See pars. 35, 36, 39 & 41 of the Findings of Fact.)

Respondent attempted to reasonably accommodate Mr. Krueger's handicap, within the meaning of s. 111.34(1)(b), Stats., by offering him a demotion position which was compatible with Dr. Rifken's report. Mr. Krueger rejected the offered accommodation. He argued that such offer did not meet statutory requirements because respondent did not make it clear to him that termination would result if he rejected the offer. While the preferred practice may have been to clearly state the consequences of refusal in writing or orally, there is no such requirement in the FEA or in s. 230.37(2), Stats. Nor does respondent's failure to clearly state the consequences raise an inference of discrimination or failure to accommodate in this case. To the contrary, the record shows respondent treated Mr. Krueger fairly in all other regards and

provided an unprecedented medical leave period in excess of two years in hope that he would be able to return to work.

Analysis of Mr. Krueger's Retaliation Complaint

It is assumed for purposes of this decision that Mr. Krueger established entitlement to protection against retaliation under the FEA due to the union grievances he filed in January and February 1990. (See pars. 14-15 of the Findings of Fact.) The remaining portion of the first element of a prima facie case is to determine whether the alleged retaliator was aware that Mr. Krueger filed the grievances.

The alleged retaliators of the 9 hearing issues included Ms. Norman-Nunnery, Mr. Mommaerts, Mr. Truesdell, Ms. Van Vleck, and Ms. Blatterman. Of the alleged retaliators, the only person the record shows had knowledge of the grievances was Mr. Truesdell. The hearing issues involving Mr. Truesdell include the following: a) Truesdell's letter of November 12, 1991, to Donna Rifken, and b) Truesdell's conversation with Mr. Krueger on February 14, 1992. All other alleged retaliatory acts fail because the record does not indicate that the alleged retaliator was aware of Mr. Krueger's protected activity. Accordingly, only the 2 actions involving Mr. Truesdell as the alleged retaliator have potential to survive and are discussed in the following paragraphs.

Truesdell's letter of November 12, 1991, to Donna Rifken: Mr. Krueger disputed the accuracy of information contained in Mr. Truesdell's letter and in the chronology attached to the letter. The record established such information was correct. (See pars. 32-34 of the Findings of Fact.)

Further, Mr. Truesdell's letter contained no new decision regarding Mr. Krueger's employment. Instead, this was a follow up letter providing information to Dr. Rifkin, based upon Ms. Norman-Nunnery's prior order for Mr. Krueger to undergo a medical exam. Accordingly, this alleged action was not an adverse employment action as required to establish the second element of a prima facie case of retaliation.

Truesdell's conversation with Mr. Krueger on February 14, 1992: (See par. 47 of the Findings of Fact.) The focus of this allegation is unclear. It appears Mr. Krueger believes Mr. Truesdell gave him incorrect information about his appeal rights. The alleged act does not constitute an

employment action as required for the second element of a prima facie case of retaliation.

Even if the alleged act was deemed to be an adverse employment action the record evidence is insufficient to establish the third element of the prima facie case. Specifically, the record does not show that a causal connection existed between Mr. Krueger's filing of grievances in January and February of 1990, and Mr. Truesdell's opinion of Mr. Krueger's appeal rights given more than two years later with no intervening incident alleged to have been taken by Mr. Truesdell as the retaliator.

ORDER

That a status conference be scheduled to establish a date for a hearing on the merits in regard to the probable cause portion of this decision.

Dated _____, 1995.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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