STATE OF WISCONSIN — PERSONNEL COMMISSION

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WAYNE I. ZIMMERMAN,

Complainant,

v.

Chancellor, UNIVERSITY OF WISCONSIN-Madison,

Respondent.

Case No. 92-0224-PC-ER

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DECISION AND ORDER

This matter is before the Commission on the following issue:

> Whether respondent violated the Family Medical Leave Act (FMLA) (s. 103.10, Stats.) in connection with family leave taken by complainant that commenced in January 1992.

The parties have reserved the issue of appropriate relief.

FINDINGS OF FACT

1. The respondent's Department of Preventative Medicine is a subdivision of the University of Wisconsin Medical School. The chairperson of the Department is Donn D'Alessio.

2. The complainant was employed in the Department of Preventative Medicine from April, 1990 until November, 1992.

3. Among the various research projects being conducted by the Department during the relevant time period were:

 a. A project related to cardiopulmonary disorders during sleep and generally referred to as "SCOR." The overall director of this project was Jerry Dempsey. The complainant's contact person for this project was Terry Young.

 b. A project entitled "Wisconsin Incidents Cohort Registry of Type I Diabetes" which is generally referred to as the "Diabetes Registry." The principal investigator on this project was Dr. D'Alessio.

Kitty Allen was a co-principal investigator and Mari Palta an investigator on this project.

c. A project entitled "Risk Factors in Broncopulmonary Dysplasia" which was generally referred to as the "Newborn Lung Project." The principal investigator for this project was Mari Palta.

4. The appellant was appointed to a vacancy in the Department of Preventative Medicine by letter dated April 9, 1990. This appointment was for a 50% position and only ran through June 30, 1990, with the understanding that the appellant would be employed at 100% starting July 1st. In the original appointment letter as well as in re-appointment letters, the appellant was specifically advised that renewal of his appointment was "contingent upon available funding, program need and performance level."

5. The Position Vacancy Listing (Resp. Exh. 9) for the position filled by the appellant (#14875) listed the principal duties as follows:

> Systems management of VAX mini computer running VMS. Data base management for 3 large epidemiologic studies. Programming to maintain data quality. Development of interfaces between each study's data bases and statistical packages. Uploads and downloads of data between computers & data base systems. Programming using statistical software for report generation & data manipulation. Occasional programming in other languages such as Fortran or Pascal when necessary or more convenient. Assistance to research study staff members (of three projects) in the use of hardware and software. Maintenance and up-grading of hardware and software on each study' micro computers (mainly IBM PS/2:S). Planning for long range departmental computing needs.

At all relevant time periods, the complainant's actual supervisor was Mari Palta.

6. Complainant's responsibilities in his position were divided into two main functions: systems management (30%) and programming (70%). The systems management responsibilities were divided equally between the three studies, while the programming function was to be divided between the SCOR project (60%) and the Diabetes Registry (10%). The time allocations reflected the funding levels provided to the position from the three projects.

7. Complainant's SCOR work included moving a database maintained at the Physical Science Laboratory temporarily to another computer system on the UW campus and then to Preventative Medicine's own computer system and

completing the programming of that database. Complainant's Diabetes Registry work included extracting information contained in the WISAR format at the Vital Statistics Center and converting it so that it could be uploaded into an INGRES database system maintained in Preventative Medicine's own computers.

8. Complainant was periodically required to complete reports reflecting the time he worked on the various projects. For the six-month period ending December 31, 1991, the report reflected that he spent 10% on the newborn lung project, 20% on the diabetes registry and 70% on SCOR. Complainant signed this report on February 4, 1992, and by doing so confirmed that "the above percentage(s) represents reasonable estimates of work performed... during the period indicated." Ms. Palta co-signed the report on February 5, 1992, confirming that the percentages were reasonable estimates.

9. The complainant's actual time allocation was substantially in conformance with the report referenced in finding 8.

10. Ms. Allen was frustrated by the slow progress shown by complainant in his efforts to convert the Diabetes Registry data base from WISAR to INGRES.

11. In a request for a renewal grant for the Diabetes Registry Study, submitted on July 1, 1991, respondent listed a programming position to be filled at 55% for the one year period commencing May 1, 1992. This compares to the 20% rate which was the Diabetes Registry funding rate for complainant during his employment. The request resulted in a grant award on April 28, 1992.

12. Prior to November 13, 1991, Ms. Allen and Ms. Palta had a conversation in which they discussed the need to hire a person to spend additional time on the Diabetes Registry conversion.

13. In an E-mail message dated November 13, 1991, complainant informed Ms. Palta, as well as Mr. D'Alessio, Ms. Young and Ms. Allen, that his wife was due to give birth on December 21, and that he would be taking parental leave for one week after the birth and then would like to work half-time (i.e. afternoons only) for the subsequent 10 week period. Complainant also asked to work at home "for a couple of hours each morning if the department allows this." (Comp. Exh. 4)

14. In a letter to Ms. Palta dated November 27, 1991, Ms. Allen laid out what she expected complainant would accomplish on the Diabetes Registry project prior to and during the period of his leave. (Resp. Exh. 1, p. 21)

15. In a memo to complainant dated November 27, 1991, Mari Palta wrote:

> I have discussed the arrangements for your parental leave with Kitty and Terry. Our understanding is that you will distribute your 6 week leave as follows: 1 week full time leave following the birth and 10 weeks half time leave after that. We have discussed the option of working at home, but do not feel that this would be appropriate.
>
> Kitty has sent me the attached letter stating the expectations for what should reasonably be accomplished on the diabetes study in the near future. I suggest that you also soon discuss with Terry what her expectations are for the SCOR. She has mentioned to me that the machine generated sleep data is a priority. I know (from experience) how hectic things can get with a new baby, so it would be to everyone's benefit to have clear goals outlined before you take off. Please let me know if you have any questions or concerns.

16. Complainant's request to work at home was denied. Complainant's systems management work was inappropriate as work from home and there was no previous history of persons other than principal investigators working at home.

17. Ms. Palta also mentioned additional SCOR duties to the complainant in a memo dated December 27, 1991, and asked that complainant check with Ms. Young if he had not already done so.

18. By memo dated December 20, 1991, the complainant wrote Ms. Allen that he would "be working one day per week on Registry programming" and that this "matches the proportion of my pay contributed by the Registry."

19. Effective December 23, 1991, Joe Hodkiewicz was hired by the Department of Preventive Medicine as an Associate Systems Programmer at a 70% appointment, with 50% funding from the Diabetes Registry and 20% funding from the newborn lung project. Prior to his 70% appointment, Mr. Hodkiewicz had worked for the Department for 3 years on the newborn lung project as a student employe. During the period of his student employment, Ms. Hodkiewicz had worked for a period of no more than a couple of months on data conversion for the newborn lung project from the WISAR database to the

INGRES database. Mr. Hodkiewicz was assigned the following responsibilities for the 70% position:

> data base management for 2 epidemiologic studies, programming to maintain data quality, development of interfaces between each study's data bases and statistical packages, uploads and downloads of data between computers and data base systems, occasional programming in other languages such as Fortran or Pascal when necessary or more convenient, assistance to research study staff members in the use of hardware and software, maintenance and up-grading of hardware and software on each study's micro computers. Data base programming in a research environment and experience with INGRES and WISAR are required. Organization and problem solving are critical to this position. (Comp. Exh. 5)

Mr. Hodkiewicz was assigned to do certain portions of the Diabetes Registry data conversion work which had previously been assigned to, but not completed by the complainant.

20. Mr. Hodkiewicz's appointment was for 6 months, with the possibility that it might go longer depending on funding issues. Mr. Hodkiewicz ultimately worked at the 70% level until August of 1992, and then worked at 25% until November. During his employment period after June of 1992, all of his funding was derived from the Diabetes Registry project, which reflected his work during that period. At the time of Mr. Hodkiewicz's departure in November of 1992, the bulk of the work on the data conversion for the Diabetes Registry had been completed, but there was still substantial work to be done. Respondent hired another employe in a 50% position to continue the remaining work.

21. Complainant's child was born on December 31, 1991. Starting January 6, 1992, complainant took one week of full-time leave. Then, for the 10 week period from January 13 until March 23, complainant worked on a half-time basis. Complainant took off the remainder of these days as family leave.

22. During the period of his partial leave, complainant's half time work was consistent with both his position description and with his funding ratio of 70:20:10.

23. Complainant did not meet with Ms. Young, as had been requested in Ms. Palta's November 27 and December 27 memos until late in January, 1992. At that time, she gave him a tour of the "sleep lab." Complainant also talked

several times with another SCOR employe about the proposed SCOR duties for complainant.

24. On April 3, 1992, complainant met with both Ms. Young and Jerry Dempsey regarding the SCOR work. The work they described fell within the scope of the complainant's position description, set forth in finding 5 above. However, the proposed duties were also different from those which had previously been actually performed by the complainant in his position. The proposed responsibility was to develop a unique software program for the analysis of all of the biological data which was being gathered at the sleep lab. The SCOR project had previously employed someone on a nearly full-time basis for a period of two years on this particular responsibility. That person had left.

25. SCOR funding levels were such that respondent could only employ one SCOR programmer. The SCOR project was running a very large deficit during this period.

26. Shortly after the April 3rd meeting, Ms. Palta cautioned the complainant not to act rashly and reject the SCOR responsibilities.

27. In a memo to Ms. Palta dated Sunday, April 5, 1992, the complainant wrote:

> I do not feel that I will be able to effectively handle the added responsibilities of the SCOR project, whatever they may be. I was to have inform [sic] Terry & Jerry of my decision on Monday. But I now realize this is not my decision alone, that I need your approval.
>
> I do not believe that I have the temperment [sic] or training for these additional responsibilities. I also suspect that I may have understated the time requirements for the system management duties. I have contacted two other system managers on campus... for their estimates of the time requirements for managing a system this size. I am awaiting their replies.
>
> I also think we should meet to assign priorities to the list of tasks that [are] waiting to be completed. I will update the list and send you a copy. (Resp. Exh. 15)

Complainant later also informed both Ms. Young and Mr. Dempsey that he would not perform the duties.

28. Ms. Palta prepared a memo dated April 7, 1992 directed to Ms. Young and Mr. Dempsey regarding "Wayne's responsibilities." The document read as follows:

It is important that we be clear about exactly what we expect from Wayne Zimmerman for his 70% committment [sic] to SCOR. I have attempted to delineate expectations by individual discussions with Wayne and Terry, and in meetings of the Biostat Core.... The following areas of activity seem to be appropriate for the SCOR project at the present time:

1. Handle systems management of the VAX network as jointly required for activities in the supporting grants and for educational needs of departmental students.

2. Handle maintenance of the INGRES and SAS data bases as problems occur, or requests for changes are made by data entry, statistical staff, Terry or Jerry.

3. Program and implement uploading of machine scored data into SAS. Program and implement error checking routines for such data in consultation with Bob [Mulroy], Terry [Young], Jerry [Dempsey] and appropriate sleep lab staff.

4. Devise a system of notification, so that sleep lab data can be either automatically or manually uploaded whenever they are ready.

5. Handle uploading of survey data according to current procedures.

6. Become familiar with general structure of machine generated data to increase likelihood of detecting errors and to be able to communicate about problems in theses data.

7. Understand the machine scoring program sufficiently to be able to make at least minor changes.

8. Keep Bob informed of issues related to the uploading of machine generated data.

9. Act as technical expert in decisions concerning the transfer of sleep data to the VAX.

To be able to perform the above, it will be necessary to rely on the sleep lab to supply data on a timely basis (Bob's responsibility). It will also be necessary to provide sufficient documentation for the machine scoring program so that places to modify can be reasonably identified.

I have a feeling that there are other areas as well that fall somewhere in the domain between the biostat and sleep lab (maybe data handling and storage? maybe assuring that appropriate data management takes place at the 1st and 2nd pass levels?). We may wish to discuss these.

The responsibilities enumerated in the memo had all been discussed previously with the complainant. This memo was provided to Ms. Young and Mr. Dempsey but was never provided to complainant because Ms. Palta concluded that complainant had already definitively rejected the new SCOR responsibilities.

29. By letter dated April 24, 1992, Ms. Allen informed complainant that his programming for one of the databases in the Diabetes Registry Study was being reassigned from complainant to Mr. Hodkiewicz, and complainant was to work on two very short databases which could be completed quickly. (Comp. Exh. 7)

30. In a letter dated May 5, 1992, complainant was informed that his position would terminate November 6, 1992. (Resp. Exh. 10) The reason expressed in the letter was the "rapidly changing" programming needs of the SCOR and Diabetes Registry projects:

> The major changes in the projects' needs over the next several months will include a markedly reduced requirement for data base programming and a primary responsibility in programming for machine scoring of data generated by the instruments in the Sleep Laboratory.

31. Complainant understood that his non-renewal was due to his failure to accept the changed SCOR duties.

32. Respondent hired Tony Jacques to perform the SCOR programming duties. Mr. Jacques began working on July 10, 1992, and worked full-time on the SCOR project. He gradually assumed the complainant's continuing database responsibilities on that project but his primary responsibility was to further develop the sleep analysis program software which complainant had declined to perform in April of 1992. This involved categorizing the 16 channels of biological data generated during a sleep test at the sleep lab and revising, expanding and verifying the programming work already done in this area so that the computer could analyze the data. The Position Vacancy Listing for the position filled by Mr. Jacques established the employment period as July 10, 1992 through June 30, 1993, "with possibility of renewal." The PVL also reflected the following principal duties:

> Provide computer-related consulting and training to faculty, principal investigators and research staff on the use and appli-

> cations of the laboratory data analysis and data-based systems. Identify and develop software interfaces to produce reports needed by faculty and principal investigators. Identify and recommend computer hardware and software improvements and enhancements. Serve as a liaison with vendors on maintenance and trouble shooting issues.
>
> Develop computer programs for the analysis of data collected in lab experiments, specifically, signal processing and data base management programs.
>
> Maintenance and enhancement of existing programs such as the Sleep Disordered Breathing Analysis Program (SAP) and the NIH funded Specialized Center of Research data base system

The Jacques position received a SCOR contribution of $14,000 from the Veterans Administration. Mr. Jacques' employment was renewed, commencing July 1, 1993.

33. In a letter to Ms. Palta dated August 3, 1992, complainant sought to change his personal activity report for the 6 month period ended December 31, 1991, and described in finding 8. Complainant stated that his actual time allocation was as follows: Diabetes Registry 70%; Bronchopulmonary Dysplasia (Infant Lung) 10%; and SCOR 20%.

34. Complainant was one of three candidates interviewed in December of 1992 for the 50% Diabetes Registry position vacated by Mr. Hodkiewicz. The term of the position was until August 31, 1993, but would not be renewed. Complainant was not selected. The successful candidate, Ram Bhamidipaty, had worked in the position as a limited term employe beginning in late October, 1992.

CONCLUSIONS OF LAW

1. The complainant is eligible to file a complaint under the Family/Medical Leave Act.

2. The respondent did not violate the act with respect to family leave taken by complainant that commenced in January of 1992.

OPINION

The issue for hearing is not particularly clear in terms of what conduct the complainant contends violated the Family/Medical Leave Act (FMLA). In

his complaint filed on November 20, 1992, complainant alleged that the termination of his employment effective November 6, 1992 constituted retaliation for having taken family leave for the birth of his child. In an initial determination issued on March 15, 1993, the investigator concluded that there was an insufficient basis for concluding "even at the probable cause stage, that the respondent intentionally retaliated against the complainant for taking family leave when it decided not to renew his appointment in May 1992." The investigator then went on to find "no probable cause" in terms of respondent's assignment of work upon complainant's return from family leave.

In a letter to the Commission dated April 13, 1993, complainant appealed from the initial determination but referred only to the issue of the complainant's reinstatement upon returning from leave, and not to the termination issue. The letter stated in part:

> Complainant submits that the initial determination is based on a misunderstanding of the facts surrounding Mr. Zimmerman's alleged rejection of work offered on his return from taking family leave. Complainant submits that he has met his burden of establishing that the work the Department offered him was so ill-defined that he was incapable of knowing what position he should have accepted.
>
> Therefore, complainant requests a hearing to review this portion of the initial determination. (Emphasis added)

The issue for hearing, as set forth at the beginning of this decision, simply refers to whether respondent violated the FMLA, without specifically identifying the alleged illegal conduct. In his post-hearing briefs, the sole contention being made by the complainant appears to be that the respondent violated the law by not placing him in the same position or an equivalent one *when he returned from his Family Leave. It is that contention which is the* focus of this decision.

Employes returning to work after having taken family leave have rights under §103.10(8), Stats., in terms of the position to which they return:

> (a) [W]hen an employe returns from family leave... his or her employer shall immediately place the employe in an employment position as follows:

> 1. If the employment position which the employe held immediately before the family leave or medical leave began is vacant when the employe returns, in that position.
>
> 2. If the employment position which the employe held immediately before the family leave is not vacant when the employe returns, in an equivalent employment position having equivalent compensation, benefits, working shift, hours of employment and other terms and conditions of employment.

One of respondent's contentions is that because the complainant worked part time during the course of his family leave, the requirements of §103.10(8) do not apply. This contention is inconsistent with §103.10(2)(d), which states that an employe "may take family leave as partial absence from employment." Such a partial absence is still family leave. When an employe completes his or her partial leave and returns to work on a full-time basis, the requirements of §103.10(8) apply.

If the position formerly held by an employe returning from family leave is not vacant, the employe is entitled to placement in "an equivalent" position. The meaning of an equivalent position was explored by the Wisconsin Supreme Court in Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992). In that case, a reorganization had occurred while the employe was on family leave. Before the leave, Ms. Marquardt had been employed as Credit Manager, which included supervising four employes, contacting sales representatives, handling complaints, budgeting, supervising accounts receivable and employing a collection agency. The employe's new position upon returning from leave had no job title or job description and included processing and auditing invoices, supervising one employe, and approximately 25% clerical work. The court held the new duties were not equivalent to the old:

> [A]n equivalent employment position means a position with equivalent compensation, benefits, working shift, hours of employment, *job status, responsibility and authority.* The equivalent position need not include the same job duties, but the new duties must be equivalent in terms of significance to those performed prior to the leave. (Emphasis in original.)

The court's holding in Kelley has to be read in the context of §103.10(9), which provides that a returning employe is not entitled to "a right... or employment

position to which the employe would not have been entitled had he or she not taken family leave."

In the present case, the complainant was working on three research projects at the point he advised he was going to take Family Leave. Ms. Allen was dissatisfied with the way things were going on the Diabetes Registry Study, and shortly before the complainant was to take his leave, respondent hired an additional employe, Mr. Hodkiewicz, to do some of the data conversion responsibilities on that project. When complainant returned to full-time work on March 23, 1992, after taking partial leave, complainant was not reassigned the work which had previously been assigned to Mr. Hodkiewicz, but complainant did continue on other portions of the same data conversion work on that project. Complainant also performed SCOR work on his return to full-time status. His work during this period reflected the same 70:20:10 ratio as his funding level during the prior 18 months. In addition, respondent continued to pursue discussions with the complainant about changes in the SCOR work that was available. The new SCOR duties that were identified by respondent were different from those duties complainant had previously been assigned but were still within the scope of his job description. Respondent had provided complainant with substantial information about the goals of the new SCOR programming work. In a memo to his supervisor, complainant declined the new responsibilities. Complainant reiterated his decision in subsequent conversations with Mr. Dempsey and Ms. Young. SCOR funding limitations only permitted the employment of one programmer on that project. When complainant declined the new SCOR duties, respondent hired someone else (Tony Jacques) to do them and later assigned complainant's remaining SCOR responsibilities to the new employe. Complainant was given notice on May 5, 1992 of his non-retention effective November 6, 1992. He filed his complaint on November 20, 1992.

The complainant contends that prior to requesting leave, he was actually spending 70% of his time on the Diabetes Registry Study and 20% on SCOR, rather than 70% on SCOR and 20% on the Registry, which was the funding ratio. The Commission does not accept complainant's contention that the ratio had flipped. Complainant completed a report on February 4, 1992, verifying that he spent 70% on SCOR during the six-month period ending December 31, 1991. Ms. Palta, Ms. Allen, Mr. D'Alessio and Ms. Young all testified that the

numbers on the report were essentially accurate. Complainant did not suggest that his February 4th report was inaccurate until he prepared a letter dated August 3, 1992. This was well after he had been informed that his employment would be terminated in November of 1992, which undercuts the weight to be accorded to complainant's assertion. If, as complainant contends, the relative amount of time he was spending on SCOR and the Registry was an issue at the time, then his February 4, 1992, report has to be considered reliable.[1]

When he returned to work on March 23, 1992, the complainant returned to a position that was, in most respects, identical to the one he had been in prior to requesting leave. Immediately upon his return, he continued to perform systems management work, SCOR programming work and Diabetes Registry programming work. His duties were distributed according to the same 70:20:10 funding ratio that was in effect at the time of his leave request. However, the duties assigned immediately upon complainant's return were temporary, as indicated by the continuing discussions with the complainant about a change in SCOR duties. It is this proposed set of duties, which were still being hashed out when the complainant returned on March 23rd, that must be analyzed in terms of whether the complainant was being offered a position that was equivalent to his previous one.

Complainant raises two contentions regarding the duties which were discussed with him early in 1992. His first is that the duties were unclear. It is true that the discussions never reached the stage where an extensive written description of the responsibilities was provided to the complainant. However, the duties were discussed with the complainant on several occasions and by numerous people. Complainant's supervisor, as indicated by the document set forth in finding 28, was still willing to work on further definition of the responsibilities when the complainant definitively indicated that he would not perform them. The complainant's decision to reject the position, "whatever the duties," preempted any further efforts by the respondent to clarify the duties.

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[1]The Commission recognizes that there is also some circumstantial evidence which would tend to support a conclusion that complainant was spending significantly more than 20% of his time on Registry duties. However, this evidence is not sufficient to overcome the contrary evidence recited above.

In addition to his contention about vagueness, the only other argument raised by complainant relating to the issue of equivalency relates to funding concerns. Complainant bases his contention on a comparison of the revised SCOR duties with the collection of duties assigned to Mr. Hodkiewicz. Complainant contends that the "key difference" between the position held by Mr. Hodkiewicz[2] and the position reflecting the SCOR duties, was "their likely length of existence." (Response brief, page 8) If it were concluded that the SCOR responsibilities represented a less secure position than the one held prior to the leave, that would serve as a basis for a finding that the respondent had violated the FMLA. Johnson v. Goodyear Tire & Rubber Co., 790 F. Supp. 1516 (E.D. Wash. 1992) Complainant points to the existing deficit for the SCOR project and the fact that the Registry position had received a grant renewal which reflected a 55% funding level for a programmer. The proper basis for comparison is not between the position filled by Mr. Hodkiewicz and the position filled by Mr. Jacques, it is between the position filled by complainant before his leave request and the position he rejected upon his return. The key funding source for both of the latter two positions was SCOR. As noted in finding 25, the project was running a large deficit during the relevant period. It is difficult to say that the funding prospects for the prospective duties was any more tenuous than the funding for the complainant's pre-leave SCOR responsibilities. The importance attached by respondent to the new SCOR responsibilities is evidenced by the fact that it hired Mr. Jacques despite the deficit and at the same time that it continued to pay complainant with 70% SCOR funds. As noted in finding 32, respondent was able to obtain a $14,000 contribution from the Veterans Administration with respect to the Jacques duties.

Even if the funding issue is premised upon a comparison of the Registry duties performed by Hodkiewicz and the SCOR responsibilities later carried out by Jacques, the latter responsibilities would be considered equivalent. The re-

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[2]The Hodkiewicz position has never been filled at more than a 75% level, while the SCOR position to which Mr. Jacques was hired in July of 1992, has been filled at 100%. A 75% position clearly would not be considered equivalent to the position held by complainant prior to his leave. The complainant apparently feels that he would have retained some additional responsibilities, such as systems management, which were never assigned to Mr. Hodkiewicz, at the same time he acquired the additional Registry funding.

newal of the Registry grant was not acted upon by the National Institute of Health until after the complainant declined the SCOR duties. Although the request for the Registry grant renewal was submitted in July of 1991, it was not awarded until April 28, 1992. Both the Hodkiewicz and Jacques positions continued to exist through the date of the hearing. In addition, the evidence shows that the new configuration of SCOR duties will continue longer than the Registry conversion responsibilities assigned to Mr. Hodkiewicz. The PVL (Resp. Exh. 20) used to fill the vacancy created upon the departure of Mr. Hodkiewicz in November of 1992 indicated that the position would not be renewed at the end of the appointment on August 31, 1993. The PVL (Resp. Exh. 17) for the position filled by Mr. Jacques, states that the there is a "possibility of renewal" at the end of the initial appointment on June 30, 1993. This appointment was renewed, as indicated by Resp. Exh. 3. This evidence does not support the contention that the SCOR responsibilities rejected by complainant were less secure or part of a dead-end position.[3]

In his response brief, complainant also suggests that because he felt the Registry duties to be more desirable, the revised SCOR position should not be considered "equivalent." Again, the comparative focus must be between complainant's former position and the rejected position.

In summary, the respondent made an equivalent position available to the complainant upon his return from leave. The complainant chose not to accept that position while the specifics of the position were still being explored with him. While that was his prerogative, once he opted out, complainant had no continuing right to be placed in an equivalent position.

The respondent's decision to terminate the complainant's employment was the direct result of the the complainant's refusal to accept the new SCOR responsibilities and reflected the limits on the funding available from SCOR. There is no evidence that respondent violated the FMLA with respect to the decision not to renew the complainant's employment.

The complainant also contends that the respondent was required to reassign the Diabetes Registry conversion duties to him when Mr. Hodkiewicz's

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[3]Even if the Commission concluded that the complainant was spending 70% of his time, before his leave, on Registry work, it would still not provide a basis for concluding the respondent had violated the FMLA because the SCOR duties offered by respondent would also be considered as equivalent on the basis of funding prospects to a pre-leave position with 70% Registry responsibilities.

initial appointment ended on June 30, 1992, or when Mr. Hodkiewicz subsequently vacated the position.

As noted above, the FMLA does not give a returning employe a unilateral right to occupy his/her former position upon returning from a family leave. The statute specifically permits the employer to either return the employe to their former (vacant) position or to provide an equivalent position. According to the court in Kelley: "An employer is not stopped from reorganizing departments or making changes in job positions for legitimate business reasons during the time an employee is away on family or medical leave as long as the same position or an equivalent employment position is available for the employee upon return from leave." 172 Wis. 2d 234, 251. Here the respondent had already provided complainant with an opportunity to work in an equivalent position. Complainant rejected the offer. Once that occurred, the respondent did not have continuing responsibility to offer complainant other positions as they came available.

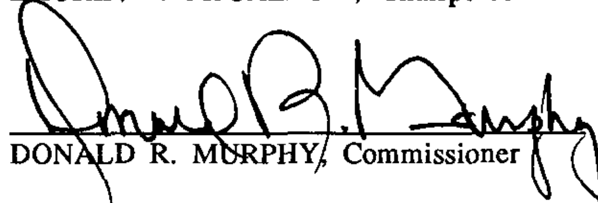
ORDER

The complaint filed under the Family/Medical Leave Act is dismissed.

Dated: June 21, 1994

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson



DONALD R. MURPHY, Commissioner

KMS:kms
K:D:Merits-fam/med lv (Zimmerman)

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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 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.