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CHRISTINE BOHL,

Complainant,

v.

Secretary, DEPARTMENT OF  
CORRECTIONS,

Respondent.

Case No. 93-0004-PC-ER

\* \* \* \* \*

DECISION  
AND  
ORDER

A proposed decision and order was issued on January 3, 1995. The parties were provided an opportunity to file written objections, but did not.

The Commission has reviewed the proposed decision and consulted with the hearing examiner. The following amendments are made for clarification.

1. In the last line on page 5 of the proposed decision, correct the spelling of the word "advise" to "advice".
2. In footnote 3 on page 5 of the proposed decision, add the word "normally", as shown below:  
  
"The use of the term 'discriminatory' in the context of an arbitration case is normally not the same as in the context of a case filed under the Fair Employment Act."
3. In paragraph 20 on page 7 of the proposed decision, change the spelling of Mr. "Nails" name to "Nehls".
4. In the second conclusion of law, add the word "credible" as shown below:  
  
"Ms. Bohl failed to meet her burden of showing, by a preponderance of the credible evidence, that DOC discriminated against her because of her sex when DOC terminated her services effective 11/24/92.

ORDER

That the proposed decision and order, as amended herein, be adopted as the Commission's final decision.

Dated February 20, 1995.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

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

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

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

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

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

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

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

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

2/3/95

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

CHRISTINE BOHL,

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v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 93-0004-PC-ER

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PROPOSED DECISION AND ORDER

Ms. Bohl filed a charge of discrimination with the Commission on January 6, 1993, which alleged that DOC suspended and later terminated her employment because of discrimination on the basis of sex and/or arrest record and/or conviction record. On May 22, 1994, an Initial Determination (ID) was issued which found No Probable Cause to believe that arrest/conviction record discrimination occurred and Probable Cause to believe that sex discrimination occurred in relation to her termination. Ms. Bohl did not appeal the no probable cause portion of the ID. Accordingly, the matter proceeded to a hearing on the merits regarding the probable cause portion of the ID.

The hearing issue was defined by the parties at a prehearing conference held on September 13, 1993, as shown below.

Whether respondent discriminated against complainant on the basis of sex in violation of the FEA with respect to her discharge on or about November 24, 1992.

A hearing was held in the above-noted case on October 6, 1994<sup>1</sup>, at the close of which DOC orally presented a closing argument. Ms. Bohl requested an opportunity to file a written brief which was received by the Commission on

<sup>1</sup> Ms. Bohl had been represented by counsel up to the hearing date. She appeared at hearing and informed the examiner that she planned to proceed representing herself (without counsel), which confirmed written notice received from her attorney the prior day.

October 20, 1994. Any written reply by DOC was due by November 15, 1994, but no reply was filed.

#### FINDINGS OF FACT

1. Ms. Bohl was employed by the Department of Corrections (DOC) as a Correctional Officer 2 at the Waupun Correctional Institution (WCI).
2. DOC terminated Ms. Bohl effective November 24, 1992, with notice provided by letter of the same date signed by Warden Gary R. McCaughtry. The termination letter (Exh. R-8<sup>2</sup>) provided, in part, as shown below.

I received the attached written report from Capt. Dean Fuller notifying me of your illegal conduct on November 5, 1992, in which you knowingly engaged in the possession, purchase, and use of cocaine base, specifically crack cocaine. The information provided in reports by the Madison Police Department indicate that you used incredibly poor judgement in that you knowingly engaged in unprofessional and illegal conduct. The reports from the other individuals arrested with you indicate that you were engaged in the possession and/or use of cocaine base.

A copy of the pre-disciplinary hearing on this matter conducted by Ronald Torsella, Supervising Officer 1 and Glenn Weeks, Personnel Manager, is also attached. This action on your part is a violation of Work Rules #1 and #5 of the State DOC, and a violation of the DOC Disciplinary Guidelines - Category C.

3. DOC work rules #1 and #5 are shown below. Dishonesty could be cited either under work rule #1 or #7. Fraternalization violations could be cited under work rule #1, too. (Exh. R-10):
  1. Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.

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<sup>2</sup> All references to record exhibits are to respondent's exhibits. Ms. Bohl failed to exchange any exhibits prior to hearing, but brought a few to the hearing which were reviewed off the record. The exhibits she brought to hearing were found to be the same as some of respondent's exhibits. Respondent agreed to allow Ms. Bohl to use respondent's exhibits for those she brought to hearing. Accordingly, no exhibits are marked as complainant's in the record.

3. Disorderly or illegal conduct including, but not limited to, the use of loud, profane, or abusive language; horseplay; gambling.
4. DOC's reasons for termination included Ms. Bohl's illegal conduct involving crack cocaine and her untruthfulness about her involvement to the police and to DOC. Fraternalization was not a reason for termination.
5. Illegal conduct is a potential Category C violation under DOC's Disciplinary Guidelines (Exh. R-11). Category C violations are the most severe types of violations under DOC's guidelines and may be subject to termination on the first incident. Under DOC's guidelines, illegal conduct as a Category C violation requires a "relatedness" to exist between the employment and the illegal conduct.
6. DOC's disciplinary process is described in the guidelines (Exh. R-11, p. 1-2) as shown below in pertinent part.

#### DISCIPLINARY PROCESS

Provisions of state civil service/employment relations statutes and collective bargaining agreements establish the right of management to take disciplinary action against an employee for just cause.

The DOC follows a philosophy of corrective discipline: except for serious or repeated offenses, disciplinary action is taken for the purpose of correcting employee conduct. Prevention of continued misconduct, not punishment, is the goal.

The administration of the following guidelines will serve to ensure that employees are treated fairly and consistently and still allow the flexibility for serious infractions to be addressed with a more serious disciplinary response.

When a violation occurs it is incumbent on the appointing authority to give proper and serious consideration to the following:

- (1) The identification of aggravating or mitigating circumstances surrounding the violation;
  - (2) based on such circumstances, the determination that just cause exists and discipline is warranted; and
  - (3) The presence of aggravating or mitigating circumstances require discipline that is more or less severe than that provided on the guidelines.
7. The November 5, 1992 incident which lead to Ms. Bohl's discharge, started with a trip from Beaver Dam to Madison with her best friend,

- Deborah, where they planned to meet Deborah's boyfriend for dinner. Ms. Bohl and Deborah stopped at a bar in Madison where Deborah introduced her to George. They rode with George to a destination in Madison where George left the car, entered a residence, made a crack-cocaine purchase and returned to the car with the drug. Ms. Bohl was driving. Stops were made in unsuccessful efforts to obtain a pipe with which to smoke the drug and to pick up another male, Michael. Ultimately, they stopped to purchase soda, the cans of which could be modified for the purpose of smoking crack cocaine. Ms. Bohl lent Deborah \$40 without knowing Deborah would use the money to contribute toward the drug purchase. At hearing, Ms. Bohl admitted to smoking the crack cocaine once.
8. Police officers observed Ms. Bohl and the others in the car after the drug purchase. The police searched the car and found the drug. Ms. Bohl denied drug use in the car or by her own person, in response to questions from the police. Ms. Bohl and the three others in the car were taken to the police office for questioning after which a decision was made to formally arrest and charge Ms. Bohl. She was then taken to a local hospital where blood was withdrawn and tested positive for cocaine base.
  9. All four individuals were charged with violations stemming from use/possession of cocaine base. Ms. Bohl was charged as a party to the crime of cocaine base possession, a misdemeanor.
  10. Deborah had been convicted of embezzlement, a fact of which Ms. Bohl was aware. However, Ms. Bohl was unaware that as of 11/5/92, Deborah remained on probation. It is Deborah's probationary status which formed the basis for DOC's potential concerns about fraternization. (See par. 4 above.)
  11. A substantial relationship existed between the circumstances of Ms. Bohl's illegal behavior and the circumstances of her job as a correctional officer at WCI. As explained by Warden McCaughtry, many inmates at WCI were incarcerated for drug-related behavior and drug-use within the institution was a monitored problem. Ms. Bohl's illegal involvement with drugs would create a great credibility issue between herself and the inmates, which would destroy her role-model function

- as a correctional officer. Her illegal drug involvement also could have a negative impact on inmates' rehabilitation efforts by giving inmates yet another excuse; such as: "How can you expect me (inmate) to stop using drugs when your own staff uses them?"
12. Ms. Bohl's involvement in the incident also created credibility issues between Ms. Bohl and DOC. DOC concluded that Ms. Bohl was untruthful to the police and to DOC in denying use of crack-cocaine on the night of her arrest. DOC's belief was reasonable in light of the positive blood test taken on the same night as the arrest.
  13. Ms. Bohl filed a union grievance over the termination action. The arbitrator's decision was issued on June 12, 1994 (Exh. R-1). The arbitrator found that Ms. Bohl's termination was for just cause. The arbitrator noted that other correctional officers arrested for off-duty conduct were allowed to remain in state service, but rejected Ms. Bohl's argument that her termination was thereby "discriminatory"<sup>3</sup>. Rather, the arbitrator agreed with DOC that the other incidents were sufficiently different from Ms. Bohl's situation.
  14. Prior to the arbitration proceeding and throughout DOC's investigation of the matter, Ms. Bohl had denied smoking cocaine base on the evening of her arrest. The arbitration hearing (on 2/7/94) was the first time DOC heard her admit that she used the drug on the evening of her arrest. Ms. Bohl stated at the Commission hearing that the only reason she smoked the drug on the night of her arrest was because one of the men in the car asked if she was a police officer when she initially refused to smoke. Ms. Bohl said she smoked once thereafter to allay his concerns and her fears. The examiner did not believe this testimony. The stated excuse seems plausible at first blush, and would have provided "mitigating circumstances" under DOC's disciplinary policy. The examiner did not believe the testimony because it is too difficult to understand why she would not have raised this defense to the police or to DOC if it were true. She testified that her denial to the employer during its investigation was based on the advise of her attorney. Even if

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<sup>3</sup> The use of the term "discriminatory" in the context of an arbitration case is not the same as in the context of a case filed under the Fair Employment Act.



this were true, it does not explain why she would not have mentioned the mitigating factors to the police, prior to receipt of the alleged advice from her attorney.

15. Ms. Bohl's claim of sex discrimination is based upon her belief that other correctional officers who also had been charged with misdemeanors were not terminated by DOC. Each example provided is discussed in the following paragraphs.
15. Exh. R-12, is a termination letter dated 4/25/88, which indicates that a DOC Correctional Officer, Mr. Bontemps, was terminated for violation of work rule #5, under circumstances similar to Ms. Bohl's case. Specifically, he was arrested for possession of drugs and was untruthful with DOC regarding his involvement. This discharge was from Columbia Correctional Institution, a different institution than where Ms. Bohl worked.
16. Exh. R-13, involves discipline imposed by the same warden as involved in Ms. Bohl's case for a correctional officer at WCI, Mr. VandenBoom, who was caught in the illegal behavior of gambling with inmates and exchanging cigarettes with inmates as *in kind* payment of gambling debts. Gambling is an inmate population problem monitored at WCI. An investigatory interview was held at WCI on 11/6/90, at which time Mr. VandenBoom denied involvement. However, the next day he telephoned requesting a second meeting which was held the same day. He was truthful at the second meeting. In Warden McCaughtry's disciplinary letter dated 11/21/90, he informed Mr. McCaughtry as follows:

I received the attached written report . . . notifying me of your engaging in gambling with an inmate . . . and of your failure to be truthful in this matter.

. . . These actions on your part are in violation of Work Rules #1, #5, #7 and #15 of the State DOC, including violation of DOC's Fraternalization Policy.

I cannot over-emphasize the seriousness of this illegal behavior. This extreme lack of judgement on your part compromises the credibility of staff and could jeopardize the safety and security of the institution. I have, however, considered the fact that . . . you did subsequently provide truthful information, in mitigating the severity of your discipline.

You are hereby notified that you are suspended from employment . . . for a period of ten work days. . . . I would like to emphasize that I place great importance on the fact that, subsequent to your initial questioning on this incident, you recognized the importance to be forthright concerning the information you provided. Had you not done so, the level of discipline resulting would have been far greater. . . .

17. Ms. DeMotts, a DOC employe, was terminated for violation of DOC's fraternization policy. Ms. Bohl felt her own behavior was less severe than Ms. DeMotts' because Ms. Bohl's behavior did not occur on the job. However, Ms. Bohl's behavior was substantially related to her the circumstances of her job, as noted previously in paragraph 11.
18. Ms. Schroeder, a DOC employe, was charged with possession of cocaine in her own apartment. Ms. Schroeder took the resulting discipline to arbitration where it was overturned. Ms. Bohl felt her own situation was less offensive than Ms. Schroeder's because Ms. Bohl told DOC that police contact occurred, whereas Ms. Schroeder did not.
19. Ms. Arndt, a DOC employe, was terminated for violation of DOC's fraternization policy. Ms. Bohl felt she was less culpable than Ms. Arndt because Ms. Arndt's offense occurred at work whereas Ms. Bohl's occurred off DOC's premises.
20. Tod Nails, a DOC employe at the Dodge Correctional Institution was arrested and convicted of battery which occurred while he was off-duty and off DOC premises. DOC terminated Mr. Nails. An arbitrator reinstated his DOC employment finding that his off-duty misconduct was unrelated to the job.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to s. 230.45(1)(b), Stats.
2. Ms. Bohl failed to meet her burden of showing, by a preponderance of the evidence, that DOC discriminated against her because of her sex when DOC terminated her services effective 11/24/92.
3. Sex did not play any part in DOC's decision to terminate Ms. Bohl, effective 11/24/92.

## DISCUSSION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981).

Ms. Bohl, at least arguably, has established a prima facie case of discrimination. Her claim of discrimination based on sex is a basis protected under the FEA. She was qualified for her correctional officer job at DOC, as evidenced by her successful tenure up to November 5, 1992. Lastly, she was discharged for an incident which did not occur while she was performing services for DOC.

DOC, however, articulated legitimate reasons for terminating Ms. Bohl. Specifically, her off-duty conduct and subsequent dishonesty to management about her involvement created a significant negative impact on her work obligations to DOC as detailed in paragraph 11 of the Findings of Fact. Further, Ms. Bohl failed to show that DOC's articulated reasons were a pretext used to camouflage unlawful discrimination taken against herself.

The example she gave regarding Mr. Nails (see par. 20 of the Findings of Fact) showed that DOC was consistent in terminating male, as well as female, employees whose off-the-job illegal conduct was considered job-related. The fact that an arbitrator disagreed about job-relatedness in Mr. Nails' case is irrelevant to Ms. Bohl's charge of discrimination where the arbitrator was interpreting rights under the union contract (not under the FEA) and where the arbitrator in Ms. Bohl's own case affirmed DOC's decision to terminate Ms. Bohl. In short, DOC treated them both the same when the off-duty illegal conduct of Mr. Nails (battery) and Ms. Bohl (crack-cocaine possession) were considered by DOC to be sufficiently job-related.

Mr. VandenBoom's situation was similar to Ms. Bohl's in that Mr. VandenBoom's gambling was considered as illegal behavior and he initially was untruthful to DOC about his involvement. (See par. 16 of the Findings of Fact.) However, Mr. VandenBoom received a penalty less than termination because he decided to tell DOC the truth about his involvement in illegal

activities. Ms. Bohl, on the other hand, remained untruthful with DOC throughout its investigation. Ms. Bohl disagrees that DOC should have placed so much value on Mr. VandenBoom's truthfulness as to warrant a 10-day suspension for him as compared to her termination. The value of truthfulness is for DOC management to determine and unless circumstances suggest unequal or otherwise discriminatory application of the value management placed on truthfulness, the Commission will not second guess the value assigned by DOC.

In her post-hearing brief, Ms. Bohl argued that the differences between her situation and Mr. VandenBoom's also suggests discrimination based on sex. Specifically, Ms. Bohl notes that Mr. VandenBoom's incident involved the following factors which should have resulted in his receipt of discipline at least equal to Ms. Bohl's: 1) his illegal conduct occurred on the job, whereas her conduct was away from the employer's worksite, and 2) he was cited for more work rule violations than she was. This argument shows another example of how Ms. Bohl would weigh certain factors of an offense differently than DOC did. The fact remains, however, that Mr. VandenBoom told DOC the truth which was a factor DOC weighed heavily in his favor and a factor not present in Ms. Bohl's case.

Ms. Bohl also provided testimony regarding three females (DeMotts, Arndt and Ehler) terminated by DOC for violation of DOC's fraternization policies. The examples, however, are different from Ms. Bohl's situation because they involved violation of different conduct from Ms. Bohl's illegal drug possession. Further, the examples depart from the traditional examples of unequal treatment which involve members outside the complainant's protected group. The fraternization examples, unlike traditional examples of unequal treatment, involved members of the same sex as the complainant.

In her post-hearing brief, Ms. Bohl argued that the three female examples of fraternization show DOC's harsher discipline of females when compared to Mr. VandenBoom's 10-day suspension which also contained an allegation of fraternization in addition to gambling with inmates. The comparison may provide some inference of less-favorable treatment to females with fraternization violations. However, Ms. Bohl was unable to show that any possible discrimination in fraternization violations had an impact on the discipline she received for her illegal possession of crack-cocaine and subsequent untruthfulness about her use of the drug.

ORDER

That Ms. Bohl's case be dismissed.

Dated \_\_\_\_\_, 1995.

STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

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