

notes and asked the same questions repeatedly. As a result, Ms. Voigt advised Mr. Dvoraczky that complainant did not appear to be making progress and she was wasting her time.

3. In addition to the training provided by Ms. Voigt, training was provided to complainant by Daniel Hutchens, a Financial Specialist in the Pre-Audit Unit, which related to processing a variety of payment types, processing encumbered purchase orders and contracts, processing the error list, and following audit trails using voucher numbers from encumbrance documents.

4. The Financial Specialist position was considered a paraprofessional position. The Auditor position was considered a professional position. Other than the unit supervisor position, complainant's position held the highest classification level in the unit.

5. After the two-week training session, Ms. Voigt continued to receive from complainant questions relating to routine mail distribution and document processing matters which had been explained to complainant during training. Ms. Voigt gave to complainant several copies of the purchasing exemption list from the State Procurement Manual and explained the use of the list to complainant, but complainant continued to seek approval for vouchers which this list indicated didn't require approval of the Purchasing Section. Ms. Voigt continued to receive calls and other contacts from other DNR employees relating to invoices that had been misrouted by complainant and voucher transactions that complainant failed to resolve for them. Ms. Voigt continued to resolve these problems herself until the unit supervisor position was filled by Barbara Kneer.

6. During Mr. Dvoraczky's supervision of complainant, complainant indicated to him that a previous injury to her back, hip, and leg prevented her from travelling long distances without taking a break. Mr. Dvoraczky explained to complainant that the DNR's Employee Assistance Program and Affirmative Action Office were resources available to her. Complainant did not disclose to Mr. Dvoraczky any other limitations or request any other accommodations. In February of 1990, complainant was assigned to do one audit in a district office. Mr. Dvoraczky advised Harry Ogden, a co-worker who was to accompany complainant on the trip to make sure and take regular breaks, but did not tell Mr. Ogden why.

7. During Mr. Dvoraczky's supervision of complainant, Cathy Costa, a Financial Specialist with DNR's Western District office in Eau Claire, brought to

his attention concerns she had relating to complainant's work performance. Ms. Costa's primary concerns were that complainant did not respond to inquiries promptly enough, i.e., she expected a response within a few hours due to the nature of the inquiries but complainant on several occasions took days to respond. As a result, Ms. Costa began forwarding her inquiries to Financial Specialists Hutchens or Capper within the Pre-Audit Unit whose response time met or exceeded her expectations.

8. During Mr. Dvoraczyk's supervision of complainant, Mark Kuechler, a Senior Accountant in DNR's Accounting Systems Section, Bureau of Finance, brought to his attention concerns he had relating to complainant's work performance. Mr. Kuechler's primary concerns were that complainant did not follow established procedures, mis-matched codes, incorrectly recorded codes, and took a longer time than others in the unit to correct errors on the error list. When Mr. Kuechler became aware that complainant had made an error, he would discuss it with her and show her how to correct it. Mr. Kuechler also audited the work of all other employees in the Pre-Audit unit and complainant committed more errors than any of these other employees.

9. During Mr. Dvoraczyk's supervision of complainant, Mr. Hutchens brought to his attention concerns he had relating to complainant's work performance. Mr. Hutchens' primary concerns were that complainant failed to identify numerous errors on documents such as those relating to the proper identification of the vendor or proper recording of the relevant contract number, made errors in identifying the correct effective date of a transaction, failed to promptly respond to inquiries from district offices so the districts would circumvent complainant and contact Mr. Hutchens, and failed to properly handle carryover expenditures so Mr. Hutchens would have to correct them.

10. During Mr. Dvoraczyk's supervision of complainant, Sheila Mittlesteadt, Program Assistant, Accounting Systems Section, DNR Bureau of finance, brought to his attention concerns she had relating to complainant's work performance. These concerns related to numerous errors complainant continued to make in routing invoices, and complainant's lack of knowledge and skill in using the personal computer despite training in addition to that provided other unit staff. Complainant had the same personal computer set-up as others in the unit. Complainant was the only employee in the unit who had significant problems learning or using the personal computer.

11. Mr. Dvoraczky resigned effective December 15, 1990. James Stenz, Audit Section Chief, performed the duties of the Pre-Audit Unit supervisor position until a new supervisor was appointed effective August 11, 1991. During Mr. Stenz's supervision of the unit, Delores Monday, another employee in the unit, brought to his attention her concerns relating to complainant's work performance; Mr. Hutchens reiterated the concerns he had earlier brought to Mr. Dvoraczky's attention; and Ms. Voigt advised that she was continuing to handle tasks assigned to complainant's position either because complainant would bring a matter to her for assistance even though she had instructed complainant numerous times how to handle such matters, or because other DNR employees asked Ms. Voigt to handle a matter because complainant had not handled it promptly or properly or had not handled similar matters promptly or properly in the past. These employees expressed to Mr. Stenz their concerns that complainant's technical knowledge and knowledge of applicable procedures was not adequate to carry out the duties of her position, and that she had poor interpersonal, communication, and listening skills.

12. In January of 1991, complainant attended a meeting convened at least in part for the purpose of discussing the Internal Revenue Service's (IRS's) requirement that the vendor names and taxpayer numbers (employer identification number or social security number) on 1099 forms filed by the DNR match the vendor names and taxpayer numbers on W-9 forms filed by vendors. No mismatches had yet been reported by the IRS to the DNR but Mr. Stenz emphasized it was important that the DNR obtain from vendors their taxpayer number and the name they were using for IRS reporting purposes. Putting an incorrect taxpayer number on a 1099 form would result in a mismatch. Such a mismatch would be reported to the DNR by the IRS and could result in the imposition of a penalty. Due to differences in the way vendors reported to the IRS and to the DNR, and to the failure of DNR's reporting system to be able to catch such differences, the IRS reported 45 DNR mismatches in 1990 and imposed a penalty of \$3300. This penalty was waived when the DNR explained the reason for the mismatches to the IRS. The DNR files 750-800 1099 forms each year. Although mismatches also resulted in subsequent years, the DNR has not had to pay a penalty. Complainant does not have responsibilities relating to the filing of 1099 forms and attended no further meetings relating to 1099 mismatches. It was complainant's understanding of the 1099 problem

that there was information missing from 1099 forms, not that there was mismatched information. Mr. Stenz did not suggest that the DNR invent taxpayer numbers to include on 1099 forms.

13. Due to the dual nature of his assignments during this period of time, Mr. Stenz did not follow up on such complaints because he did not feel he had the time to investigate them thoroughly. Mr. Stenz completed a review of complainant's work performance in June of 1991 which indicated that complainant had met the overall objectives of her position, had been "dedicated to getting the work done in a quality and timely manner," had "worked effectively with district employees and been responsive to their questions," had met the objective of insuring encumbrances were accurately recognized on accounting records, and demonstrated a "desire to achieve improvements and is flexible in her thinking." Mr. Stenz also noted that complainant needed to "further develop leadwork/interpersonal skills." Mr. Stenz was flexible and lenient in completing all the performance evaluations for Pre-Audit employees at this time since he was not close to the unit's day-to-day operation.

14. Barbara Kneer was appointed to the unit supervisor position effective August 11, 1991.

15. Upon assuming the duties of the unit supervisor position, Ms. Kneer was assigned by Mr. Stenz to review what he perceived to be the primary problem areas: uneven workload distribution, inconsistency in quality of work product, low unit morale, and reports of ineffectiveness of lead worker. Based on her review, Ms. Kneer recommended to Mr. Stenz that the lead worker assignment be removed from complainant's position; that the workload be more evenly distributed within the unit by, among other things, reducing the number of areas for which the Hutchens position was responsible and increasing the number of areas for which complainant's position was responsible; and that complainant's position be assigned duties more consistent with the classification level of her position. As a result, on or before September 17, 1991, complainant's position description was re-written to remove lead worker responsibilities and to add responsibility for developing audit policies and procedures and for auditing employee moving expenses. In addition, a decision was made at this time that responsibility for handling more complex processing transactions would be assigned to complainant's position.

This did not necessitate a change in the language of either position description.

16. On September 17, 1991, Mr. Stenz and Ms. Kneer met with complainant to discuss these changes in her assignments. Complainant did not agree that these changes should be made. Ms. Kneer met with complainant at complainant's request several times after this meeting to answer complainant's questions and concerns.

17. In a memo to complainant dated October 2, 1991, Ms. Kneer summarized the meeting of September 17, 1991. This memo stated as follows, in pertinent part:

We discussed the restructure of the unit, specifically, restructure of your position as follows:

1. The lead worker role/function will be eliminated. Employees will report directly to me, the unit supervisor, on all matters. I will be responsible for scheduling overflow work and scheduling work in cases of vacations, sick leave, etc. If I am not at work and an employee calls in sick, it will be your responsibility to review that employee's work area and process any priority items. The reasons for eliminating this aspect of your position description are as follows:

a. It is my preference to manage the unit in a "hands-on" fashion with employees reporting directly to me. This will not only help me learn each employee's job duties but will also enable me to more effectively supervise the unit as a whole.

b. As it is currently written, your Position Description could fit into the new Financial Specialist series that is being established through the fiscal survey. It is our intention to keep your position in the Auditor series by incorporating more duties consistent with the Auditor 3 classification.

c. As Jim discussed, the lead worker concept was not working.

2. Additional duties consistent with an Auditor 3 classification will be assigned including assisting me with the formulation of audit policies and procedures. It is our plan to utilize your skills and training more effectively by assigning duties and responsibilities that focus more on audit functions and policy development.

3. As we discussed, district reviews need to be performed on an ongoing basis. Due to a management decision, district program/preaudit delegation reviews were not carried out during the 1990-1991 fiscal year. As such, we would like to

complete a full round of district reviews as soon as possible and develop a schedule for periodic, timely reviews thereafter. As discussed in your current position description, you will be taking a lead role in these reviews. I will also be participating as will other selected staff members. As we discussed in our meeting, we do not anticipate changing the percentage of your job description dedicated to the district review process (currently 25%) at this time. It was also mentioned that the DNR financial environment will be changing, particularly when the accounts payable system is installed. At that time, remote transaction entry will increase which will call for an increase in on-site reviews at the district level.

4. Specific processing responsibilities will be assigned as the unit is restructured.

5. I will edit your current Position Description to delete lead worker responsibilities and add other responsibilities which are consistent with the Auditor 3 classification as we discussed. The initial updated Position Description will be a draft copy. As we discussed, you will have an opportunity to review and suggest changes to the draft before finalization.

18. During the discussion of on-site district reviews at the September 17, 1991, meeting, complainant expressed her concern that riding long distances in a car could be a problem for her due to a back condition. Complainant explained that car travel would not be a problem if she could stop every hour to get out of the car and walk around. Mr. Stenz and Ms. Kneer indicated that this was acceptable to them.

19. Complainant prepared and issued a handwritten memo dated August 9, 1991, to Central Office Contact Personnel and District Office Personnel which stated as follows:

Subject: Thank You

The financial year end close was a success!
Thank you for your continued cooperation and efforts!

Please feel free to contact me or any of our qualified staff regarding: Accounts Payable; Accounts Receivables; Contracts; Travel; or other financial issues.

Copies of this memo were directed to Margie Devereaux, the Director of the Bureau of Finance; Mr. Stenz; Ms. Kneer; the Pre-Audit staff; Ron Semmann, Administrator, DNR Office of Planning and Analysis; and "Buzz" Besadny, the DNR Secretary.

20. When Mr. Stenz became aware of his memo, he was very concerned because the close-out of the fiscal year was a Bureau-wide responsibility, not the sole responsibility of the Pre-Audit unit, and there may have been problems with the close-out of which complainant was not aware; the memo looked and sounded very unprofessional; and complainant had not consulted with him before she issued the memo.

21. At the meeting of September 17, 1991, this "thank you" memo was discussed. Complainant explained that she had issued a similar memo the year before at Mr. Dvoraczky's direction but she was never able to produce a copy of such a memo and Mr. Stenz was not aware that any such memo had ever been issued in the past.

22. In response to the "thank you" memo, Mr. Stenz issued a "letter of instruction" to complainant dated September 17, 1991, which stated as follows, in pertinent part:

In going through my mail that accumulated during my absence I was disturbed when reading your recent August memorandum of "Thank You". Although the memo was presumably well intended, I am concerned with the style, content and distribution of such a memo. Based on this determination, all future correspondence that you author which does not pertain to a specific pre-audit issue(s) involving an individual/organization should be cleared with Barbara Kneer or me prior to finalization. The point here is to prevent distribution of memoranda having policy implications, top management notifications or widespread circulation without appropriate supervisory review.

By following the above procedure adequate opportunity will exist for supervisory review.

Your compliance with this Letter of Job Instruction is expected and will be appreciated.

23. Mr. Stenz had consulted with Ms. Kneer and James Federhart of DNR's personnel unit before issuing this letter of job instruction. Both Ms. Kneer and Mr. Federhart agreed that the letter should be issued. This letter would not be placed in complainant's personnel file.

24. On January 23, 1992, Ms. Kneer met with Penny Kanable and Sheri Stach of the Bureau of Air Management. Ms. Kanable and Ms. Stach had requested the meeting to discuss problems they were experiencing with complainant's work performance. These problems included: having to ask complainant for information several times before it was received, receiving

communications from complainant which were confusing and unclear, receiving communications from complainant through the mails rather than over the phone which cause prompt payment concerns, having bills repeatedly mis-routed to them by complainant, performing tasks complainant failed to perform, and complainant sending materials back to them for modification after they had made the changes she had originally directed. Ms. Stach and Ms. Kanable also provided to Ms. Kneer written examples of some of these problems and explained that they had begun circumventing complainant by obtaining the information themselves or by contacting other employees in the Pre-Audit unit.

25. On January 27, 1992, Ms. Kneer met with complainant to discuss the concerns expressed in her meeting with Ms. Stach and Ms. Kanable, show her copies of the documents they provided to illustrate their concerns, and provide her with a letter of job instruction which related primarily to answering preaudit questions by phone instead of by notes sent through the mail, and to achieving a shorter turnaround time in her responses to inquiries.

26. Early in February of 1992, Ms. Kneer directed Mr. Hutchens to provide his recommendations relating to the most effective means of transferring the 90/95 fund responsibilities from Mr. Hutchens to complainant. In a memo to Ms. Kneer dated February 14, 1992, Mr. Hutchens recommended that the transfer be accomplished in stages, specified the order such stages should take, and recommended that training should be provided at each stage. The 90/95 fund processing duties were among the more complex processing duties performed by the Pre-Audit unit.

27. In a memo dated February 14, 1992, Ms. Kneer gave the following assignment to complainant:

Assignment: Write a comprehensive report discussing the Federal Express Delivery Service problems covering the below-listed items at a minimum. Write a summary page briefly outlining the problem, the alternatives and the proposed solution.

Phase 1:

- I. The Problem.
 - A. What is the problem?
 - B. What are the causes?
 - C. What has been done in the past to remedy the problem?

- II. Possible Alternatives
 - A. List each possible alternative
 - B. Detail the pros and cons of each alternative
 - C. Include research information (E.g. who you got information from etc.)

- III. Recommendations
 - A. Recommended course of action
 - B. Implications of implementing recommendation

Phase 2:

After a course of action has been agreed upon by management, write a policy for agency-wide procedures. Develop procedural steps for implementation.

This assignment was consistent with Ms. Kneer's intention, as communicated to complainant in the meeting of September 17, 1991, to assign complainant to assist Ms. Kneer in developing audit policies and procedures.

28. Complainant was involved in a car accident on February 15, 1992, and did not return to work until February 24, 1992. When complainant returned to work after her accident, she wore a cervical collar and a back brace for several weeks. Other than the wearing of the cervical collar and back brace, there were no other outwardly obvious manifestations of complainant's injuries. In addition, complainant did not describe to her supervisors any symptoms she was experiencing or any limitations on her activities, or request any accommodations. Complainant did indicate that she would need to use leave time for medical appointments.

29. On March 18, 1992, Ms. Kneer met with complainant to review a draft copy of the 90/95 fund training plan and to give complainant an opportunity to comment on it. This plan listed key job areas; performance objectives and standards for each area; a description of training materials that would be provided for each area; a timetable of training dates, review dates, and expected progress for each area; and accuracy and timeliness requirements for each type of transaction.

30. In a meeting on March 25, 1992, Ms. Kneer provided complainant a copy of the final 90/95 fund training plan which incorporated complainant's comments as well as complainant's request to extend the training period from two months to three months due to the scheduling of her medical appointments.

31. Mr. Hutchens conducted his first 90/95 fund training session with complainant on March 4, 1992. During this training session and all following sessions, Mr. Hutchens provided detailed written and oral instructions and written examples, answered any questions complainant presented, and provided feedback to complainant as he observed her perform the processing. Ms. Kneer was also present during these training sessions. During one of the earlier sessions, when Mr. Hutchens was showing a written example to complainant, Ms. Kneer observed that complainant was taking notes and not looking at the example. Ms. Kneer suggested to complainant that it would be advisable for complainant to review the document with Mr. Hutchens as he was explaining it and to take notes after this review was completed.

32. Mr. Hutchens had wanted to compete for complainant's Auditor 3 position in 1989 but was unable to due to a change in the classification of the position from Auditor 2 to Auditor 3. Mr. Hutchens was very upset about this. Mr. Hutchens was responsible for 90/95 fund transaction processing from 1986 to 1992 and would like to have continued with the assignment because it was one of the more challenging and interesting aspects of his position. During his 90/95 fund training of complainant, Mr. Hutchens was going through a difficult time in his life adjusting to a wheelchair and was on occasion impatient with those with whom he was in contact. After his 90/95 fund training of complainant was completed in July of 1992, Mr. Hutchens continued to process the most complex 90/95 fund transactions. Mr. Hutchens was routinely assigned to perform special projects.

33. After the March 4 training session, complainant was assigned the processing of certain transactions of the type which had been reviewed during this session. On or around March 18, 1992, Ms. Kneer prepared a written review of complainant's performance in regard to the processing of these transactions which stated as follows, in pertinent part:

First batch processed by Nancy 3-5-92: Nine vouchers were processed in this batch. Five of these vouchers had incorrect effective dates (invoice date should be used). Thought effective date procedures differ slightly from non-90/95 fund procedures, oral instructions were given during the training session to use invoice dates, examples showed invoice dates, and written instructions with one of the examples specifically stated that the invoice date should be used for the effective date.

Eight of the nine vouchers processed also had incorrect PMN's. All of the nine vouchers processed were routine vouchers for which specific examples were given to Nancy at the initial training session. Correct PMNs are clearly noted on the examples. In addition, oral instructions at the training session specifically discussed the correct PMNs to be used. Finally, Nancy was given instructions to look up all codes.

Performance for the initial stage of this assignment is unacceptable. Clearly written instructions and examples and oral instructions were not followed.

Second batch processed by Nancy 3-16-92: 21 vouchers processed, one auditing error. Effective dates and codes were all correct in this batch. One voucher had an individual's name on the top line of the address instead of "Register of Deeds". Individual names must be crossed off in cases like this. This procedure is the same in non-90/95 funds so this was an audit step that was overlooked rather than not known. One error in a batch of 21 is an acceptable error rate at this point, however, since the primary objective is accuracy, Nancy should be sure so carefully go through each audit step for each voucher.

34. On March 25, 1992, complainant met with Ms. Kneer to discuss the March 18 evaluation as well as the final draft of the training plan (See Finding of Fact 31, above). During this meeting, complainant questioned Ms. Kneer's authority to evaluate complainant's performance more frequently than annually. In addition, complainant and Ms. Kneer discussed issues of accommodation. In a memo to complainant dated March 27, 1992, in which Ms. Kneer summarized the March meeting, she stated as follows in regard to the accommodation issue:

When Jim Stenz and I discussed your position description with you in September and October of last year, you indicated travel was a problem because you have a disability regarding your back. We agreed to the accommodation of stopping approximately every hour on trips so you could get out and walk around.

During the 3-24 [sic]-92 meeting, you asked for some flexibility on the dates in the training plan due to your medical situation from the car accident you were in. I agreed that, if you have medical appointments or otherwise need to be absent from work for medical reasons, we could adjust the time frames by a couple of days, depending upon the circumstances. In order to adjust the time frames, you need to inform me ahead of time that you are taking medical leave. I will adjust the time frames accordingly based on legitimate medical needs. If you have need for any other accommodations, please complete the attached Disability Accommodation Request Form (DER-DAA-10) and submit the form

to Julie Miller, the Department's Equal Opportunity/Affirmative Action Officer.

Though we did not discuss this in our 3-25-92 meeting, I would like to remind you of the availability of the Department's Employee Assistance Program (EAP) to assist you in resolving any personal problems which may be affecting your job performance and conduct. The program is voluntary and strictly confidential. You may contact Jeff Carroll, EAP Director in Madison, at (608) 266-2133 or any DNR Employee Assistance Coordinator.

35. On or around March 19, 1992, complainant submitted written questions to Ms. Miller, DNR AA/EEO Officer, and, after that date, presented additional questions to Ms. Miller over the phone. In a memo dated March 27, 1992, Ms. Miller addressed these questions as follows:

This is in response to your written inquiries dated 3/19 on performance evaluations, harassment and reasonable accommodations.

First, regarding performance evaluations, it is DNR policy to have an annual performance review. This is a minimum standard. It does not necessarily mean a supervisor is limited to one. Supervisors may wish to conduct more structured evaluations or coaching sessions periodically as their needs may dictate. The performance review and feedback you're currently receiving from Barb Kneer is not in violation of the manual code.

Second, you asked about harassment. Feedback on work performance does not fit the legal definition of harassment. You mentioned that during these discussions that you were subjected to swearing. You also mentioned that you addressed this directly with Barb at the time. Unless this is a chronic problem that does not improve with your request for the behavior to cease, it does not constitute harassment. Please review the attached manual code for more details.

Finally, there is a special manual code on requesting an accommodation for a disabling condition. Any employee that wishes to request such an accommodation should put it in writing using a special form (both are attached.) It is then reviewed to determine if it is, in fact, reasonable. Sometimes during this review it is necessary to verify the condition with the health care provider and/or discuss directly the condition more fully, the effects of necessary medication and employer/employee expectations with the doctor. At this point we'd need more specific information from you as to what type of accommodation you are seeking.

36. During the period of complainant's 90/95 fund training, she met with Ms. Kneer at least every other week to review and discuss the written

progress/performance evaluations prepared by Ms. Kneer. In general, these evaluations indicated that the quality of complainant's work was satisfactory although concerns were expressed in certain of these evaluations relating to the length of complainant's processing turnaround time and to occasional minor errors.

37. Complainant submitted to Ms. Kneer her first draft of the Federal Express report (See Finding of Fact 28, above) on March 9, 1992. After their review of this draft, Ms. Kneer and Mr. Stenz met with complainant to explain that the report was unsatisfactory and to suggest ways to approach the assignment and improve the report. Complainant's draft failed to address each of the areas in Ms. Kneer's memo of assignment, failed to research and clearly define the nature and extent of the problem, failed to explore more than one alternative to the current procedure, and failed to sufficiently research and discuss the feasibility and impact of any alternative. Both Ms. Kneer and Mr. Stenz considered the draft an unacceptable work product. Complainant submitted to Ms. Kneer a second draft of the report on or around April 27, 1992. Ms. Kneer met with complainant on June 2, 1992, to discuss the draft report and to provide complainant a lengthy memo explaining the shortcomings of the draft and making specific suggestions on how such shortcomings should be addressed. This second draft report did not fully develop or explain or research the existence, nature, cause, or scope of the problem; how the problem had been addressed in the past; did not clearly delineate alternatives or sufficiently explain their practical implications; presented contradictory findings; and failed to clearly present a recommendation or to explain the ramifications of the recommendation made. Both Mr. Stenz and Mr. Kneer considered the second draft report an unacceptable work product. Complainant submitted her final draft report to Ms. Kneer on or around June 15, 1992. Mr. Stenz and Ms. Kneer met with complainant on June 16, 1992, to discuss the draft report and to provide complainant a memo explaining the shortcomings of the draft. This final draft report had many of the same shortcomings as the first and second draft reports and failed to answer many of the questions posed in the other feedback memos or to follow up on suggestions made in such memos. This final draft report did not provide respondent a usable work products and did not evidence the type of technical, research, or analytical knowledge or skills expected of an employee in an Auditor 3 classification.

38. In April of 1992, the Department of Employment Relations (DER) completed a personnel management survey of related positions, including complainant's, and reallocated complainant's position to the Auditor-Objective level. This classification was in the same pay range (pay range 13) as complainant's Auditor 3 classification. Ms. Kneer, during the survey, had recommended that complainant's position be classified at the Auditor-Journey level (pay range 14). Complainant appealed the reallocation of her position. Ms. Kneer did not support complainant's appeal because she did not believe that complainant was performing at the Auditor-Journey level. Complainant's position was reallocated to the Auditor-Journey classification based on a settlement with DER. The presence or absence of lead work duties did not affect the level of classification within the Auditor series.

39. On or around May 14, 1992, complainant was assigned a special project relating to work study student payments. In a memo dated May 21, 1992, complainant provided to Ms. Kneer her first draft report. This draft report was difficult to follow, incorporated information obtained from the DNR employee who had been responsible for work study payments to date but little original research or analysis, and failed to set forth a clear recommendation or discussion of the practical effect of any recommendation. In a memo to complainant dated August 5, 1992, Ms. Kneer summarized their meeting of that date relating to the report and made specific suggestions relating to how it could be improved. On August 20, 1992, complainant submitted to Ms. Kneer a second draft report which showed that complainant had done some additional research following up on Ms. Kneer's suggestions but little original analysis. Ms. Kneer advised complainant in a memo dated September 11, 1992, that this second draft report met the minimum requirements of the assignment, and made specific comments and suggestions, as a means of assisting complainant in developing her professional skills, on what in the report represented a good work product and how other areas in the report could have been improved.

40. During her supervision of complainant, Ms. Kneer received unsolicited reports relating to complainant's work performance, including the following:

- a. Dan Drager, Accountant-Advanced, Budget Section, DNR Bureau of Finance, reported that complainant used incorrect class codes; referred unresearched and unresolved work problems to him which were her responsibility; and was very

combative and argumentative, failed to follow instructions and procedures, and refused to acknowledge her errors;

b. Mark Kuechler, Accountant-Senior, Accounting Systems Section, DNR Bureau of Finance, reported that complainant failed to follow proper procedures, continued to make errors in translating DNR to Department of Administration (DOA) codes and errors in processing encumbered payments, and did not process the error list in a timely manner despite his repeated instructions to her on proper methods and procedures;

c. Dan Hutchens reported that others were asking him to resolve issues with vouchers and encumbrances even though they were complainant's responsibility because they failed to get adequate service from complainant, and that he was continually correcting errors that complainant was making on vouchers and encumbrances and re-training her;

d. Sheila Mittelstaedt, Program Assistant, Accounting Systems Section, DNR Bureau of Finance, reported that complainant continued to mis-route phone bills, calling card bills, and computer bills despite repeated instructions to complainant in regard to such routing; that complainant failed to adequately research routing questions; and that complainant continued to have problems using her personal computer despite additional training;

e. Kathy Costa, Financial Specialist, DNR Western District office, reported that complainant did not provide timely, consistent, or correct responses to her inquiries and, as a result, she discontinued contacting complainant and referred her inquiries to others in the Pre-Audit unit, especially Dan Capper and Dan Hutchens who provided very timely responses;

f. Mary Ellen Franson, Finance Supervisor, Southeast District office reported that complainant failed to provide timely responses to phone inquiries and often appeared to fail to understand the substance of the inquiries, and, as a result, she discontinued contacting complainant and referred her inquiries instead to Ms. Voigt, Mr. Hutchens, and Ms. Kneer.

g. Pauline Volden, Financial Specialist, DOA Bureau of Finance, reported that complainant continued to make numerous errors on 90/95 fund processing including duplicating encumbrances which caused suspended checks, and created a great deal of extra work for herself and Mr. Drager;

h. Patricia Hillestad, Management Services Section Chief, DOA Division of Facilities Development, reported that complainant failed to provide complete and timely responses to inquiries relating to payments, failed to resolve problems with certain 90/95 fund transactions, and appeared to fail to understand concepts and issues relating to bonding transactions.

i. Dennis Sheldon, Operations Unit leader, Accounting Systems Section, DNR Bureau of finance, reported that complainant made many errors in converting DNR codes to DOA codes and in batching, both of which required a great deal of extra work for his unit;

j. Diane Barman, DNR Bureau of Law Enforcement, reported that complainant on numerous occasions mis-routed invoices to her which should have been routed to other units.

41. During her supervision of complainant, Ms. Kneer provided frequent written and oral feedback and training relating to the subject matter of these complaints as well as to other errors and performance problems of which she became aware. During her supervision of complainant, Ms. Kneer did not receive similar complaints relating to the performance of any other Pre-Audit unit employee, and observed relatively few errors committed by these other employees.

42. On or around June 18, 1992, Ms. Kneer completed a written evaluation of complainant's work performance for the period July 1, 1991 through June 30, 1992, which stated as follows, in pertinent part:

[Key job area = Performance of compliance auditing of District Operations and internal reviews of central office operations] Due to a management decision, this function was not performed. It is anticipated that district reviews will be performed in the next fiscal year.

[Key job area = Assist in development of policies, procedures and programs for central and district offices] This objective has not been met satisfactorily. A project assigned to develop procedures for delivery services was returned to Nancy twice because the work product was unsatisfactory. While the final draft of this report did show some improvement in readability and organization, the report was still lacking sufficient information to determine an appropriate course of action. Recommendations made by Nancy appear inappropriate for the scope of the problem and diversity of users. Another smaller project on work-study procedures was assigned. This work product also required additional work in order for it to be a usable product.

[Key job area = preaudit of vendor invoice vouchers, travel vouchers, rush vouchers, and land purchases and grant-in-aid payments] Nancy has taken over responsibility for processing 90/95 Fund transactions during this period. Regular reviews were performed biweekly over the training period which showed some concerns over accuracy and timeliness, however, Nancy has shown improvement and is performing this task in a satisfactory manner. Other specific preaudit assignments such as vehicle vouchers and large short forms are being handled timely

and in an acceptable manner. The volume of work performed in the overall area of preaudit of vouchers is of concern. Because two of Nancy's Worker Activities (District Reviews and Moving Expense) were not performed, more of her time was available for carrying out the objectives in the voucher preaudit area. The overall objectives are not met with regard to quantity of work.

After two letters of job instruction and further training, Nancy has shown improvement in areas of customer service and communications. She has corrected the problems previously noted and puts forth good effort to provide service to customers who call or stop in the office. These objectives have been met.

[Key job area = Preaudit of encumbrance transactions and their recognition on accounting records] Primary duties in this area relate to 90/95 encumbrance processing. As noted above, improvements in this area is noted and these tasks are being performed satisfactorily. Objectives met.

[Key job area = Performance of special projects are assigned] Nancy is dependable in her follow-up of vendor research questions assigned by supervisor. Larger special assignments given such as the Delivery Service project and work study project (discussed above) were not completed satisfactorily. This objective has been met with regard to day-to-day assignments but has not been met overall.

[Key job area = Audits and processes authorized employee moving expense report and related third party invoices] By management decision, Nancy has not been given this responsibility at this time. It is anticipated that Nancy will take over these duties early in the next fiscal year.

Several changes have occurred over this review period relative to Nancy's job duties and responsibilities. Nancy has exhibited a willingness to adapt to the changes and incorporate them into her overall routine. She consistently puts in extra effort when required and is willing to follow through on issues until resolved. Nancy has also shown a strong desire and willingness to improve her overall performance.

Areas in need of additional improvement include: 1) judgment skills; 2) analytical skills; 3) time management skills; and 4) written communication skills. Concerns relating to time management skills relate to the quantity of work produced, with specific reference to the volume of vouchers processed in conjunction with other responsibilities. The need for improvement in the other skills listed above is more evidenced in the special projects regarding policy development that Nancy was assigned.

43. Complainant refused to sign this performance evaluation and filed a written response to it. In this response, complainant commented, in regard to

the evaluation of her performance on special project assignments, that "These work reports and assignments were additional duties and assigned approximately at the same time as my car accident or thereafter, shortly. These are extenuating circumstances, as I have been working under the handicap of after effects of a severe car accident injury, which has me still in a great deal of pain."; and that, "At the DNR, I was not trained in Lotus, and yet, expected to develop a computerized accounting system."

44. In the resume she submitted as part of her application for the Auditor 3 position, complainant indicated that she was "proficient" in microcomputers and main frames, including Lotus 1, 2, 3.

45. On March 18, 1993, Ms. Kneer met with complainant to discuss a Wisconsin Bell billing statement that Ms. Kneer felt complainant had handled improperly. Complainant became upset during this meeting. Ms. Kneer later learned that complainant submitted a request for four hours of sick leave for the remainder of the day on March 18 and attributed the sick leave request to her February 15, 1992, car accident. At no time prior to or during the meeting had complainant indicated that she felt ill or intended to request sick leave for that day. As a result of these circumstances, Ms. Kneer contacted James Federhart of the DNR personnel unit to discuss complainant's use of sick leave. Mr. Federhart reviewed complainant's use of sick leave, concluded that the frequency and length of time was high, and recommended that complainant be required to provide medical verification. Such a request for medical verification was made and complainant was advised by Ms. Kneer that her request of March 18 and any subsequent requests for sick leave would be tentatively approved pending receipt of the medical verification. Complainant was advised of the tentative approval of such leave on or before March 26, 1993.

46. The request for medical verification was dated March 26, 1993, and asked for the following information:

- 1) What were the injuries and symptoms that Nancy received from her 2-15-92 car accident and are these injuries and symptoms still present?
- 2) If the symptoms of these injuries are still present, what impact do these symptoms have on Nancy being able to perform her work duties?

3) If the symptoms of these injuries are still present, with what frequency and duration might I expect Nancy to be absent from work?

4) If the symptoms of injuries sustained in the car accident are still present, what is your prognosis for her complete recovery and/or discontinued need for absences related to these injuries?

5) Nancy has indicated that it has been necessary for her to be absent from work 1 to 2 times per week for between 1 to 4 hours per occurrence since 2-15-92 for doctor's appointments related to the car accident. Will Nancy need to continue with medical appointments with you or for therapy prescribed by you and, if so, what pattern of absences can I expect? Specifically, how many appointments do you expect will be necessary for Nancy to see you per week and how many appointments will be necessary for therapy prescribed by you per week?

6) On March 18, 1993, around 11:00 a.m. I met with Nancy to discuss a work assignment. At this time she gave no indication that she was feeling ill. Approximately 30 minutes later I found a leave request slip on my desk from Nancy that stated she was ill due to her 2-15-92 car accident and needed to take the rest of the afternoon off (4 hours sick leave). What was the nature of Nancy's illness that prevented her from performing her job duties and how was it related to the 2-15-92 car accident?

7) Under what circumstances would the symptoms of Nancy's injuries relative to the accident be such that I should expect sudden onsets of symptoms that would cause her to be unable to perform her job duties and to require use of leave time on short notice?

8) How far in advance are Nancy's medical appointments normally scheduled (appointments with you or for therapy prescribed by you).

47. In a memo to Ms. Kneer dated April 8, 1993, complainant stated as follows:

Enclosed is a note from Dr. Beyler concerning the week of March 18-22, 1993. The information that you requested on your letter dated March 26, 1993, is private and confidential. Therefore, the note from Dr. Beyler should be sufficient.

In the last couple of months, I have only been taking approximately an hour and fifteen minutes per week to see a Doctor. This is limited time off, which is a small part of earned sick leave. Therefore, this should not interfere in planning the work week.

48. Attached to complainant's memo was the following letter dated March 30, 1993, from Michael Beyler, complainant's chiropractor:

Nancy Rufener has been under my care for her spinal condition.

Last week her spinal symptoms intensified while she was working. This resulted in her leaving work on Thursday, March 18, 1993. She went home to rest her back and put ice on it.

She is currently being seen once a week which requires her to leave work one hour and fifteen minutes earlier to make her scheduled appointments.

I would hope that the sick leave she has accumulated will cover her time lost at work.

If you have any further questions please don't hesitate to call me.

49. From February 17, 1992, through March 17, 1993, complainant requested and used 257.55 hours of leave--143.05 hours of sick leave and 114.50 hours of annual, personal holiday or Saturday holiday leave. Virtually all of the sick leave and much of the other leave was attributed by complainant to her car accident. Complainant used leave other than sick leave for reasons she related to her car accident at least in part because of her low or sometimes negative sick leave balance.

50. The parties stipulated to the following sick leave usages by certain other employees of the Pre-Audit unit:

Delores Monday: 1991--Not available
1992--18 hours
1993--retired

Jim Capper: 1991--Not available
1992--75.5 hours
1993--77 hours

Joan Kranzesch: 1991--Not available
1992--125.25 hours
1993--111 hours

Dan Hutchens: 1992--28 hours
1993--29 hours

51. Mr. Federhart and Ms. Kneer accepted Dr. Beyler's response to their request for information and approved complainant's sick leave requests which

had been tentatively approved, and so advised complainant on April 16, 1993. Respondent did not deny any leave requests submitted by complainant, did not question any of complainant's leave requests prior to that of March 18, 1993, and did not question any of complainant's leave requests after receipt of Dr. Beyler's letter of March 30, 1993. After December of 1992, complainant primarily received treatment for her condition from her chiropractor. Ms. Kneer did not ask any employee other than complainant for medical verification of their use of leave.

52. In a memo dated March 18, 1993, Ms. Kneer recommended to Bruce Braun, DNR Deputy Secretary, that complainant be placed on a Performance Improvement Program. This type of program was authorized by DNR Manual Code 9126.11. In her memo, Ms. Kneer summarized the problems with *complainant's work performance as reported to her by others and as observed by her*, the continuing nature of these problems despite frequent and detailed feedback and re-training, the effect of complainant's frequent errors on the morale and productivity of the unit as a whole and on the unit's relationships with other offices and agencies, and complainant's apparent lack of understanding of basic auditing principles and procedures as evidenced by the types of errors she continued to make and by her interactions with Ms. Kneer and others. In the final paragraph of the memo, Ms. Kneer summarized the bases for her recommendation as follows:

My concerns with the **quality** of Nancy's work, as discussed above, range from the most basic processing task to professional assignments given Nancy. Despite consistent feedback on processing errors, Nancy's performance has not improved and the same errors are repeated. Her understanding of concepts and her ability to perform professional duties appears unchanged despite the tremendous time and training commitment put forth to help her improve.

The issue of **quantity** of work performed is also a serious concern. At present, there is approximately 35% of her PD that Nancy has not been assigned: 25% for district compliance audits (which are being scheduled at a later date) and 10% for handling employee moving expenses. Due to Nancy's demonstrated weaknesses and the impact that her errors would have on DNR employees, we have not wanted her to be handling employee moving expenses at this time. Without these two duties, at least 75% of her time is available for transaction processing tasks (100%) when there are no special projects assigned. A four-month review of Nancy's output compared to two other Preaudit staff doing the same type of processing work showed Nancy's

output was 60% of Dan Hutchen's output and only 40% of the output of Jim Capper. (Hutchens and Capper are classified as financial Specialists, 1 and 2 pay levels below Nancy, respectively). She clearly is not carrying her share of the work in the unit. Relative to training, Nancy has had courses in perceptive communications, organizational skills, customer service, letter and memo writing, and a variety of computer courses to help her improve her skills. In addition, Nancy has attended three Governmental Accounting courses put on by the Association of Government Accountants. Since September of 1991, Jim Stenz and I have been working closely with Jim Federhart to effect some improvement in Nancy's performance but have met with no success. We have informed Nancy of her option to file a request for accommodation should she feel there is a *medical or other reason that she cannot fully perform her job*. To date, she has not provided us with any information of this nature. We have also explained the availability of the employee assistance program. Because of all the above reasons, I recommend that Nancy Rufener be placed in the Performance Improvement Program per manual Code 9126.11.

53. In a letter dated April 5, 1993, Ron Semmann, DNR Deputy Secretary, advised complainant that, effective April 19, 1993, she was being placed on the DNR's Performance Improvement Program; summarized the reasons for this action; described in general terms the attached Performance Improvement Plan and its standards and expectations; reminded complainant that, if she had any information relating to a medical reason for her performance shortcomings, although none had been provided to date, she should provide it, and referring her to the DNR's EAP; and advised complainant that failure to achieve satisfactory performance would result in termination.

54. The Performance Improvement Plan (PIP) designated the following as performance requiring change:

- High number of errors in processing transactions
- Unacceptable quality on special projects assigned
- Not accepting responsibility for resolving problems

The PIP also set performance standards for complainant's job tasks; indicated that complainant's supervisor would provide regular feedback (usually daily) on work produced, and would meet with complainant monthly to provide detailed feedback on complainant's progress in meeting the performance standards stated in the PIP and to provide a written performance evaluation; and stated that complainant should immediately contact her supervisor if she did not understand a work expectation, if she was experiencing any problem

which would hinder her ability to complete her work assignments or meet PIP standards, or if she felt she needed more training or explanation.

55. In a letter dated April 21, 1993, a representative of the Wisconsin Professional Employees Council wrote a letter "To whom it may concern" which stated as follows:

I am writing this letter on behalf of Nancy Rufener with regard to her disability accommodations request. This will answer the questions on how her disability impairs her ability to perform assigned duties, and the reasonable accommodations she is requesting.

First, her disability impairs her from working extended hours at her computer. This applies to the way in which it is positioned and the amount of computer work needed to be performed. She also finds it difficult to perform numerous hours on the phone because of the strain it puts on her neck.

Secondly, we are requesting that the following steps be taken for a reasonable accommodation:

- A) That an ergonomic review take place regarding Nancy's worksite.
- B) That she be put on flex time so that her various doctor's appointments, will not interfere with her job.
- C) We are also requesting that she be given the formal training that was required, per her June 19, 1992, Employee Performance Review.
- D) Lastly we are requesting a suspension of her assignment to the PIP Program pending the outcome of this request. This program may need to be adjusted consistent with this disability accommodation.

Your expeditious response in this matter would be greatly appreciated.

56. In response to this letter, Ms. Kneer requested that an ergonomic review be conducted of complainant's work space. Such a review was conducted by Ruth Ann Burns, Ergonomics Coordinator, DNR Bureau of Program Services, on May 11, 1993. In a letter dated May 17, 1993, Ms. Burns set out her recommendations for modification of complainant's work station as well as modifications in the way that complainant used her work station and its equipment. Ms. Kneer took action to effect the recommended modifications, including purchasing a new chair at a cost of approximately \$400. The purchase of this chair required obtaining an exemption from the existing spending freeze.

57. In regard to the request for flex time, complainant was already working the flex time schedule which she had requested, i.e., four 9-hour days (Monday through Thursday from 6:45 a.m. to 4:30 p.m.) and a four-hour day(6:45 a.m. to 10:45 a.m.) on Friday. In addition, Ms. Kneer had permitted complainant to make up hours she missed, i.e., to take "professional time," in order to go to medical appointments. Ms. Kneer had requested, however, that complainant provide advance notice to Ms. Kneer when she intended to earn and use professional time in this way in order to better plan and schedule the work of the unit but complainant failed on numerous occasions to provide this notice. On some of these occasions, complainant failed to provide notice to Ms. Kneer until a week after earning or using professional time. No other unit employee ever advised Ms. Kneer of the earning or use of professional time after-the-fact.

58. In regard to the request for training, this apparently referred to the training plan that complainant had prepared as part of her 1992 performance review, in which she indicated those areas in which she was interested in receiving training. Ms. Kneer approved all training courses which complainant requested.

59. Respondent denied the request to suspend the PIP. The basis for this denial was respondent's conclusion that there had been no documentation provided which indicated that complainant was unable to perform any or all aspects of her job duties, and the purpose of the PIP was to improve her performance to an acceptable level.

60. The first of six monthly written PIP reviews was completed by Ms. Kneer for the period April 19, 1993, through May 18, 1993, and discussed with complainant at a meeting also attended by Mr. Stenz. This review accurately concluded as follows:

a. There had been a high number of errors in processing transactions. Ms. Kneer had requested that Mr. Kuechler, who was responsible for locating and correcting encumbered payment errors, submit to her those encumbered payment errors committed by complainant and Mr. Hutchens, whose processing responsibilities closely paralleled complainant's. Ms. Kneer's analysis (computed by dividing the number of errors by the number of processed payments) showed that complainant's error rate was 6% and Mr. Hutchens' less than 1%. Although some of complainant's errors were minor, several more significant errors were made, including an incorrect class code used on an encumbered payment, an incorrect conversion from DNR to DOA

accounting codes, and a failure to correctly recognize and designate a payment as a final payment.

b. The quality of special projects had been unacceptable. Of the several minor projects complainant was assigned during this period, her follow-up work on a letter from Federal Express was acceptable; in regard to a sales tax form submitted by Digital Equipment Corporation, respondent had received three identical forms from the company, and complainant filled out all three forms and mailed all three forms back to the company which demonstrated poor judgment, poor analytical skills, and ineffective use of time; complainant included the Department of Health and Social Services (DHSS) on a list of vendors and prepared a letter to be sent to DHSS in regard to a concern relating to the prompt payment law even though state agencies were not subject to this law and this was a matter with which complainant should have been very familiar; complainant was calculating interest under the prompt payment law incorrectly; and, on one occasion, complainant wrote the same note on five different documents for submission to her supervisor which showed poor judgement and inefficient use of time.

c. In regard to her attitude, Ms. Kneer noted that complainant had exhibited a desire to do a good job but an impediment to the improvement of her performance was her refusal to acknowledge that she had made an error or that her performance needed improvement.

d. In regard to her productivity, Ms. Kneer noted that she was only processing 61% of a standard production level (this standard was established utilizing as a comparison the number of transactions processed by Mr. Hutchens and adjusting for the different number of hours each of them had available for performing transaction processing) and, as a result, the quantity of complainant's work, in addition to the quality, was a concern.

61. Effective June 6, 1993, Ms. Kneer hired Elise Mattei as a limited term employee (LTE) in the Pre-Audit unit. Ms. Kneer was acquainted with Ms. Mattei, was aware that she was looking for work in the financial field, and, when the LTE position became available, asked Ms. Mattei if she would be interested in filling it. When Mr. Ogden's position in the unit became vacant, Ms. Kneer encouraged Ms. Mattei to apply for it. Ms. Kneer's practice was to assist all LTEs in finding permanent employment. Ms. Mattei competed for the position and was appointed to it.

62. The second of six monthly written PIP reviews was completed by Ms. Kneer for the period from June 10, 1993, to July 9, 1993, (since complainant had been on leave from May 19, 1993, to June 9, 1993, for her wedding and

honeymoon), and discussed with complainant at a meeting also attended by Mr. Stenz. This review accurately concluded as follows:

- a. There had been a high number of errors in processing transactions (9%) and these errors included the more significant errors of incorrect class code; interest charged to wrong account; incorrect liquidation; DNR to DOA conversion error; incorrect effective dates; incorrect designation of "final" versus "partial" liquidation on voucher; and failure to identify and investigate an invoice copy.
- b. The quality of the work on special projects had been unacceptable. Complainant and Mr. Hutchens had been assigned to develop sample manual warrant forms, complainant using 90/95 fund codes and Mr. Hutchens non-90/95 fund codes. Each had been given the same very specific instructions on how to develop the same form. The sample form complainant developed was not readable and did not conform to the instructions given on how the assignment was to be completed. Mr. Hutchens correctly completed the assignment.
- c. Complainant had shown improvement in accepting responsibility for problem solving.
- d. Complainant's willingness to accept feedback had improved.
- e. Complainant's production level declined to a level of 48% of the standard. (During complainant's leave, Ms. Mattei, a new LTE assigned to perform some of the duties of complainant's position, had made errors on several documents which complainant corrected when she returned. These documents were not included in computing complainant's production level. The record shows that there were 5 of these documents).

63. Complainant also raised a concern at this time that she was not receiving training on the WISMART system, i.e., the computerized accounting system utilized by the Department of Administration for its transactions. Complainant at this time had no responsibilities which required her to have more WISMART training than she had received. When Ms. Kneer assigned complainant the responsibility of looking up DOA encumbrances, Ms. Kneer gave complainant two hours of WISMART training in relation to this function. There were brown-bag WISMART informational sessions which DNR employees were advised they could attend on a voluntary basis during lunch breaks or non-work hours. Complainant did not attend any of these sessions. Although the new WISMART system required some changes in the way the

DNR reported information to DOA, none of DNR's basic preaudit procedures changed as a result of WISMART.

64. The third of six monthly written PIP reviews was completed by Ms. Kneer for the period July 10, 1993, to August 20, 1993, and was discussed with complainant at a meeting also attended by Mr. Stenz. This review accurately concluded as follows:

a. There had been a high number of errors in processing transactions (3%), including vouchers which should not have been processed, incorrect class code, incorrect PMNs (project management numbers), incorrect liquidation information, and carryover not identified. In addition, it was noted that only 25% of the vouchers complainant had processed during this period were the more complex encumbered payments compared to 43% during each of the previous two review periods, and that complainant had continued to process the less complex vouchers even when instructed by Ms. Kneer to assist Mr. Hutchens in processing encumbered payments. It was also noted that Mr. Hutchens' had an error rate of approximately 1% even though 100% of his processing was of the more complex encumbered payments.

b. The quality of the work on special projects had been unacceptable: the report on the Madison Lodging Direct Billing Project failed to address the major issues, did not provide sufficient information from which to draw any conclusions or make any recommendations, included erroneous data and irrelevant information, failed to include a necessary cost/benefit analysis, and the conclusions reached were not supported by the data; and the Work Study Memo failed to effectively convey pertinent information or to clearly communicate the type of action requested.

c. Effective August 2, 1993, due to continuing concerns relating to the issue of productivity, a standard of 150 documents processed per week was established as part of the PIP. Although complainant had met this standard during the last three weeks of the review period, it was noted that the more complex encumbered payments constituted only 25% of the vouchers complainant had processed during this time.

65. The fourth of six monthly written PIP reviews was completed by Ms. Kneer for the period August 21, 1993, to September 10, 1993, and discussed with complainant at a meeting also attended by Mr. Stenz. This review accurately concluded as follows:

a. There had been a high number of errors in processing transactions (7%). Of the 255 vouchers complainant processed,

38% were encumbered payments. These errors included incorrect effective dates, incorrect liquidation amounts, incorrect subunit, failure to include copy of voucher, incorrect class code, incorrect PMNs, incorrect line code, and failure to attach accounting codes.

b. The quality of the work of special projects had been unacceptable: the second draft of the Madison Lodging Direct Billing Project had most of the same shortcomings as the first draft; the Eye Exam and Safety Glasses Audit Program complainant prepared failed to effectively convey pertinent information, failed to clearly or logically present the information it did contain, included incorrect and irrelevant information, and was not usable as prepared.

c. Complainant satisfactorily accepted responsibility for resolving problems.

d. Adjusting for time not available for processing, the standard was 352 transactions and complainant processed 310 transactions. It was also noted that, since July, the complexity of the transactions that complainant had processed had decreased. 26 transactions complainant processed despite instructions from Ms. Kneer not to process this type of transaction were not credited to complainant's production figures. These 26 transactions were not complex and would have taken little time to process.

66. The fifth of six monthly written PIP reviews was completed by Ms. Kneer for the period September 11, 1993, to October 8, 1993, and discussed with complainant at a meeting also attended by Mr. Stenz. This review accurately concluded as follows:

a. There had been a high number of errors in processing transactions (12%). 52% of the 438 vouchers processed were encumbered payments. The errors included incorrect effective dates, incorrect liquidation information, incorrect class code, carryover not indicated, incorrect PMNs, payment not recorded on purchase order, incomplete batch ticket, and DOA final payment date not completed accurately.

b. Although instructed by Ms. Kneer to contact Ms. Hillestad and resolve certain problems with a document prior to submitting it for processing, complainant simply resubmitted the document without resolving any of the problems. This was given as an example of complainant not accepting responsibility for resolving problems.

c. Adjusting for time not available for processing, the production standard was 570 and complainant's actual production was 507.

67. The sixth of six monthly written PIP reviews was completed by Ms. Kneer for the period October 9, 1993, to November 5, 1993, and was discussed in a meeting with complainant. This review accurately concluded:

a. There was a high number of errors in processing transactions (9%). 78% of the 478 vouchers processed were encumbered payments. The errors included incorrect effective dates, incorrect class code, payment not recorded on contract, carryover not designated, interest paid to other state agency, non-original invoice processed, and amendment not processed correctly. In her follow-up memo to this review, complainant asserted that a memo issued by Ms. Kneer dated June, 1993, which related to effective date policy for expenditures constituted a change in policy when, in fact, this memo just confirmed existing policy.

b. The quality of the work on a special project had been unacceptable: the draft memo on the National rental car contract project failed to address pertinent information, included unnecessary and redundant information, was poorly organized and not clearly written, and was not usable.

c. As a follow-up to the problem noted in the previous PIP review, Ms. Kneer contacted DOA and was told that complainant had given DOA incorrect information and had not been helpful to DOA in resolving the problem. As a result, Ms. Kneer resolved the problem herself. Ms. Kneer also received a formal, written complaint from the DNR Bureau of Law Enforcement that complainant continued to route vendor invoices to them that belonged to other bureaus, and that they often did the necessary research to forward these to the correct bureaus because of concerns relating to timely payment.

d. Complainant's productivity was 12 below the standard the first week of the review period, 20 the second week, 32 the third week, and 2 above the standard the fourth week.

e. Ms. Kneer further noted that complainant continued to demonstrate an unwillingness to accept that improvement in her performance was merited and continued to refuse to acknowledge that she had made errors, and this attitude had grown significantly worse over this last review period and she had been argumentative and uncooperative in her interactions with Ms. Kneer and other staff of the Bureau of Finance.

68. During the entire PIP review period, Ms. Kneer would provide complainant oral and/or written feedback in regard to each error, show complainant the document with the error, and instruct complainant as to the correct manner in which to correct the error.

69. Deputy Secretary Semmann concluded, on or around November 30, 1993, that complainant had failed to attain a satisfactory level of performance by the end of the PIP review period. As a result, a pre-termination meeting was held on December 7, 1993. At this meeting, complainant was offered three alternatives: resignation in lieu of termination, demotion and transfer to a position commensurate with her abilities, or termination. Complainant chose termination. In a letter dated December 17, 1993, from Mr. Semmann, complainant was notified of her termination effective January 3, 1994.

70. Ms. Kneer reviewed the documents remaining in complainant's work area after her termination. These included: past-due invoices and unresolved billing issues associated with Madison Lodging billings; work study records that were in disarray; and unresolved 90/95 fund contracts and amendments, some going back as far as September of 1993. In addition, processing errors committed by complainant, including coding errors, incorrect mail routing, and incorrect contract reference numbers on encumbered payments were brought to Ms. Kneer's attention after January 3, 1994.

71. Individuals outside the DNR central office had no reason to know of complainant's medical condition. Prior to complainant's February 15, 1992, car accident, others in the DNR central office, other than her supervisors and those working in the AA/EEO programs, had no reason to know of complainant's medical condition. Mr. Stenz and Ms. Kneer became aware that complainant had a back condition on September 17, 1991.

72. During her supervision of complainant, Ms. Kneer spent 20% of her work time reviewing complainant's work performance.

73. In computing the amount of time complainant had available for transaction processing duties, Ms. Kneer allocated 1.5 hours per day to the routing of the mail based on Ms. Kneer's experience performing this task and on her conversations with Mr. Hutchens and Mr. Capper who had performed this task on occasion. There were three primary types of mail: (a) vouchers to pay--complainant had to extract the 90/95 fund vouchers she was responsible for processing and place the others in the fiscal clerks' basket; (b) contingent fund disbursements--these generally came in packets from the districts and complainant was to place these in the fiscal clerk's basket; and (c) 20-30 invoices per day to be routed--Ms. Kneer had worked with the Purchasing unit so that purchase orders included the name and address of the person to whom

the invoice should be directed, and had worked with vendors so that they understood that failure to include this name and address would prevent application of the prompt payment law to their request for payment.

Although Ms. Voigt had spent 3-4 hours on this task, 1.5 hours was a reasonable expectation for complainant given the change in procedure and the other requirements of the task.

74. Although complainant testified at hearing that the review she had completed of "error list" records showed that she had committed only 5 of 600 errors, this list, as it applies to the Pre-Audit unit, would show only the presence of incorrect or missing codes and this was not the type of error attributed to complainant in reports from other employees, in feedback from her supervisors, or in her PIP or other performance evaluations; and it is not generally possible to determine who in the Pre-Audit unit may have been responsible for an error on the error list.

75. Complainant was not directed by Ms. Kneer to perform compliance audits of district or central office operations (Goal A on complainant's 1991 position description) because Ms. Kneer and DNR management had set other work priorities for the Pre-Audit unit (others in the unit who had been assigned this compliance audit responsibility also did not perform any of such audits during the relevant time period); or to audit and process employee moving expense reports (Goal F) because Ms. Kneer did not feel complainant had mastered the other goals of her position. Complainant was directed to carry out the other goals and worker activities of this 1991 position description and it was the performance of these goals and worker activities on which she was evaluated by Ms. Kneer.

76. Complainant's testimony at hearing was frequently marked by unresponsiveness, evasiveness, confusion and lack of awareness of the requirements and procedures of the Pre-Audit unit and the DNR financial system, inconsistencies, and failure to acknowledge clearly obvious facts or errors .

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §§230.45(1)(b), 103.10(12), and 230.44(1)(c), Stats.

2. Respondent has the burden to show that there was just cause for appellant's termination.

3. Respondent has sustained this burden.
4. Complainant has the burden to show that she was discriminated against on the basis of her handicap as alleged.
5. Complainant has failed to sustain this burden.
6. Complainant has the burden to show that she was retaliated against for engaging in activities protected by the Family and Medical Leave Act or that respondent otherwise violated the requirements of the Family and Medical Leave Act.
7. Complainant has failed to sustain this burden.

Opinion

The issues established for hearing are as follows:

Case Nos. 93-0074-PC-ER and 94-0051-PC-ER

1. Did the respondent discriminate against the complainant on the basis of handicap with respect to their March, 1993, memo requiring a doctor's certification for absences.
2. Did the respondent discriminate against the complainant on the basis of handicap or violate the Family/Medical Leave Act with respect to:
 - a. Its April 15, 1993, action of placing the complainant on a Performance Improvement Program;
 - b. Maintaining the complainant on the Performance Improvement Program; and/or
 - c. Termination of her employment effective January 3, 1994.

Case No. 94-0008-PC

1. Whether the respondent had just cause to discharge the appellant/complainant.
2. Whether the respondent violated the appellant/complainant's substantive or procedural due process rights.
3. Was the degree of discipline imposed excessive.

Handicap Discrimination

As the Commission stated in Harris v. DHSS, Case Nos. 84-0109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the proscription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");
- (4) If the employer has succeeded in establishing its discrimination covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such impairment; or
- (c) Is perceived as having such an impairment.

The Wisconsin Supreme Court provided an analytical framework for applying this definition of handicap in LaCrosse Police Comm. v. LIRC, 139 Wis. 2d 740 (1987). The Court held that to establish that a particular physical condition constitutes a handicap, the complainant must first show there is an impairment by showing there is "a real or perceived lessening, deterioration, or damage to a normal bodily function or bodily condition, including absence of such function or condition." Complainant asserts that, for purposes of these proceedings, her handicap consists of a 5% permanent disability resulting from an injury to her leg, hip, and back in 1989 which prevents her from sitting in one place for longer than an hour or an hour and a half; and a

spinal condition resulting from a 1992 car accident which prevents her from sitting in one place for longer than an hour or an hour and a half, which results in some pain, which required visits to a physical therapist and chiropractor several times a week within the first 10 months after the accident and a weekly visit to a chiropractor thereafter. Although complainant has provided little evidence in the record as to the nature or extent of her physical condition or its limitations on her activities, it could be concluded that an impairment is present. However, this evidence is insufficient to support a conclusion that this impairment has made achievement for complainant unusually difficult or has limited her capacity to work. The first element refers to a "substantial limitation on life's normal functions or a substantial limitation on a major life activity." Complainant has failed to show that her physical condition imposes either of these limitations. The mere existence of a partial disability, involvement in a subsequent car accident, temporary wearing of a cervical collar/back brace as the result of the car accident, and continuing visits to a physical therapist/chiropractor without a record tying the partial disability or the car accident injuries to substantial and lasting changes in the way that complainant handled the major day-to-day activities of her life does not satisfy this first element. Renz v. DHSS, Case No. 88-0162-PC-ER (12/17/92) presents a parallel fact situation, i.e., the complainant was involved in a car accident, wore a cervical collar and wrist splints on a temporary basis, and was required to visit a physical therapist and chiropractor several times a week for a time after the accident. Even though complainant Renz provided a great deal more specific information than complainant Rufener relating to her injuries and the resulting symptoms of headaches, numbness, and neck and back pain, the Commission concluded that she had failed to satisfy this first element because she had failed to show any significant manner in which her injuries or symptoms had required her to change the way she performed the responsibilities of her job or the way in which she managed other aspects of her life. This result is consistent with the Commission's conclusion in Miller v. DOT, Case No. 89-0092-PC-ER (11/23/93), that not every physical or mental impairment constitutes a handicap, only those impairments that are profound enough to make achievement unusually difficult. The complainant here has not created a record sufficient to reach this conclusion and has, as a result, failed to satisfy the first element.

The second element requires that complainant show that her impairment limits her capacity to work. The only limitation complainant has specifically described is that relating to sitting in one place for long periods of time. This is not the type of substantial limitation contemplated by this element.¹ It can be implied, although it was not specifically set forth in the record, that, for a time after the 1992 accident, the wearing of a cervical collar and/or back brace by complainant limited her movements and was evidence that she was experiencing pain. However, complainant has failed to show that any limitations on her movements or any pain she was experiencing had any significant impact on her ability to carry out the duties and responsibilities of her position. In addition, this implication of pain and motion limitation would not carry over into the period of time that complainant was no longer wearing the collar/brace which occurred later in 1992. Complainant has failed to satisfy this second element.

Finally, complainant appears to argue that she was perceived as handicapped by her supervisors and co-workers. In regard to her 1989 injury and resulting 5% partial disability, the record shows that neither Mr. Stenz nor Ms. Kneer, i.e., the two individuals complainant alleges discriminated against her, had any reason to know of this disability until September 17, 1991. In addition, the only limitation complainant communicated to them at that time which resulted from this disability was her inability to sit for long periods of time in one place. The restricted nature of this limitation lends credence to their testimony that they did not perceive complainant to be handicapped as the result of this 1989 injury. The record also shows that none of

¹ The conclusion that only substantial limitations or those which have a significant impact on the ability of a person to perform the duties and responsibilities of a particular job should be regarded as meeting the FEA definition of handicap is supported by the Commission's decision in Renz v. DHSS, 88-0162-PC-ER (12/17/92), and by the Wisconsin Supreme Court in American Motors Corp. v. LIRC, 119 Wis. 2d 706, 350 N.W. 2d 120 (6/28/84). In Renz, the Commission concluded that complainant's limitations did not "in any significant way" limit her capacity to work and did not, as a result, constitute a handicap, based on the fact that complainant, using the same process and the same equipment, produced after her accident a work product of essentially equivalent quality and quantity to that produced before the accident. In American Motors, the Court concluded that not every impairment which imposes a limitation on a person's ability to perform a job constitutes a handicap, and to hold that minor impairments which have only a limited impact on a person's ability to do a job constitute handicaps would lead to absurd or unreasonable results under the FEA. (See decision at p. 718).

complainant's other co-workers, other than former supervisor Dvoraczky and Mr. Ogden, had any reason to know of this partial disability at any time. In regard to her 1992 injuries, complainant never communicated nor demonstrated to supervisors Kneer or Stenz or to her co-workers that her injuries were interfering in any significant way with her ability to perform the duties and responsibilities of her position. Even though complainant wore a cervical collar/back brace and may have appeared on occasion to be in discomfort, the record does not show that any of complainant's supervisors or co-workers were under the impression that these devices or discomfort were interfering in any significant way with complainant's ability to do her job and complainant never indicated to them that they were. The accommodation request filed by complainant on April 21, 1993, after she was apparently no longer wearing a collar/brace, states that her "disability impairs her from working extended hours at her computer" and makes "it difficult to perform numerous hours on the phone." This provided little information beyond that which Mr. Stenz and Ms. Kneer already had, i.e., that complainant's impairment prevented her from sitting in one place for long periods of time. Complainant has failed to successfully rebut the testimony of Mr. Stenz and Ms. Kneer that they did not perceive complainant as handicapped at any time relevant to this matter. It should also be noted that record does not show that complainant's co-workers, other than Mr. Stenz, Ms. Kneer, and employees of DNR's personnel unit, had reason to be aware of complainant's April 21, 1993, accommodation request.

The Commission concludes that the record does not show that complainant was handicapped within the meaning of the Fair Employment Act or perceived as handicapped by her supervisors or co-workers.

If complainant had shown that she was handicapped or perceived as handicapped by respondent, the next question to be resolved under the Harris analysis is whether the respondent discriminated against the complainant because of her handicap. There are two ways that discrimination on the basis of handicap under this element of the analysis can occur. The first would occur if respondent's actions had been motivated by complainant's handicap. The second would occur if respondent's actions were based on performance reasons which were causally related to complainant's handicap. Conley v. DHSS, Case No. 84-0067-PC (6/29/87).

Complainant first alleges that she was discriminated against on the basis of handicap with respect to the March, 1993, memo requiring a doctor's certification for absences. Respondent had a legitimate, non-discriminatory reason for requiring this certification, i.e., complainant had a high incidence of leave usage which she had attributed to her car accident (both sick leave and other earned leave) and her actions of March 18, 1993, (See Finding of Fact 45, above) justifiably led Ms. Kneer to conclude that complainant may be requesting sick leave and attributing it to her car accident in situations where she was not actually sick. To demonstrate pretext, complainant argues that other employees showed comparable levels of sick leave usage (See Finding of Fact 50, above) but were not required to provide medical verification. However, in order to sustain her burden here complainant would have to demonstrate that Joan Kranzisch, the only employee whom the record shows had a comparable level of sick leave usage, was similarly situated to complainant. The record here, however, does not show the circumstances surrounding the use of sick leave by Ms. Kranzisch nor that Ms. Kranzisch gave respondent any reason to suspect that she was requesting sick leave for reasons unrelated to illness. Complainant has failed to show that she was similarly situated to Ms. Kranzisch and has failed to show handicap discrimination in regard to this allegation.

Complainant next alleges that she was discriminated against on the basis of handicap with the respect to the April 15, 1993, action by respondent placing her on a Performance Improvement Program. Respondent states that this action was taken due to continuing problems with complainant's work performance and this reason is legitimate and non-discriminatory on its face.

Complainant first argues that Ms. Kneer, based on information given to her by Mr. Stenz when she first became the unit supervisor, had negative preconceptions concerning the quality of complainant's work performance and, as a result, did not view complainant's performance objectively, and failed to provide complainant with adequate feedback or training. It is important to note in regard to this argument and, in fact, to this case as a whole, that it was not just the opinion of Mr. Stenz and Ms. Kneer that complainant's work performance was inadequate. The record shows that numerous individuals, both inside and outside the Pre-Audit unit, reported to complainant's supervisors problems they had experienced or observed in regard to complainant's work performance; that many of these individuals had no

reason to be aware of complainant's physical impairments; and that no other unit employee was the focus of this type of reporting. Complainant has also failed to show that her work performance was in fact satisfactory. The clear preponderance of the credible evidence in the record shows that complainant committed a high number of errors for an employee at her classification level and with her experience, that complainant was able to offer for only a small percentage of these errors some rational justification for processing the transaction in the manner she did, and that complainant continued to commit the same types of errors over the length of her employment in the unit. Complainant attempted to show that her error rate was not significantly different than that of other unit employees by analyzing the "error list." This approach is puzzling since the error list is not designed or intended to list the major types of errors committed by unit processing staff, e.g., errors in effective dates, incorrect class codes, incorrect PMNs, incorrect line codes, incorrect liquidation information, and failure to identify carryover, but instead to list invalid codes entered into the DNR's financial system; and further demonstrated that complainant lacked a basic understanding and familiarity with the DNR's financial system and procedures. Complainant also points to isolated errors made by others in the unit but the record shows that no employee, even those at lower classifications and with less experience than complainant, committed the volume or frequency of errors that complainant committed. In regard to special projects, the preponderance of the credible evidence shows that complainant's work product, despite specific and detailed instructions and guidance from her supervisors and others, did not show the level of analysis, independent research, or knowledge of an employee at her classification level and with her experience. It is telling that complainant's supervisors and others in the DNR concluded, with one exception, that complainant's work product, despite repeated opportunities for re-writes, was not usable.

As its relates to the type of training that complainant received, the record shows that complainant was provided frequent training, re-training, and feedback by Ms. Kneer and others; that this training was significantly more extensive than that provided to other unit employees and, in fact, Ms. Kneer spent 20% of her time training, providing feedback to, and evaluating complainant; that, although Mr. Hutchens was abrupt during his 90/95 fund training of complainant, this training was accurate and thorough and more

extensive than that provided to Mr. Hutchens when he assumed responsibility for 90/95 fund processing; and that, although complainant points to her lack of WISMART training, the record shows that complainant's job duties did not require this training and, when her duties changed to incorporate certain responsibilities relating to the WISMART system, she was provided the appropriate training. Complainant argues that Ms. Kneer's prohibition on complainant's note-taking during 90/95 training demonstrates pretext, i.e., demonstrates that Ms. Kneer was setting complainant up for failure. However, the record shows that, on one occasion, Ms. Kneer observed that complainant was writing notes rather than observing the example that Mr. Hutchens was trying to show her, and suggested that complainant observe the example first and take notes after the observation. This does not demonstrate pretext.

Complainant argues that the failure of respondent to have complainant perform all the duties and responsibilities listed on her position description denied her the opportunity to demonstrate her proficiency in regard to all assigned tasks and demonstrates pretext. However, one of the reasons offered by respondent for this action is that, in regard to the compliance audit assignment, different work priorities had been set for the unit by management. This is confirmed in the record by the fact that other pre-auditors with compliance audit responsibilities were also not directed to perform any compliance audits during the relevant time period. As a result, complainant has failed to show she was treated differently in this regard than any other similarly situated employee. Another reason offered by respondent is that complainant had failed to sufficiently master all the tasks of her position which she was performing. As concluded above, the record demonstrates this failure. It would have been incongruous given the circumstances present here for respondent to require complainant to learn and perform additional tasks when she had failed to demonstrate proficiency in regard to those tasks for which she had been trained and which she was performing; and, as a result, the Commission declines to draw an inference of discrimination or a conclusion of pretext in this regard.

Complainant argues that the fact that she received the 90/95 fund assignment immediately upon her return from the medical leave resulting from her car accident demonstrates pretext. However, the decision to assign the 90/95 fund processing to complainant's position had been made some time before the accident (See Findings of Fact 15, 17, 27, and 28, above).

Complainant argues that the fact that Ms. Kneer gave complainant difficulty relating to her use of sick leave demonstrates pretext. However, Ms. Kneer never denied complainant's use of sick leave and only questioned such use when complainant requested sick leave on a day when she had not appeared sick to Ms. Kneer; Ms. Kneer granted complainant's requests to use flex time and professional time and only requested that complainant notify her in advance of her use and accumulation of professional time, with which such request complainant did not consistently comply; and that, despite complainant's continuing failure to comply with this request and the showing that no other employees in the unit failed to provide such notice, Ms. Kneer continued to approve complainant's flex time and professional time requests. The record actually shows that respondent was quite lenient with complainant in regard to her use and adjustment of leave time and does not show pretext in this regard.

Complainant has failed to show that she was discriminated against on the basis of handicap when she was placed on the Performance Improvement Program.

Complainant also alleges that she was discriminated against on the basis of handicap when respondent maintained her on the Performance Improvement Program. Once again, respondent states that complainant was maintained on PIP since her work performance was not satisfactory and did not meet the requirements of the PIP. The record shows that complainant's performance did not improve in any significant manner during the period of time she was on PIP, despite continuing feedback and training. Complainant argues that it was not possible for complainant to satisfy PIP performance standards since these standards changed during the PIP. However, the only standard that complainant argues changed during the PIP was that relating to productivity. Although a numerical standard was not established in the original PIP, it was clearly stated in Ms. Kneer's recommendation to Deputy Secretary Braun that the quantity of complainant's work was a concern she sought to address through the PIP, and concerns relating to complainant's productivity were stated in the first PIP review (See Finding of Fact 60, above), and in all subsequent PIP reviews. Furthermore, complainant has failed to show that her productivity was reasonable in view of the classification level of her position or her experience, or consistently met numerical standards once such standards were established. Reasonable productivity is an element of any

position and the argument that this requirement was surprising or unjustified is not compelling. Complainant also argues that her productivity was computed in a different manner than that of Mr. Hutchens. Specifically, complainant argues that:

a. Ms. Kneer used the statistics from Mr. Hutchens' most productive month, rather than an average over several months' time, to establish a numerical standard for complainant's productivity. However, there has been no showing that it was not reasonably justified for Ms. Kneer to use the most up-to-date monthly productivity statistics that were available to her (for the period 6/10/93-7/9/93) to establish complainant's productivity standard.

b. Ms. Kneer used different methodologies for deducting leave time in computing the time available for complainant and Mr. Hutchens to process transactions. However, the record shows that the methodologies used were identical and logically sound.

c. Ms. Kneer credited the 10% of time specified in complainant's position description and Mr. Hutchens' position description for "encumbrances" duties to available processing time for complainant but not for Mr. Hutchens. However, the record shows that encumbrance transactions processed by complainant were credited to her transaction total; but that such transactions (including both encumbrances and encumbered contingent fund transactions) processed by Mr. Hutchens were not possible to tabulate at the time Mr. Hutchens' transactions were being totalled and, as a result, the time allotted for processing encumbrances (10%) and encumbered contingent fund transactions (4 hours per week) were deducted from Mr. Hutchens' processing time. Complainant has failed to show a difference of treatment in this regard.

d. Mr. Hutchens was credited with 10% of his time for performance of special project assignments but only did one short assignment during the period of comparison; but, during this same period of time, complainant was also credited with 10% but had several assignments of a more complex nature. However, it is not entirely clear from the record that Mr. Hutchens was assigned only one special project during the relevant time period. The record does show, however, that special projects were assigned to Mr. Hutchens routinely during the period of his employment in the unit.

e. Complainant was not given sufficient credit in these computations for her mail processing duties. The record shows, however, that such duties were well-defined and not of sufficient volume or complexity to consume 3-4

hours each day as complainant claimed; that Ms. Kneer had developed the standard for completion of such duties based on the experience of others who had performed the task; and that these duties had changed sufficiently since Ms. Voigt was performing them to justify assigning to them less time for completion than Ms. Voigt had experienced. The record does not sustain complainant's contention of different treatment and shows instead that the method utilized by Ms. Kneer to generate productivity statistics was consistent and mathematically justified. Complainant has failed to show that she was discriminated against on the basis of handicap when maintained on PIP.

Finally, complainant alleges that she was discriminated against on the basis of handicap when she was terminated. Much of complainant's argument in regard to this allegation parallels that discussed above. Complainant has failed to show that she met performance expectations, that such performance expectations were unreasonable in view of the duties and responsibilities of her position, or that she was held to a different performance standard than other employees. In addition, it should be reiterated that many of the concerns expressed about complainant's performance were brought to the attention of complainant's supervisors by individuals who had no reason to know of complainant's impairment and no motive to discriminate against her; it was the expression of these concerns by these individuals that alerted complainant's supervisors at least in part to complainant's unsatisfactory performance and the impact of her performance on the functioning of the unit and the relationship of the unit to other agencies and units; and the record shows that no other unit employee was the subject of such expressions of concern. Complainant has failed to show that she was discriminated against on the basis of handicap in regard to her termination.

Family and Medical Leave Act Retaliation

The Family and Medical Leave Act (FMLA) states as follows, in pertinent part:

(11) PROHIBITED ACTS. (a) No person may interfere with, restrain or deny the exercise of any right provided under this section.

(b) No person may discharge or in any other manner discriminate against any individual for opposing a practice prohibited under this section.

* * * * *

(12) ADMINISTRATIVE PROCEEDING. (a) In this subsection, "department" means:

1. The personnel commission, if the employe is employed by the state or any office, department, independent agency, authority, institution, association, society or othe body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

* * * * *

(b) An employee who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a compliant with the department alleging the violation. . . .

Complainant cites three actions on the part of respondent which she alleges violate the FMLA: respondent's April 15, 1993, action of placing the complainant on a Performance Improvement Program; maintaining the complainant on the Performance Improvement Program; and terminating her employment effective January 3, 1994.

Case No. 93-0074-PC-ER was filed May 17, 1993. As a consequence, a challenge to respondent's action of placing complainant on a Performance Improvement Program on April 15, 1993, would not be timely, i.e., May 17 is more than 30 days after April 15.

Respondent's action of maintaining complainant on PIP during the first review period, i.e., within the 30-day period prior to May 17, 1993, would be timely, but respondent's action of maintaining complainant on PIP during subsequent review periods would not be timely since they occurred after the filing of Case No. 93-0074-PC-ER; no amendment was filed to Case No. 93-0074-PC-ER; and Case No. 94-0051-PC-ER was filed March 16, 1994, i.e., more than 30 days after the end of the last PIP review period.

Complainant was terminated effective January 3, 1994, and complainant's challenge to this action under the FMLA would not be timely since Case No. 94-0051-PC-ER was filed more than 30 days after January 3, 1994.

Complainant's argument in relation to respondent's action of maintaining her on PIP does not raise any points not already raised in her complaint of handicap discrimination. Since the Commission has already concluded that the preponderance of the credible evidence in the record

shows that respondent was justified in placing and maintaining complainant on a Performance Improvement Program due to her failure to meet performance expectations, that discussion will not be repeated here. Complainant argues that the fact that, on May 18, 1993, complainant filed the subject FMLA request, and, on this same date, Ms. Kneer recommended that complainant be placed on the Performance Improvement Program, demonstrates a relationship between the two events. However, in view of the timeliness conclusions cited above, this contention would not be relevant to the matter under consideration here. In addition, even if it were, the serious concerns relating to complainant's work performance which Ms. Kneer and others had expressed prior to this point in time, demonstrate that it is unlikely, given the facts in this case, that a decision to place complainant on a Performance Improvement Program was related in any way to her request for leave on May 18, 1993.

Appeal of discharge

The underlying questions in an appeal of a discharge are:

(1) Whether the greater weight of credible evidence shows that appellant committed the conduct alleged by respondent in its letter of discharge.

(2) Whether the greater weight of credible evidence shows that such chargeable conduct, if true, constitutes just cause for the imposition of discipline, and;

(3) Whether the imposed discipline was excessive.

(Mitchell v. DNR, Case No. 83-0228-PC (8/30/84))

The conduct of appellant which formed the basis for her discharge was her allegedly unsatisfactory work performance. It has already been concluded above that appellant's work performance consistently failed to satisfy reasonable performance expectations. In arguing against this conclusion, appellant offered many of the same arguments she offered in relation to the handicap/FMLA retaliation issues, including the following:

(1) the errors attributed to appellant did not exceed the number committed by other unit employees, did not actually constitute errors, or primarily represented minor errors;

(2) the addition of a productivity standard in the middle of the PIP process unfairly introduced a new performance expectation;

(3) the lack of WISMART training provided to appellant interfered with her ability to satisfy performance expectations;

(4) the PIP review error rates and productivity rates were incorrectly and inconsistently computed; and

(5) respondent failed to provide appellant with adequate training.

Each of these arguments was discussed above and the conclusion reached in regard to each, i.e., that the preponderance of the credible evidence does not support appellant's arguments, is equally applicable here.

In addition, appellant offers the following additional arguments:

(1) Mr. Stenz's inordinate attention to and criticism of appellant's work performance was in retaliation for appellant's public disagreement with him concerning the proper way to handle the 1099 form problems. The record shows, however, that Mr. Stenz's version of what occurred at the subject 1099 meeting is more plausible and more credible, i.e., since the problem related to mismatched, not missing, numbers, it would have made no sense for Mr. Stenz to propose that invented numbers be inserted on the 1099s. In addition, the record shows that the reason that both Mr. Stenz and Ms. Kneer were more attentive to and critical of appellant's work performance than that of other employees was that they received many more reports from others relating to appellant's performance deficiencies than to the deficiencies of any other unit employee, and appellant's work product was substantially more deficient than that of other unit employees.

(2) Ms. Kneer was cold, impatient, and angry with appellant from the start and this colored her perception of appellant's performance. Not only is this representation not supported by the record but it also fails to explain the numerous and continuing reports from other employees as to deficiencies in appellant's performance.

(3) Ms. Kneer wanted to get rid of appellant in order to make room for her friend Elise Mattei. Appellant offers in support of this contention that Ms. Mattei was appointed to appellant's position after her termination. The record shows, however, that Ms. Mattei was appointed to Harry Ogden's position after he transferred out of the unit; and that Ms. Mattei was appointed to the position pursuant to a competitive civil service process. Appellant also contends in this regard that Ms. Mattei's prior experience with Ward-Brodt Music Company as a data processor immediately before assuming her LTE position in the unit

demonstrates that she was not qualified for an Auditor position. However, not only does the record show that Ms. Mattei worked for Ward-Brodt as a data processing accountant but also that she had a B. A. degree in finance, and as a result, does not support appellant's contention that Ms. Mattei was not qualified for an Auditor position. Appellant also cites mistakes that Ms. Mattei made as an LTE in support of her contention that she and Ms. Mattei were being judged by different standards. However, the record does not support this conclusion in view of the fact that Ms. Mattei had only been an LTE for a few weeks when she made these errors and appellant was a permanent employee with several years of experience in the unit. In addition, the record does not show that Ms. Mattei committed the volume or frequency of errors that appellant committed.

(4) Respondent continued to rely upon the first letter of job instruction (See Findings of Fact 19-24, above) despite the fact that it had not been placed in appellant's personnel file. However, although it was part of the hearing evidence and clearly formed part of the basis for Mr. Stenz's and Ms. Kneer's initial concerns with appellant's performance, the record does not show that it was one of the factors considered during the PIP review process which led to the decision to terminate appellant.

(5) Frequent changes in relevant processing policies/procedures which were not communicated to appellant interfered with her ability to satisfy performance expectations. The testimony of other unit employees does not support appellant's contention and, in fact, appellant's testimony in regard to this point sustained respondent's assertion that appellant demonstrated a lack of familiarity with basic preaudit policies and procedures despite frequent feedback and re-training. The record shows that the basic preaudit policies and procedures which unit employees were required to apply did not change in any substantial way during appellant's tenure in the unit, and that other unit employees had no problems applying these policies and procedures. The record also shows that, when a policy or procedure which appellant was required to apply did change she was provided with adequate training and feedback relating to this change.

(6) Ms. Kneer actively solicited reports relating to complainant's work performance from others. The record, however, shows that, when reports were made to Ms. Kneer relating to errors made by any unit employee, she advised those making the reports that she needed documentation of the errors. The only individual she directed to report to her in relation to appellant's

performance was Mr. Hutchens when he was conducting the 90/95 fund training of appellant. This was certainly a reasonable procedure to employ when transferring a job duty from one employee to another.

Respondent has met its burden with respect to this part of the analysis.

In determining whether certain conduct constitutes just cause for discharge, the Commission has followed the test set forth by the Wisconsin Supreme Court in Safransky v. Personnel Board, 62 Wis. 2d 464, 215 N.W. 2d 379 (1974), i.e., whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the performance of the duties of the position or the efficiency of the group with which the employee works. As the Commission stated in Tews v. PSC, Case Nos. 89-0150-PC, 89-0141-PC-ER (6/29/90), "it is axiomatic that failure to meet the performance standards for a position, as has been shown here, impairs the performance of the duties of appellant's position." In addition, the Commission has consistently held that failure to meet reasonable performance standards impairs the efficiency of the group with which the employee works. Tews, supra; Fauber v. DOR, 82-138-PC (8/21/84), aff'd Milw. Cty. Circ. Ct., Fauber v. State Personnel Commission, 649-551 (8/8/85). Respondent, in showing complainant's continuing failure to meet reasonable work expectations, has also met its burden in regard to this part of the analysis.

The next question is whether the action taken was excessive. The record shows that respondent devoted considerable resources to its attempt to improve appellant's performance to a satisfactory level and that, despite this, appellant's performance did not improve to this level. This fact situation was similar to that in the Tews case in which the Commission concluded that discharge was not excessive and made the following statement:

Respondent's primary responsibility was not to appellant, but to the public that it serves and respondent finally concluded, after a considerable investment of its resources, that the public interest would not be served by allowing appellant to continue in a position the performance standards of which she had failed to meet on a consistent and continuing basis.

The Commission, in other parallel fact situations, has also concluded that discharge is not an excessive action. Buchanan v. DOR, Case No. 81-289-PC (12/2/82); Ruff v. State Investment Board, Case Nos. 80-0105, 0160, 0222-PC (8/6/81, aff'd Dane Cty. Circ. Ct., Ruff v. State Pers. Comm., 81-CV-4455 (7/23/82),

aff'd Wis. Ct. of App, 82-1572 (Dist. IV, 11/8/83); Fauber, supra. The Commission concludes that the action taken by respondent in discharging appellant is not excessive in view of the record in this matter and Commission precedent.

The final question is whether respondent violated appellant's due process rights. Appellant's primary argument in this regard is that respondent's failure to have complainant perform compliance audits (Goal A of appellant's position description) and to audit and process employee moving expenses (Goal F) meant that appellant's position description did not accurately reflect the duties and responsibilities assigned to her position, that this failure was in direct conflict with a requirement of DNR's Performance Improvement Program manual code provisions, and that failure of an employing agency to satisfy one of its own procedures violates an employee's rights to procedural due process. This contention is not persuasive for the following reasons:

(1) The record shows that respondent intended to have this position perform all the duties and responsibilities listed in the position description and, as a result, the position description is not inaccurate per se.

(2) The duties and responsibilities detailed in this position description are consistent with the classification level of this position.

(3) Appellant was not directed to perform or evaluated in regard to any duties and responsibilities not specified in the position description.

(4) Respondent was justified in not having appellant perform duties listed under Goal A because of work priorities for the entire unit determined by management, and under Goal F because complainant had not yet achieved satisfactory performance of the duties she was performing; and it would be incongruous to penalize respondent here for exercising appropriate management prerogatives.

(5) Respondent clearly indicated to appellant those duties in relation to which her performance would be evaluated, and they were explained in detail in the Performance Improvement Plan and PIP review documents.

It is the obvious intent of the "accurate position description" requirements in the DNR manual code that employees be fully apprised of the duties and responsibilities they are to be performing and on which they are to be evaluated during the PIP review period. A review of the record and the relevant case law indicates that respondent met this requirement here and, as a result, did not violate appellant's procedural due process rights in this regard.

Appellant further argues that, since Mr. Stenz did not properly carry out his role in the performance review process in 1991, appellant's procedural due process rights in regard to her discharge were violated. Although the Commission concludes that it was probably not a good personnel practice to prepare an evaluation based on an inadequate review of an employee's performance, the procedure followed in regard to the 1991 review is irrelevant for our purposes here in view of the extensive review and evaluation process upon which the discharge decision was based. Respondent has sustained its burden to show that it did not violate appellant's procedural due process rights in this regard.

Finally, complainant has offered a motion to strike certain of respondent's exhibits contending that they were not properly included in respondent's responses to complainant's discovery requests. When this motion was offered at hearing, the hearing examiner indicated that it was not possible to rule on the motion at that time because it had not been presented with sufficient specificity, i.e., it did not link a specific exhibit to a specific discovery request or response; and instructed complainant to renew the motion and to supply specifics and relevant argument in her post-hearing briefs. At hearing, complainant offered the following as respondent's exhibits which she may want to include in the motion to strike: respondent's exhibits 49, 52, 71, 80, 81, 94, 117, 124, 128, 129, 131, 133, 140, and 274.

In her initial post-hearing brief, complainant stated as follows, in relation to the motion to strike:

4. RESPONDENT SHOULD NOT BE ALLOWED TO RELY UPON ANY DOCUMENTS WHICH BARBARA KNEER RETAINED IN HER OWN PRIVATE NOTEBOOK LOCKED IN HER OFFICE.

During the course of hearing, it was learned that a number of the documents which Respondent offered as Exhibits in this matter and which Barbara Kneer relied upon during her testimony were documents that were never identified or provided to Appellant during formal discovery, and were never made available to Appellant for review, but rather were part of a private file kept by Barbara Kneer in her office under lock and key. In fact, when asked in written interrogatories to identify the alleged errors committed by Nancy Rufener which resulted in a double encumbrance on DOA books, or in an incorrect account balance, Respondent formally swore that it was not possible to trace the reason for suspended checks after the fact (Ex. C1, answers to Interrogatory 18 and 19), that it is not possible to determine this information [each and every error by Nancy

Rufener which has resulted in incorrect account balances] after the fact (Ex. C1, answer to Interrogatory 21), and that the only way to determine if a double encumbrance has occurred is if research is performed specifically to determine if a double encumbrance exists at any given point in time. (Ex. C1, answer to Interrogatory 20). Yet at hearing, Respondent suddenly was able to determine this type of information; much if not all of the information Respondent relied upon had been kept in Kneer's private notes which were produced at hearing though not even noted in formal discovery.

Respondent should not be allowed to rely on any of these documents which were part of Kneer's private notes. Until Appellant has had an opportunity to review Respondent's initial brief, she cannot know exactly which exhibits will be relied upon, and which specific exhibits to object to.

In her reply brief, complainant offered no further specifics and, in fact, made no mention of the motion to strike.

It is concluded that, despite instructions from the hearing examiner, the complainant has failed to provide sufficient specificity to permit the Commission to decide the motion to strike or, in fact, to determine whether complainant clearly intends to present the motion for decision. In addition, as discussed below, even if the Commission were to accept the information provided by complainant as a sufficient basis to grant the motion, it is clear that the few examples of errors committed by complainant which the subject exhibits represent and which would be properly included within the scope of the motion, in view of the scores of such errors described and documented in the record, would not influence the outcome of this case in any significant manner.

The interrogatories mentioned by complainant include interrogatories numbered 18, 19, 20, and 21 in the first set. These interrogatories and respondent's responses to them (which follow in italics) are as follows:

INTERROGATORY NO. 18: Identify each and every error made by Nancy Rufener since January 1, 1992 which has resulted in a suspended check.

It is not possible to trace the reason for suspended checks after the fact. The only way to know the reason is to research the situation as it occurs. One such situation occurred the week of 12-14-92. Another bureau employee received a call from a vendor inquiring about his payment. When the employee researched the matter he found the check had been suspended due to a double encumbrance processed by Nancy Rufener. A follow-up review by Nancy's supervisor using DOA reconciliation records showed duplicate information was sent to DOA by Nancy Rufener

on three other occasions in a one-month period. Additional review of suspended checks or double encumbrances was not necessary as the procedural error that caused the original suspended check was identified and discussed with Nancy Rufener.

INTERROGATORY NO. 19: Identify each and every error in the last 12 months made by employees under Barbara Kneer's direct or indirect supervision, other than Nancy Rufener, which has resulted in suspended checks.

It is not possible to trace the reason for suspended checks after the fact. Nancy Rufener indicated there were two or three suspended checks that occurred while she was on vacation apparently caused by an LTE using an incorrect code book to convert DNR to DOA code. Specific details are not available.

INTERROGATORY NO. 20: Identify each and every error by Nancy Rufener since January 1, 1992 which has resulted in double encumbrances on DOA books.

The only way to determine if a double encumbrance has occurred is if research is performed specifically to determine if a double encumbrance exists at any given point in time. Refer to the answer to Interrogatory #18 above.

INTERROGATORY NO. 21: Identify each and every error by Nancy Rufener since January 1, 1992 which has resulted in incorrect account balances.

It is not possible to determine this information after the fact. Each time Nancy Rufener processed a document with an incorrect effective date, incorrect reference number, incorrect payee, incorrect accounting code for expenditure or liquidation, or incorrect dollar amount for expenditure or liquidation, it resulted in incorrect account balances unless the error was caught by someone else prior to the information being posted. Documentation regarding these errors are in the Performance Improvement Plan reviews which you have received.

The record shows that Ms. Kneer kept in her desk a handwritten journal as well as a chronological file relating to incidents which occurred in the office relating to complainant's work during all times relevant to this matter.

Of the exhibits identified by complainant in the record as subject to the motion to strike, numbers 71, 81, 124, 131, 140, and 274 do not appear to present the types of errors described in the interrogatories cited above and would not, therefore, be properly subject to the motion. None of the errors presented by the remaining exhibits appear to be described by any of the cited

interrogatories other than interrogatory #21. Of these remaining exhibits, numbers 49 and 52 describe errors which could lead to an incorrect account balance but would not have because these errors were caught before being posted and, as a result, would not be described by Interrogatory #21 and would not be properly subject to the motion. The remaining exhibits, i.e., numbers 80, 94, 117, 128, 129, and 133 would be the only ones arguably subject to the motion and, as concluded above, striking them from the record, in view of the scope of the record in this matter and the numbers of documented errors committed by complainant, would not influence in any significant way the outcome in this case.

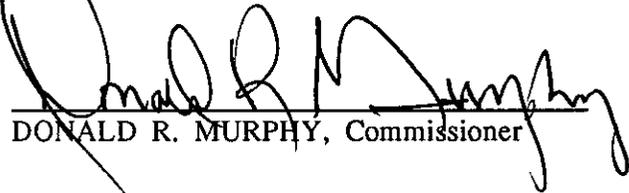
Order

The action of respondent is affirmed and these cases are dismissed.

Dated: August 4, 1995 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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Waunakee, WI 53597

George Meyer
Secretary, DNR
PO Box 7921
Madison, WI 53707-7921

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