

JUDITH VOLOVSEK,
Complainant,

v.

**Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,**
Respondents.

**DECISION
AND
ORDER**

Case No. 93-0098-PC-ER

This matter is before the Commission after a hearing on the following issues:¹

1. Whether respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondents did not reclassify the appellant's position to the Agrichemical Specialist - Developmental level in either February 1993 or May 1993.
2. Whether there is probable cause to believe respondent DATCP or respondent DER discriminated against complainant because of her sex or age when respondent(s) took the following actions:
 - a) Respondents made advancement to the Environmental Enforcement Specialist position a promotional opportunity rather than a re-allocation in March 1993;
 - b) Respondent DATCP did not select complainant for an Environmental Enforcement Specialist - Senior position in June 1993;
 - c) Respondent DATCP assigned an Environmental Enforcement Specialist to conduct an investigation in complainant's area/territory in June 1993.

¹ The issues for hearing were established by order of the Commission dated April 16, 1996. Complainant withdrew what had previously been identified as issue 2a on the fourth day of hearing and the issues have been renumbered, accordingly.

The parties have stipulated that, in deciding this case and for reasons immaterial to the resolution of this matter, an individual actually considered for advancement to the Environmental Enforcement Specialist (EES) level, shall *not* be considered as having participated in the selection process. That individual is identified in Exhibit 29 as candidate 12. The parties also stipulated to a numbering system for referring to individual applicants.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the complainant has been employed within the Investigation and Compliance Section, Bureau of Agrichemical Management, Division of Agricultural Resource Management, Department of Agriculture, Trade and Consumer Protection (DATCP).

2. Complainant, a female, was born on December 12, 1943.

3. Complainant was hired on August 12, 1991, into a position classified at the Plant Industry Inspector 1 (PII1) level. (Exhibits 3 and 6) This position was within the Security and Public Safety Bargaining Unit. She was assigned the geographic area running north from Milwaukee's Wisconsin Avenue to Manitowoc and west to Fond du Lac.

4. A male was the highest ranking candidate for the position ultimately filled by the complainant in August of 1991. Respondent initially offered the position to the top-ranked candidate but he declined the offer. Complainant was among the next group of candidates who were all rated comparably. Complainant was offered the position because the classification was underutilized for females.

5. The Plant Industry Inspector classification series had been adopted in June of 1984 and included two levels, PII1 and PII2. (Exh. 3) The specifications identified the PII2 level as the objective level for the series. The representative position at the PII2 level included the following language:

Positions at this level differ from those at the lower level in that the employees have demonstrated their ability to independently carry out all in-

spection and investigation duties, and have successfully completed all required training.

6. Complainant was informed when she started work in August of 1991 that reclassification from PII1 to PII2 typically occurred between 18 and 24 months after hire. (Exh. 132, p. 12)

7. During a period which ended in 1992, respondents carried out a classification survey that included complainant's position. As a consequence, respondent DER abolished the Plant Industry Inspector series and created a new classification series entitled Agrichemical Specialist (Agchem Specialist), effective June 14, 1992. This classification remained in the Security and Public Safety bargaining unit. (Exh. 13) The new series included three levels; Entry, Developmental and Objective. Complainant's position was reallocated to the Agchem Specialist - Entry level. The specifications include the following language:

AGRICHEMICAL SPECIALIST-ENTRY

Under close, progressing to limited supervision, these positions perform investigative, inspection, enforcement and compliance work in an assigned area of the State to foster and enforce compliance with State and Federal laws, regulations, and standards related to the manufacture, sale, labeling, application, use, storage, and distribution of pesticides, fertilizers, liming materials, soil and plant additives; sampling and identification of the possible sources for and scope of groundwater contamination due to pesticide and other agrichemical use; spills and/or contamination of soil and/or groundwater from violations of pesticide fertilizer and other agrichemical storage regulations; the viability, labeling, and claims made for animal feed and vegetable and agricultural seed; and the adulteration of animal feed and vegetable and agricultural seed.

Duties include: . . . investigating pesticide incidents involving alleged negligent use . . . compiling and analyzing groundwater sample data to assist in the identification of possible groundwater contamination due to pesticide use, and to identify the scope and source of the alleged contamination; . . . investigating spill incidents associated with fertilizer and pesticide bulk storage to determine whether spills have resulted from violations of storage regulations; . . . providing assistance and information to manufacturers, dealers, and the public relative to the interpretation of laws and regulations.

AGRICHEMICAL SPECIALIST-DEVELOPMENTAL

Under limited, progressing to general supervision, these positions perform investigative, inspection, enforcement, and compliance work in an assigned area of the state. Positions at this level differ from those at the lower level in that employees have demonstrated their ability to independently carry out all activities described under the entry level definition, have obtained certification from the United States Environmental Protection Agency and must be a commissioned notary public. In addition, employees at this level may issue notices of violations, warning notices, "stop sales" and holding orders in any of the programs listed above.

AGRICHEMICAL SPECIALIST-OBJECTIVE

Under general supervision, these positions perform investigative, inspection, enforcement and compliance work. Employees in this class perform the full range of activities performed by lower level Agrichemical Specialists and must meet all certification requirements. Additionally, employees in this class direct sampling and inspection activities pertaining to all aspects of agricultural resources management; train, guide, provide outreach, and assist other Agrichemical and ARM program Specialists; act as lead investigator in toxic response cases; may serve as a technical expert to management, industry and the general public; and must obtain certification from the United States Food and Drug Administration.

8. Fourteen positions within the Investigation & Compliance Section were reallocated when the Agchem Specialist series was adopted in June of 1992. (Exh. 16) Twelve filled positions were reallocated from the Plant Industry Inspector 2 level to the Agchem Specialist - Objective level. Complainant's position was the only one in the section that had been classified at the PII 1 level immediately prior to the effective date of the new series. One other position, which was vacant, had been classified at the PII 2 level and was reallocated to the Agchem Specialist - Entry level.

9. Before creating the Agchem Specialist series, respondent DER had created the Environmental Enforcement Specialist (EES) classification series, which encompassed positions within the Professional Science Bargaining Unit. (Exh. 21) The EES series was adopted as of April 19, 1992, and included the Entry, Objective and Senior levels. The key language of the EES specifications reads:

This series encompasses positions . . . in the central, district, or field offices of the Department of Natural Resources and the Department of Agriculture, Trade, and Consumer Protection. . . .

DATCP programs supported by the Environmental Enforcement Program include the Pesticide, Toxic Response, and Animal Feed programs. The goals of DATCP's Environmental Enforcement program include: (1) Protection of Wisconsin's human and natural resources by preventing and investigating allegations of misuse or illegal use of regulated products to the detriment of public health, safety, and welfare; (2) Response to and investigation of the death of humans or farm animals from adulteration of feed or foodstuffs or exposure to pesticides; and (3) Utilization of the DATCP case-tracking systems to determine the status of compliance with the rules and statutes of DATCP.

D. Entrance Into and Progression Through This Series

Employees typically enter this classification series by competitive examination. Progression to subsequent levels may be through competitive examination, or by reclassification based on logical and gradual change(s) in the position's duties and responsibilities. . . .

ENVIRONMENTAL ENFORCEMENT SPECIALIST, SENIOR

[T]he senior specialist develops and follows broadly defined work objectives and the review of the work is limited to administrative evaluation by the supervisor.

Positions at this level have extensive authority in carrying out secondary enforcement actions across Environmental Quality program lines. This involves independently reviewing enforcement cases, deciding which action is appropriate, initiating the appropriate enforcement action(s), involving other district and central office staff necessary to follow through with a completed complex civil case and preparing civil cases under the parallel proceedings format. The work performed at this level requires a high degree of interpretation and creativity in exercising independent judgment, e.g., in evaluating cases for consistency with statutes and rules.

Positions at this level function as (1) a senior district Environmental Enforcement Specialist responsible for developing, administering and evaluating a major portion of the environmental enforcement program being implemented districtwide; or (2) a central office specialist respon-

sible for planning, coordinating and implementing specific aspects of the program as well as directing investigations. Senior Environmental Enforcement Specialists can serve as a district focus for enforcement operations and decisions, provide statute and code interpretation guidance and an enforcement training resource for district and area field staff.

10. Initially, there were no positions in DATCP's Division of Agricultural Resource Management that were classified in the EES series. Because the EES - Senior classification was assigned two pay ranges higher than the Agchem Specialist - Objective classification, the Division lost one or more persons who took DNR positions.

11. Complainant successfully completed her probationary period in August of 1992, one year after she was hired.

12. From approximately September of 1992 until November 15, 1993, David Hagemeier, who was employed by DATCP as one of two Environmental Enforcement Supervisors, served as complainant's immediate supervisor. David Fredrickson, Chief of the Investigation and Compliance Section, supervised Mr. Hagemeier. In addition to his supervisory responsibilities, Mr. Hagemeier was directly involved in more complex investigations and served in an educational role to the field staff. He supervised 7 employees. Of those 7, complainant had the least experience and the least knowledge of the relevant laws and of the regulated public.

13. Mr. Hagemeier worked in the central office, had the opportunity to observe and interact with complainant on a regular basis.² After spending January 19, 1993, with complainant in the field, Mr. Hagemeier had concerns regarding her work performance. He observed that she was not organized, was ineffective in conveying information, and made inaccurate statements regarding the legal requirements imposed on the regulated industry. These concerns were the reason he wrote complainant a two page memo, dated January 29, 1993, (Exh. 18) in which he made several suggestions for improving her work performance.

² This sentence has been changed from the language found in the proposed decision and order to eliminate possible confusion.

14. Complainant was one of two employees supervised by Mr. Hagemeyer who required more attention than the other subordinates. Mr. Hagemeyer considered the other employee, a male under the age of 40, to have a negative attitude which resulted in low work production, even though he had the requisite skills to perform his assignments. Mr. Hagemeyer also had concerns regarding a third employee, a male over the age of 40.

15. On May 12, 1993, Mr. Hagemeyer gave complainant an overall performance rating of "At or Above Job Standards" for a 12 month period while complainant was classified at the Agchem Specialist - Entry level. (Exh. 30) This overall rating is below "Exceptional" and below "Well Above Job Standards," but is above "Needs Improvement." The evaluation included the following comments:

Judy has done a good job performing investigations. She responds in a timely manner to complaint investigations, employs adequate investigative techniques, and follows established policies and procedures for successful prosecution of cases. Judy does need additional training and experience in label interpretation, product knowledge, general industry practices, and application of laws and rules to investigations. . . .

Judy needs to continue to improve her communication skills so that she can effectively inform the regulated industry what is required of them. Judy is sometimes unclear or inaccurate in her communication of rules and regulations to the public. . . .

Identify a plan to address problems in each of the areas listed as needing improvement.

Knowledge of laws and rules. Her supervisor and other office staff will continue to work with Judy in the field to train in the enforcement of laws and rules. Judy should also rely more heavily on interpretive brochures and the laws and rules themselves to guide her in providing information to the public.

Knowledge of industry practices. Her supervisor will identify and assign possible sources of training in this area. Training may include industry-sponsored conferences or seminars, certification training, or training in the Madison office. Priority areas of training for Judy are lawn care and structural pest control; agricultural applications will be considered in the future.

Communication skills. Judy's verbal communication skills will improve as she becomes more familiar with Department programs, but additional training in how to communicate verbally would be helpful. Additional training in listening skills would also be of benefit. Her supervisor will identify appropriate training that may be available through the Department, a local college, or other sources. . . .

Employee Comments (employee's option - add sheets if necessary)

I feel I have a very cooperative working relationship with Dave H. and appreciate his helpful guidance.

Mr. Neher, Division Administrator, signed the evaluation document on June 1, 1993.

16. One co-worker in the field advised his supervisors that, based on his contacts with her in the field, complainant tended to rush through things, had difficulty listening to suggestions and explanations and jumped from one subject to another during her inspections. Another co-worker told management of very negative comments about complainant's work knowledge and performance that were made by persons within the regulated industry who had direct contact with complainant. These included comments that 1) complainant did not have an agriculture background, 2) they couldn't understand why she approached things the way she did, 3) she had a very limited knowledge of agriculture, 4) some of complainant's statements were contrary to the applicable rules, and 5) they laughed at her in the field. While there were also questions raised about the appropriateness of a woman doing the job, those comments were not relayed to management. Industry representatives did not complain about other field staff.

17. During the relevant time period, authority which had been held by the Department of Natural Resources (DNR) to serve as the lead agency for the remediation of agrichemical spills was transferred to DATCP. Before this change, DATCP was the support agency and its duties included taking some samples at the spill site. After the change, DATCP was the lead agency for the spills and its employees were responsible for reaching conclusions as to the extent of the contamination, including soil,

surface water and groundwater contamination, the measures necessary for removing contaminated soil or otherwise remediating the contamination and monitoring the site.

18. Early in 1993, respondent DATCP had two vacant positions in the Division of Agricultural Resource Management which had been created with funding arising from the 1991-93 budget. DATCP requested and received approval from respondent DER to fill the positions at the EES - Senior level based upon the anticipated performance of new remediation responsibilities. (Exh. 19) This additional work had been identified by a 1989 survey of randomly-selected sites used for mixing and loading fertilizer. Approximately 50% of the sites showed significant environmental damage or danger. The standard position description (Exh. 22) for a position in DATCP's Investigation and Compliance Section that is classified at the EES - Senior level includes, as goal A, 45% time providing "remediation case oversight." The eight worker activities in that goal refer to responding to spills and suspected releases, conducting investigations to determine the cause or sources, reviewing sample results preparing or reviewing recommended remediation strategies, preparing administrative, civil and criminal complaints, providing testimony and presenting cases to district attorneys for enforcement. The number of spills actually encountered has, at least initially, been less than was anticipated.

19. There were 15 field staff positions within the section, including the two vacancies.

20. Respondent DATCP opted to fill the vacancies via promotion. In making its promotional decisions, DATCP sought to fulfill the following objectives:

- a. No current employee would end up without a job.
- b. All existing staff would have an equal opportunity to be hired at the EES - Senior level.
- c. Any changes would not require existing staff to relocate.
- d. Qualified and competent people would be hired for the positions.

21. A Job Opportunities Bulletin dated March 1, 1993, (Exh. 20) announced a promotional opportunity for the vacancies at the EES - Senior level. The announcement, for positions "statewide," included the following language:

The register established from this recruitment will be used to fill vacancies which may occur throughout the state during the next 6 to 12 months. . . . Provide field oversight for environmental investigation and remediation projects related to improper handling or storage of pesticides or fertilizers. Enforce the laws and regulations and investigate suspected violations related to pesticides, medicated feeds, fertilizers and related agricultural products. Prepare related legal case documents. Serve as lead investigator for the department's toxic response team in determining the causes of sudden animal illness or death. KNOWLEDGE REQUIRED; Environmental contamination investigation and assessment techniques; environmental remediation methods; pesticide and other toxic material hazards; laws, regulations and recognized standards governing pesticides, medicated feeds, fertilizers and related agricultural products; sampling techniques and procedures; and effective oral and written communication skills. (emphasis in original)

22. DATCP management anticipated that the pool of applicants able to fill the vacancies would include at least 2 individuals from within the group of existing Agchem Specialists within the Investigation and Compliance Section. Management assumed that upon promotion into the vacancies, the successful internal candidates could take their position numbers from their Agchem Specialist position with them so that even after their own appointment to the EES - Senior level, there would still be another vacancy remaining at that level. However, this procedure could not be used for a successful candidate coming from outside of the Investigation and Compliance Section. The initial certification request, made in January of 1993, was to fill 4 EES-Senior positions. Exh. 179. It was not known at the beginning of the process how many EES-Senior positions would eventually be filled. However, it was the goal of Nick Neher, ARM administrator, to ultimately have all field staff classified in the EES series. The net result of the entire series of promotional vacancies in the Investigation and Compliance Section between April and June of 1993 was that 12 of the 15 field staff positions were filled at the EES-Senior level. All but one of the successful candidates was em-

ployed as an Agchem Specialist - Objective in the Investigation and Compliance Section immediately prior to promotion. The complainant was the sole Agchem Specialist - Entry who competed for a vacancy.

23. Complainant completed an application form for the promotional opportunity.

24. A three-person panel reviewed the applicants via an oral exam. The panel compared the applicant's responses to previously established benchmarks. The panel members were instructed to evaluate each candidate without regard to the other candidates. The panelists were told they could discuss their ratings with each other in case there were differences of opinion as to what was an acceptable answer and what was not, in the context of the benchmarks. The oral exam questions are set forth in Exhibit 57.

25. Complainant was certified for certain of the vacancies.

26. Those persons who were certified were evaluated by an interview panel which consisted of Nick Neher, Administrator of the Division of Agricultural Resource Management, Ned Zuelsdorff, Director of the Bureau of Agrichemical Management, and David Frederick. The interview questions are set forth in Exh. 28. There were no benchmark responses.

27. The interview scores were not the sole basis for making the selection decisions. The panelists also weighed their own knowledge of the candidate's training and work experience, including their job performance. Resumes that were brought to the interviews were also considered along with a writing sample. Three candidates (#5, 10 and 17) were not current employees of the Investigation and Compliance Section at the time of their interviews. Candidate #17 initially declined one or more of the EES - Senior promotional interviews but later asked to be considered. He was finally interviewed on June 3, 1993, the same date that DATCP signed the offer to hire for the final two positions. Because the panel did not consider candidate #17 to be a good fit for the positions in question, they did not conduct a reference check for that candidate. However, the panel did check references for candidate #5. The third candidate from

outside the section (#10) was employed by the Department of Natural Resources at the time he applied for the EES - Senior vacancies. However, he had worked in DATCP's Investigation and Compliance Section under Ned Zuelsdorff's supervision until 1988.

28. There was no mathematical weighting of the various sources of information about a candidate. At least two members of the panel, Ned Zuelsdorff and David Fredrickson, spoke with the two field staff supervisors, Peter Helmbrecht and David Hagemeyer, regarding all of the internal candidates for promotion.

29. During her interview, complainant made a statement regarding agricultural spills to the following effect: "I don't mind going into things that I don't know about. I kind of like that." She also referenced having worked for more than 20 years in enforcement work, while Mr. Fredrickson understood that complainant's work prior to her employment at DATCP starting in 1992 had been as a line inspector at a manufacturing plant. Complainant also stated she was interested in dealing with a lot of remediation work involving lawn chemicals. However, it had already been determined that lawn care sites would not be eligible for remediation under the new program.

30. The maximum number of points assigned to the writing sample was 20. Complainant received 8 points from Mr. Fredrickson which was one of the lowest scores of the candidates. (Exh. 28 and 36)

31. Respondent DATCP decided, by the end of the series of promotional vacancies, i.e. by June 3, 1993, not to promote the complainant to an EES - Senior level position. This decision was based in part on the following reasons:

- a. Complainant lacked technical background and understanding about the regulated industries.
- b. She had some communication problems.
- c. She had a problem in listening and in comprehension.
- d. She had organizational problems.

e. In investigations, she had a tendency to accept all allegations as true, rather than to go into an investigation impartially and with a responsibility to determine the necessary facts.

f. She had sometimes mulled over statements and ultimately asserted the statements were other than as were actually made.

g. She had problems with some of basic math skills for completing bulk storage and mixed load inspections.

32. David Fredrickson and Nick Neher were unaware that complainant had grown up on a farm.

33. There were only very minor changes to the geographic regions assigned to individual employees in the field as a consequence of the EES - Senior promotions. No one in the section lost their job nor had to move their base of operations.

34. At approximately the same time that respondent DATCP decided not to promote complainant to an EES - Senior level position, Messrs. Hagemeier and Fredrickson effectively decided to reclassify the complainant's position from Agchem Specialist - Entry to Developmental. This decision was reached less than 22 months after complainant was hired.

35. After the decision had effectively been made to reclassify complainant's position but before the requisite paperwork had been prepared to forward a written reclassification request, respondent DATCP issued a memo (Exh. 15) establishing the following criteria for reclassification from the Agchem Specialist - Entry to Developmental level:

1. Has completed 18 months as a Agrichemical Specialist - Entry, with a minimum of 6 months employment after completion of probation;
2. Has demonstrated basic knowledge of the laws and rules of all programs and performs their job within the guidelines set forth in the Uniform Enforcement Policy, as described below:
 - A. Has performed several pesticide/fertilizer bulk storage inspections;

B. Has received on-the-job training and demonstrates knowledge relative to the good Manufacturing Practices for medicated feed and related inspection procedures;

C. Has received on-the-job training and demonstrates understanding of state and federal pesticide law and inspection/investigation procedures, and has completed inspection/investigation activities in all pesticide areas under the Cooperative Pesticide Agreement including:

Mis-use Investigations

Pesticide Use Observations

Producer Establishment Inspections

Marketplace Inspections

Dealer Record Inspections

Commercial Applicator Record Inspections;

D. Has attended pesticide applicator certification training programs and has become certified in at least one pesticide use category;

E. Has demonstrated basic proficiency in inspection and sampling procedures, including label review in feed, seed, fertilizer, soil & plant additives and lime programs; and

3. Has demonstrated the ability to perform written and oral communication with the central office, outside agencies, the regulated industry, and the public.

The memo is dated June 7, 1993.

36. These criteria were very similar but not identical to the criteria for reclassification from PII1 to 2.

37. In addition to developing written criteria, management also had to develop a new position description for the EES - Developmental level and prepare a memorandum in support of the complainant's reclassification for submission to DATCP's Bureau of Human Resources in order to obtain formal approval of the reclass. The last of these three documents to be prepared was the memo which was signed by Mr. Neher and dated June 27, 1993. (Exh. 38) Complainant's position was reclassified effective July 11, 1993. She was notified of the action by memo dated August 23, 1993. (Exh. 39)

38. The time taken to reclassify inspectors in the Investigation & Compliance Section from their initial classification to the next level is shown below:³

<u>Employee</u>	<u>Sex</u>	<u>Date of hire</u>	<u>Age upon hire</u>	<u>Class of hire</u>	<u>Date moved to higher class</u>	<u>Months to reach higher class</u>
Peters	M	5/21/78	31	PII1	12/30/79	19
Saatkamp	M	5/22/78	<40	PII1	5/18/80	24
Gutknecht	M	7/9/79	25	PII1	2/8/81	19
Helmbrecht	M	7/11/83	unknown	PII1	6/23/85	23
Darland	M	1/14/85	47	PII1	5/10/87	28
Fenster	?	4/25/88	unknown	PII1	7/30/89	15
Brown	M	4/25/88	44	PII1	7/30/89	15
Hyer	M	4/25/88	34	PII1	7/30/89	15
Brey	M	5/8/89	25	PII1	11/4/90	18
Weiss ⁴	M	3/25/90	43	PII1	7/28/91	16
O'Donnell ⁵	F	12/2/90	34	PII1	5/17/92	18
Complainant	F	8/12/91	47	PII1	7/11/93	23

39. It is very unusual to reclassify positions from one classification series to another or from one bargaining unit to another. Management at DATCP understood that the Wisconsin State Employees Union opposed reclassifying or reallocating Ag-chem Specialist positions into the EES series. ⁶

40. In May of 1993, some "Command" herbicide drifted onto an organic farm located in complainant's area of geographic responsibility. The herbicide had drifted after it was applied to an adjacent property. The organic farmer was irate. It was DATCP's experience that it is preferable to have one person rather than several dealing with the complaining party. DATCP selected John Darland, an EES, to handle the complaint. While complainant had no experience dealing with "Command," Mr. Darland had more experience with the product than anyone else in the Division of Ag-

³ This chart, derived from Exh. 178, does not include employees who were initially hired in the Seed, Feed & Fertilizer Inspector classification because that classification, which was in effect prior to August of 1977, does not appear to have been differentiated into separate class levels.

⁴ This employee took a lateral transfer into the PII1 position.

⁵ This employee took a voluntary demotion into the PII1 position.

ricultural Resource Management. Mr. Darland, who is hearing impaired, had previously informed management that he did not wish to work with complainant because she tended to disrupt his concentration.⁷ Respondent did not assign complainant to assist Mr. Darland with the investigation.

41. Complainant filed her complaint of discrimination with the Personnel Commission on June 16, 1993. By memo dated June 14, 1993, she supplied a copy of the materials to Cheryl Anderson, DATCP's Human Resources Director, and requested that her allegations of discrimination relating to the EES promotions be handled informally as well. Dave Fredrickson was aware of this memo on or shortly after June 14th.

42. Mr. Hagemeier visited complainant at her home on September 10, 1993, in response to complainant's written request to review her personnel file and her request that Mr. Hagemeier review the file with her. After the meeting, complainant memorialized her thoughts in a memo (Exh. 143) to her supervisor, Mr. Hagemeier. The memo stated, in part:

[I]t is not clear to me why you visited; since you did not really suggest going out on an inspection. I assume you wanted to talk to me about some problems you said I had during a bulk storage inspection with Duane Klein. . . .

To me, in the last few months, I have been subjected to nit-picking of my work and especially my behavior. . . .

I am starting to feel that this continuous harping on these issues is bordering on harassment. I have not been subjected to this type of intense supervision in the last 2 years and am wondering why it is going on now.

CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.

⁶ This sentence in the proposed decision and order has been changed to better reflect the record.

⁷ This sentence in the proposed decision and order has been changed to better reflect the record.

2. Complainant is eligible to file a complaint of age discrimination and sex discrimination.

3. Respondents did not discriminate against the complainant on the basis of age or sex when they did not reclassify the appellant's position to the Agrichemical Specialist - Developmental level in either February 1993 or May 1993.

4. There is no probable cause to believe respondents discriminated against complainant because of her age or sex when respondents made advancement to the Environmental Enforcement Specialist position a promotional opportunity rather than a reallocation in March 1993.

5. There is no probable cause to believe respondent DATCP discriminated against complainant because of her age or sex when respondent did not select complainant for an Environmental Enforcement Specialist - Senior position in June 1993.

6. There is no probable cause to believe respondent DATCP discriminated against complainant because of her age or sex when respondent assigned an Environmental Enforcement Specialist to conduct an investigation in complainant's area/territory in June of 1993.

OPINION

This matter is before the Commission on several different issues and with two different standards. As to complainant's claims of discrimination arising from the decisions to make advancement to the Environmental Enforcement Specialist position a promotional opportunity, to not select complainant for such a promotion and to assign another employee to conduct an investigation in complainant's area in June of 1993, the standard is one of probable cause. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits. The

complainant's remaining claim, arising from the decision not to reclassify the appellant's position in either February or May of 1993, is before the Commission on the merits.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). Respondents contend that as to two claims, complainant has failed to show that the action complained of was adverse.⁸ Respondents also argue that complainant has failed to establish an inference of discrimination as to all her claims and, as a consequence, has failed to establish her prima facie case. Because the parties have also argued this case as if the complainant had successfully established a prima facie case, the Commission will proceed to address complainant's claims as if she had established a prima facie case in all instances.

Date of reclassification to the Agrichemical Specialist - Developmental level

When the classification survey was implemented in June of 1992, the complainant had only been employed by DATCP for 10 months, having been hired at the Plant Industry Inspector 1 level in August of 1991. Complainant was still serving her initial 12 month period of probation. The PII classification structure consisted of only 2 levels, PII1 and 2. DATCP had developed a specific set of eligibility criteria for reclassifying a position (and regrading the incumbent) from the 1 level to the 2 level. (Exh. 182) One requirement was serving at least 18 months at the Inspector 1 level. Complainant clearly had not met that requirement as of the June 1992 survey date.

Respondents' decision to reallocate the complainant's position to the Agchem Specialist - Entry level in June of 1992, rather than to some other level in that classification series, is not at issue in this matter.

Respondents ultimately acted to reclassify the complainant's position from Agchem Specialist - Entry to Agchem Specialist - Developmental effective July 11, 1993, 23 months after complainant's initial hire. Appellant's position was the first to be reclassified under the Agchem Specialist specifications. In contrast to the PII specifications which included only two classification levels, the Agchem Specialist series has three. DATCP did not develop specific criteria for reclassification from Agchem Specialist - Entry to Developmental until after the decision had been made to reclassify the complainant's position. DATCP ended up adopting criteria which were very similar to those which had been applied to reclassification from PII1 to 2. (Finding of Fact 35) The criteria include completing at least 18 months at the Entry level.

Complainant contends that her position should have been reclassified as of February or May of 1993, rather than July of that year, and that the failure to do so constitutes discrimination based on age or sex. February of 1993 was 18 months after complainant's date of hire and May was 21 months after her hire.

Respondents note that complainant is the first and only person to have been reclassified from Agchem Specialist - Entry to Developmental, so that complainant "cannot argue that others have been treated differently." (Brief, p. 14) The weight of this argument depends, at least in part, on the degree of similarity between the Agchem Specialist and PII classifications. In other words, respondent's contention raises the question of whether the other Investigation and Compliance Section employees who are listed in Finding 35 are similarly situated to complainant. The Commission concludes that, on balance, comparison to these other employees has little value.

Neither the PII series nor the Agchem Specialist series set forth specific standards for reclassification. The parties established that by the time the PII series was abolished, DATCP had promulgated written criteria for reclassification from PII 1 to 2, including "18 months as a P.I. Inspector 1, with a minimum of 6 months employment after completion of probation." (Exh. 5, 182) Some of the section employees were reclassified from PI1 to 2 after only 15 months at the lower level. The record does not re-

⁸ Respondent's contention relates to issues 2 a) and 2 c).

flect whether the PII reclassification criteria were instituted sometime after employees Fenster, Brown, Hyer and Weiss were reclassified or whether the 18 month standard was simply ignored as to those employees.

In their post-hearing brief, respondents suggest that the question of reclass from the PII 1 to 2 level was, as a matter of practice, typically addressed at the employee's first performance evaluation after 18 months on the job. The record does not indicate when such a practice began or whether it was consistently applied, but the first post-probationary evaluation for complainant (Exh 30, described in Finding 15), was signed by complainant and her supervisor on May 12, 1993. Complainant suggests that respondents have essentially admitted that the reclass should have been granted as of the date of this performance evaluation. However, the record does not support a finding that a reclassification becomes effective when a supervisor first decides the employee should receive it. Complainant's argument suggests a supervisor who fills out a performance evaluation also can, individually, authorize reclassification of a position.

Complainant compares the written reclass criteria for the PII series (Exh. 15) with the written criteria for reclass from Agchem Specialist - Entry to Developmental (Exh. 182) and argues that the latter criteria are less strenuous. Complainant may be correct, but such a comparison is without value because the criteria for the Agchem Specialist reclassification *did not exist* until after the decision was made to reclassify the complainant's position.

Even if one concluded that the other employees listed in Finding 35 are similarly situated to complainant, the 23 months it took for respondents to reclassify the complainant's position was shorter than the reclass period for two males, Jeff Saatkamp (24 months) and Jack Darland (28 months) and the same as for a third male, Peter Helmbrecht. The only other female employee on the list, Elizabeth O'Donnell, was reclassified after 18 months. The median value for all 12 employees listed in the finding is 18.5 months. Therefore, one female (Ms. O'Donnell) was reclassified in a shorter period than the median, while the other female, complainant, took longer. This information, by itself, is insufficient to support a conclusion that respondent discriminated

against the complainant on the basis of sex by not reclassifying her position in either February or May of 1993. Four of the persons listed in the finding were over 40 when they were hired. Two of the four (Brown and Weiss) took less than 18.5 months to be reclassified to the higher level and two took longer than the median. Again, this information does not support a finding of discrimination based on age.

As of the time he completed complainant's performance evaluation, David Hagemeister felt complainant needed a lot of additional training.⁹ Mr. Hagemeister acknowledged that he did not spend much time thinking about reclassifying complainant to the Developmental level because of her performance difficulties and because of the training she required. Ned Zuelsdorff also had concerns about reclassifying complainant because she had not progressed quickly. He was concerned whether complainant would be successful at the higher class level. Mr. Hagemeister met with Mr. Feredrickson at the end of May or early in June of 1993 at which point they effectively decided to reclassify appellant's position. But before the actual reclassification could occur, it was necessary 1) to develop a new position description for the higher class level, 2) to develop specific written criteria for reclassification from the Entry to Developmental level, and 3) prepare a memo, for signature by Nick Neher, to DATCP's Bureau of Human Resources, recommending reclassification of complainant's position. Once these steps were accomplished, complainant's position was promptly reclassified. Because complainant's was the first position to fall within the scope of the new specifications and because of the other factors mentioned above, the complainant has failed to sustain her burden of persuasion as to this issue.

⁹ Mr. Hagemeister's concerns relating to complainant's performance are also reflected in his memo written four months earlier, on January 19, 1993. The January memo is described in Finding 13. Complainant's performance was undercut by some basic gaps in her knowledge. For example, she had difficulty distinguishing between square feet and cubic feet and called her supervisor to obtain assistance in calculating the volume of an apartment.

Decision to use promotion rather than reallocation as method for employment as EES

Complainant contends that the decision to make advancement to the Environmental Enforcement Specialist level positions a promotional opportunity rather than to reallocate the existing Agchem Specialist positions, and regrade the incumbents, constituted discrimination against the complainant based on her age and sex.

David Fredrickson testified he was advised DATCP could not reclassify or re-allocate the Ag Specialist positions into the EES series because it would involve movement of the positions from one bargaining unit to another and because the Wisconsin State Employees Union opposed such a move.

Even if respondent had the option of reallocating the positions, there would have been a question, based on complainant's past performance level, whether she could perform satisfactorily at the new level. The language of the specifications at the Senior level refers to:

. . . independently reviewing enforcement cases, deciding which action is appropriate, initiating the appropriate enforcement action(s), involving other district and central office staff necessary to follow through with a completed complex civil case and preparing civil cases under the parallel proceedings format. The work performed at this level requires a high degree of interpretation and creativity in exercising independent judgment, e.g., in evaluating cases for consistency with statutes and rules.

Respondent was not required to make an agency-wide decision based solely on what was the best for complainant. Respondent ended up using a series of promotional hires which had the effect of retaining current employees and moving most of them into a new classification via promotion, which resulted in a significantly greater increase in pay for the successful candidates than would have been the case had their positions simply been reclassified from the Agchem Specialist series to the EES - Senior level. No one lost a job and no one was forced to relocate. There is no indication that the promotional process used by respondent was undertaken because of the complainant's age or sex. There is no reason to believe that respondent would have engaged in a lengthy procedure, including a promotional announcement, examination scoring, and a

series of 16 interviews, which resulted in decisions to hire 1 of 2 female candidates and 7 of 8 candidates older than 40, in order to discriminate against complainant based on her age or her sex.

Decision not to select complainant for EES - Senior promotional vacancies

Complainant drew extensive comparisons in her post-hearing brief between the scores she received for her responses to questions asked in the promotional interviews and the scores awarded to other candidates.¹⁰ Complainant's analysis fails to take into account the limited role that the scores to the interview questions played in the final decisions.¹¹ While those candidates who received the higher interview scores tended to be the same candidates who were hired, there were several exceptions, as indicated in the following table of the candidates who were interviewed.

<u>Total</u> <u>Interview Score</u>	<u>Hired?</u>	<u>Candidate</u> <u>Number</u>	<u>Sex</u>	<u>Age as of</u> <u>6/1/93</u>
269	Yes	8	M	39
269	Yes	10	M	39
250	Yes	11	M	27
245	Yes	1	F	36
245	Yes	6	M	42
239	Yes	13	M	49
239	Yes	15	M	46
232	Yes	3	M	29
214	Yes	4	M	54

¹⁰ Complainant also compared her responses in the oral examination (i.e. the process used to generate the certification list of candidates for promotion) to the responses and scores of the other examinees. However, complainant never related these arguments to her claims of sex and age discrimination, nor did she show that the persons who made the selection decision were even aware of the candidates' exam scores.

¹¹ There were erasures or changes made in the scoring of responses given by the candidates during the interviews. However, such changes are not inconsistent with the procedure followed here, i.e. that scoring was discussed between the panelists after the interviews and if one interviewer might remind another of specific relevant comments which were made. This matter is not a civil service appeal of a non-selection decision arising from the Commission's jurisdiction pursuant to §230.44(1)(d), Stats. Rather, it was filed as a complaint of discrimination based on age and sex.

211	No	5	M	unknown
211	Yes	14	M	60
199	No	2	M	unknown
193	Yes	7	M	55
189	No	Complainant	F	49
177	Yes	9	M	46
not scored	No	17	M	unknown

The contents of this table (derived in part from Exh. 29) confirms the testimony of DATCP management that information beyond the raw scores from the interviews was relied upon in making the final decisions whether to promote a particular candidate.¹² DATCP's witnesses testified that this information related to a large extent on the performance or work record of the candidate. Complainant's performance was marginal. Management noted numerous areas for improvement. Given management's knowledge of complainant's work performance, it was logical for management to decide not to promote the complainant to a higher classification level with wider responsibilities in areas of spill investigation and remediation.

Comments by complainant's co-workers about her work support respondent's conclusion not to promote her and to move slowly on the reclassification of her position. Many of complainant's co-workers testified about problems with complainant's performance that they had observed or negative comments about complainant's work that were made by persons in the regulated industry. These problems were relayed to management. Other field employees did not have similar performance problems as complainant. Complainant's high opinion of her own work was at variance with the opinions of management and her co-workers.

¹² Witnesses for respondent offered credible testimony that reasons other than sex or age discrimination served as the basis for their selection decision. For example, candidate 9, who had the lowest interview score of the successful candidates, had a history of suffering severe migraine headaches and it appeared to at least one interviewer that the candidate was experiencing a migraine episode during the interview. However, the field supervisors who were familiar with the work of candidate 9 felt he would be able to function at the higher level of responsibilities of the EES - Senior level. Based on that information, the final decision was to hire candidate 9 for one of the vacancies.

In her rebuttal case, complainant offered exhibits showing she investigated a 4 to 8 gallon spill¹³ of a herbicide mix onto a road where it had promptly evaporated (Exh. 189) and a spill of approximately 170 gallons of a 29% Aqua Ammonia which may be used as a fertilizer (Exh. 190). Both investigations occurred in approximately July of 1993 and were assigned to complainant by Duane Klein, who did not serve as complainant's supervisor. However, the ammonia was being used in refrigeration equipment rather than as fertilizer. Therefore, this industrial release, at all times, should have been a responsibility of DNR rather than DATCP. The materials indicate that DNR did respond. In addition, Mr. Fredrickson acknowledged that at some point in 1993, a subordinate of Mr. Klein incorrectly referred a spill to complainant for investigation and that Mr. Fredrickson carefully explained to the subordinate that he was not to refer any spills to an Agchem Specialist, and that the prior referral had been in error. Complainant's response to the herbicide spill did not involve any clean-up of the material. These events occurred *after* she was interviewed for the EES vacancies and even if one concluded that the assignments were to clean up a "spill," management subsequently took steps which indicated these referrals had been made without the management's knowledge and were contrary to policies that existed at that time.¹⁴

Decision to assign another employee to investigate "Command" drift

Complainant's final allegation relates to management's decision in May of 1993 to assign Jack Darland to respond to a herbicide drift that occurred within complainant's region of the state. Complainant appears to contend that she, rather than Mr. Darland, should have been given the assignment or she should have been assigned to accompany Mr. Darland.

¹³ The term "spill" is used in this sentence in its generic sense, rather than to indicate an incident which required an investigation, testing to determine extent of the incident and remediation.

¹⁴ Differences in responsibilities of field staff positions classified at the EES - Senior level and those classified in the Agchem Specialist series was the subject of a memo from Mr. Zuelsdorff on September 17, 1993. (Exh. 110)

Complainant clearly lacked basic knowledge about the herbicide "Command." At hearing, she was unable to identify the crops for which the herbicide would be used, its manufacturer or the active ingredients. The one physical property she could identify was that the herbicide is "volatile," yet she was unsure of the meaning of that term.

DATCP management chose to send Mr. Darland to the site. Mr. Darland was the expert for the herbicide in the Division. He was one of the Section employees who had recently been promoted from Agchem Specialist - Objective to EES - Senior. He had previously informed management that, due at least in part to a hearing disability, he did not wish to work with the complainant. In addition, it is management's view that it is more effective to send a single staff person to respond to a complaint.

Management's decision was logical in light of Mr. Darland's superior knowledge of the herbicide, in light of Mr. Darland's desire to work alone and in light of management's goal of sending only one person in response to a complaint. There is no evidence to suggest that management's decision to send Mr. Darland, who is 5 years older than complainant, was based on complainant's sex or age.

Summary

The testimony of respondents' witnesses was quite consistent in terms of the procedures that were followed relative to complainant's position and the conclusions that were reached regarding complainant's work performance. In contrast, complainant had little evidence, other than her own testimony about her work performance, that tended to support her claims of discrimination. Complainant's testimony was evasive and not credible. The overwhelming weight of the evidence is that complainant's work performance during the relevant time period was marginal and that respondents made their personnel decisions based on factors other than complainant's age and sex.

ORDER

The complaint of discrimination is dismissed.

Dated: June 19, 1997 STATE PERSONNEL COMMISSION

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DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE

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

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

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

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

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

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

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95