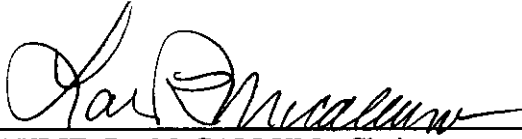


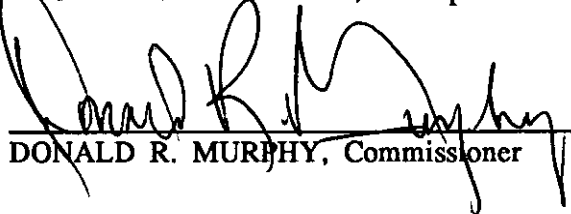


complainant's interactions with respondent in regard to health and safety issues. The purpose of these findings did not relate to the merits of complainant's health and safety complaints/grievances per se which is the focus of this umpire arbitration decision. Moreover, it frustrates the goal of finality in administrative proceedings for hearing records to be reopened and, as a result, such a reopening is considered an extraordinary result. Such a result is not compelled by the situation present here.

Dated: April 4, 1995 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

  
DONALD R. MURPHY, Commissioner

Parties:

Peggy McKibbins  
813 Buckingham Circle  
Hartland, WI 53029

Clifford Smith  
Chancellor, UW-Milwaukee  
PO Box 413  
Milwaukee, WI 53201-0413

**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



tasks), he noted that "Needs to work on safety while emptying waste baskets in her area. Do not use your hands to empty waste inside of baskets and don't put your hands in your barrel to push down the trash." This comment was prompted by complainant being injured by a needle when she used her hands to compress the trash in her barrel. All BMHs were trained not to place their hands in the trash to compress it.

4. During his supervision of complainant, when Mr. Butzlaff pointed out cleaning problems to her during his inspections, complainant became unhappy and upset and told him that she was surprised because she was doing so much extra cleaning such as cleaning grout. Mr. Butzlaff regarded the "extra" cleaning complainant described as part of her regular cleaning responsibilities.

5. Effective April 25, 1991, complainant accepted a transfer from the Health Center to the Library. Her supervisor in this position was Stephen Wieczorek. On or around May 6, 1991, Mr. Wieczorek completed an evaluation of complainant's work performance for the period June 3, 1990, through June 3, 1991. In this evaluation, complainant's performance received an M rating on 6 of the criteria and an E rating on the remaining criterion. Mr. Wieczorek's written comments were generally positive although he indicated that she needed to "continue to develop balance between quantity and quality of work," and to "continue development of effective communication with section supervisors." This communication comment was based on an incident which occurred in October of 1990 in which complainant went over her supervisor's head to point out a concern she had about cleaning up blood and other waste products without bringing her concern to her supervisor's attention first. The quantity versus quality balance comment was based on her supervisors' observations of complainant scrubbing grout with a toothbrush when there wasn't enough time for this level of detail scrubbing and when there existed other tools to do this job more efficiently.

6. In a memo dated June 21, 1991, complainant replied as follows to this memo:

My evaluation pertains to the last couple of months. I believe it was written solely on attitude and is biased.

I have brought a substandard area up to departmental standards, and only when school started was I unable to maintain the health center to my standards, which was communicated to my supervisor and never dealt with. I feel that I have shown my

work abilities in other areas such as [listed areas.] Of which only one (Purin) was my responsibility. The others were extras and above the expected work that I was to perform.

If I would have known before how my extra efforts were going to be regarded, I never would have volunteered for them on my own.

I do not feel that I should have been penalized on my evaluation for a situation that was never corrected by my supervisor.

Furthermore, I believe that my evaluation should be based on all my efforts and performed duties throughout the year.

In addition, in Mr. Wieczorek's meeting with complainant to discuss this evaluation, complainant indicated that she felt he was underrating her abilities and that she was "being screwed by management."

7. On or around May 6, 1992, Mr. Wieczorek completed an evaluation of complainant's work performance for the period of time from June of 1991 to May of 1992. In this evaluation, complainant's performance received an M rating on 5 criteria and an E rating on the remaining two criteria. Mr. Wieczorek's written comments were generally positive although he did note that "Peggy needs to focus attention on her assigned area, rather than other custodial areas in the building," "continue development of quantity of work balanced with quality of work," and "I encourage Peggy to continue efforts to communicate any problems with cleaning techniques or schedules with supervisors." The "focus" comment was based on complainant's comments to her supervisor expressing concerns relating to the work of other custodians in other areas. The "communication" comment resulted from complainant making aggressive comments to Mr. Wieczorek regarding her work assignments and his cleaning directives, and the fact that she wouldn't accept his explanations and would become very argumentative when he discussed these work matters with her.

8. In May of 1992, complainant requested and was granted a transfer to the Chemistry Building. Her supervisor in this position was Mary Herrmann, Custodial Supervisor 2.

9. Beginning in August of 1992, BMHs in the Chemistry Building were directed to note any health or safety concerns on a written log in Ms. Herrmann's office. This was part of a health and safety reporting procedure established pursuant to a plan developed by Chemistry Building custodial staff and Chemistry Department staff. Complainant was an active participant in the development of this plan which called for the reporting of safety/health

concerns by a BMH directly to his or her supervisor. Beginning some time in 1993, Ms. Herrmann would post a written notice in an area which was the subject of an entry in the log if she and Chemistry Department staff had been unable to remedy the problem informally. The vast majority of such problems were resolved informally and posting was rarely necessary. It was the responsibility of Greg Fueger, Administrator of the Chemistry Department, to resolve such problems once the area was posted.

10. In a memo dated August 26, 1992, Frank Shaw, Chairman, Chemistry Department, clarified for all Chemistry Building personnel certain safety procedures, including those involving the disposal of syringes and glass, the discarding of empty chemical containers, the disposal of chemical powders, the use of custodial equipment by lab personnel, staff members sleeping in offices or labs overnight, dogs being brought into the building, and bicycle storage. Mr. Shaw indicated that the memo was prompted by concerns voiced by the custodial staff.

11. In a memo dated September 17, 1992, David Melitz of UW-M's Environmental Health and Safety unit set forth the procedures for safe disposal of mercury which had been established by the Chemistry Department and the Environmental Health and Safety unit. This memo was directed to Ms. Herrmann and Mr. Fueger, who were instructed to remind their staffs to follow the listed procedures, and to encourage anyone who had questions regarding mercury or the listed procedure to contact their supervisor or the Environmental Health and Safety unit.

12. On September 24, 1992, complainant filed an "Abnormally Hazardous Task Report" relating to incidents which occurred on September 17 and 18, 1992, in which three (3) mercury thermometers were broken in Room 398 and disposed of in waste baskets. Ms. Herrmann's response to this report indicated that a meeting was held on September 25, 1992, with complainant, Donna Smith, the third floor laboratory technician, Ms. Smith's supervisor, and Mr. Melitz; that these individuals toured Room 398; and that signs would be posted over the glass disposal containers asking that broken thermometers not be placed in the glass disposal containers, that Ms. Smith had sent concerned parties a memo addressing the special clean-up procedure to be followed for mercury spills, that Mr. Melitz had sent a memo to Ms. Herrmann and Mr. Fueger addressing mercury spills and procedures, and that if complainant observed that any mercury spills were being improperly cleaned, she would

notify Ms. Herrmann and the Lab Tech or Environmental Health and Safety unit.

13. During 1992, complainant filed a complaint of sexual harassment with the UW-M Office of Affirmative Action and Equal Opportunity alleging that her ex-husband was spreading malicious rumors about complainant and a co-worker. An investigation was conducted and it was concluded that the actions alleged were not covered under the UW-M sexual harassment policy, and that the investigator was unable to verify in conversations with any of the witnesses named by complainant that events had transpired as complainant had described them. During this same period of time, complainant had spread rumors about her ex-husband that he had genital herpes and was having unprotected sexual contact with his partners.

14. On December 4, 1992, complainant filed an Abnormally Hazardous Task Report relating to improper disposal of sulfuric acid by a laboratory technician in the Chemistry Building. In her response, Ms. Herrmann noted that John Krezoski, Director of Environmental Health and Safety, was notified of the problem and he agreed that chemicals were not to be placed in the regular trash; that Mr. Fueger was notified and agreed to speak to the laboratory technician involved in the incident and instruct her on proper disposal techniques; and that complainant was counseled on proper disposal of unknown substances and advised to wear canvas gloves and other necessary safety equipment when removing trash from the area involved in the incident.

15. On March 1, 1993, complainant filed an Abnormally Hazardous Task Report relating to the improper disposal of a broken mercury thermometer. Ms. Herrmann's response to the report indicated that she had referred the matter to Mr. Fueger and that complainant had followed the proper procedure in dealing with the incident. Mr. Fueger, in response, directed a memo to certain laboratory technicians reminding them of the proper procedure for handling mercury spills and separating broken glass and powders into the appropriate containers.

16. Soon thereafter, complainant filed a grievance based on her dissatisfaction with the response she received to her March 1 report, and her fear that she would be transferred involuntarily or otherwise retaliated against for filing such reports. A grievance hearing was held on March 24, 1993, and a summary of the hearing stated as follows, in pertinent part:



During the hearing, Peggy was advised not to empty trash or clean up spills involving hazardous materials, per Custodial Procedure 14.10. If she finds a questionable substance, she is to contact her supervisor immediately so the problem can be addressed. In addition, Peggy's fears of retaliation are unfounded. Our department has, and will continue to promote the safety of personnel and the University community.

Therefore, this grievance is hopefully resolved.

17. Complainant filed this grievance at the third step on March 26, 1993, and a third step grievance hearing was conducted on April 29, 1993. The employer's response to the grievance stated as follows:

The grievant is concerned about several matters pertaining to Health and Safety procedures in the Chemistry Building. Many of these issues have been discussed and handled through other forums as well.

Chemical Spills. The grievant is concerned about the clean up of chemical spills, such as mercury from broken thermometers. However, the clean up of this or other hazardous materials is not within the responsibilities of the custodial staff. Custodians should notify Laboratory staff whenever they encounter a chemical spill and not attempt the clean up themselves.

Training for Custodians. The grievant is concerned that the training for custodians who work in the Chemistry building is not sufficient.

At the time of hire or transfer, every custodian who will work in the chemistry building is given personal training and a tour of the entire building by Mr. John Krezoski, the Director of Environmental Health and Safety (EHS). This training has been conducted for all existing personnel as well. Mr. Krezoski takes every employee floor by floor and lab by lab explaining the operations going on each floor. This training stresses that in the event of a problem, the custodians are to notify the Laboratory personnel and not to attempt any clean up themselves. The custodians are instructed to concentrate on the regulation wastebaskets and the hallways, and never to get "too comfortable" in any of the labs.

Disposal Techniques. The Chemistry Department has special disposal procedures for non-toxic powders, and for sharp objects, or "sharps." Those procedures are attached hereto as a reference. In both cases, the laboratory personnel are required to dispose of such waste in designated plastic-lined boxes. When the bags are full, they are to be sealed up and the boxes taped shut, so the custodians can dispose of the sealed boxes. It is not the responsibility of the custodians to close up the bags and boxes. If

boxes are not sealed when full, the custodian should make a report to the laboratory personnel, or the building manager.

Safe Thermometers. The grievant asserts that mercury thermometers in the Chemistry Department should be replaced with those using alcohol, to avoid mercury spills. The Department is presently in the process of replacing mercury with alcohol thermometers for student use, but at a cost of approximately \$20 each, the Department cannot afford to replace thousands of dollars in equipment all at once. Mercury thermometers only pose a hazard when they are broken, and the solution is for the lab personnel to call EHS or the building manager to clean up the spill with a mercury vacuum. Custodians should not handle mercury, or any other chemical spill.

In all of these situations, the Chemistry Department and the Department of Environmental Health and Safety has taken extensive measures to ensure safe laboratory practices, and diligently tries to maintain an ongoing vigilance as to their proper implementation. There has been no violation of the health and safety provisions of section 9/14. Grievance denied.

18. On March 22, 1993, David Keach, a UW-M employee and a union steward, filed a job safety/health complaint with the Department of Industry, Labor and Human Relations (DILHR) relating to the disposal of chemicals, syringes, and glass in the Chemistry Building. This complaint requested an inspection of the Chemistry Building by DILHR, and indicated that a UW-M employee had brought these concerns to his attention and that this employee had met with hostility and threats of transfer due to their actions. In deposition testimony, complainant indicated that she was not sure who this employee was and that such information would have to be obtained from Mr. Keach. At hearing a week later, complainant testified that the employee referred to in the complaint was she.

19. On April 27, 1993, complainant filed an Abnormally Hazardous Task Report relating to mercury which had been spilled on the floor in Room 398 and not cleaned up. This report indicated that complainant had contacted Mr. Fueger and he had cleaned up the spill himself using a mercury vacuum. Ms. Herrmann's response to the report indicated that she had forwarded a copy of the report to Mr. Fueger for follow-up with Chemistry Department personnel, and that complainant had followed proper procedures in dealing with the incident.

20. On or around June 3, 1993, Ms. Herrmann completed an evaluation of complainant's work performance for the period June of 1992 to June of 1993. This evaluation stated as follows, in pertinent part:

Overall Rating: E

Comments: Peggy believes in doing any task to the best of her ability. She is concerned that all custodians are able to perform assigned tasks safely and efficiently.

Goals for next review period: Continue to learn new more efficient techniques. Try to look at all sides of an issue.

1. Remove all trash from assigned areas on a daily basis. M  
Ongoing inspections by supervisor.

2. Dust, clean, and polish all surfaces on established E  
frequency schedules. Ongoing inspections by supervisor.

3. Maintain floors and carpets on a daily basis, and as E  
indicated by need and floor maintenance schedules.  
Ongoing inspections by supervisor.

4. Remove debris, dirt, and snow from exterior entrances, M  
stairs, and other areas as necessary. Inspections by  
supervisor when appropriate.

5. Maintain custodial closets, supply carts, and equip- E  
ment in a clean, sanitary, and safe condition. Periodic  
inspection by supervisor.

6. Exercise good judgment and proper safety precautions E  
while performing tasks.

Peggy's concern with safety issues has been instru-  
mental in improved waste handling by chemistry  
personnel and by custodians.

7. Communicate effectively with supervisors, peers, and M  
the University community.

During this 1992-93 evaluation period, complainant had been assigned by Ms. Herrmann to work with the Chemistry Department to put a safety program together (See Finding of Fact 9, above), and Ms. Herrmann regarded complainant's work on this assignment as exceptional. This assignment was completed prior to the 1993-94 evaluation period.

21. In a letter dated October 20, 1993, Mr. Krezoski responded to Mr. Keach's complaints to DILHR. This letter indicated that an investigation had been conducted; that the small amounts of mercury and sulfuric found in the normal trash were the result of employee error and, once brought to the attention of the supervisor, had not been repeated; that biological materials were not regarded as requiring special handling or disposal; and that further training to achieve compliance with existing procedures had been undertaken.

22. On January 10, 1994, complainant filed an Abnormally Hazardous Task Report relating to the lack of notice on January 5, 1994, that fume hoods were not operating, and to the number of chemical spills on the 6th and 7th floors of the Chemistry Building. Ms. Herrmann's response to this report indicated that, when the fume hoods are shut down for maintenance, there would be a notice of this posted on the elevator; that she had spoken to maintenance person William Picard who told her that he would notify her of scheduled maintenance on the fume hoods, and that she would inform affected employees; and that she reminded complainant that, if she felt she was in danger, she should leave the area immediately and report the problem.

23. Complainant stopped entering her health and safety concerns in the log in Ms. Herrmann's office on or around December 20, 1993, because she believed Ms. Herrmann was not following up on them.

24. On March 2, 1994, the materials in complainant's trash barrel started on fire when she emptied a wastebasket into it in Room 398. When complainant attempted to put the fire out with the available fire extinguisher, the materials became very smoky. The laboratory technician then put out the fires while complainant left to report the fire to Ms. Herrmann who accompanied complainant back to Room 398. Ms. Herrmann asked complainant if she wished to fill out an accident report and she indicated that she did because her hair had been singed, and that she wished to fill out an Abnormally Hazardous Task report as well. Complainant appeared fine physically although she did appear upset. Complainant did not request medical attention. Complainant re-entered the smoky room several times and Ms. Herrmann told her to leave everything the way it was for the investigator. Mr. Krezoski investigated the fire incident that day, finding that the fumes given off were primarily hydrogen which is an irritant, that smoke from the paper towels in the barrel and the melting plastic barrel liner were also likely

given off, that he would advise that complainant see a doctor if she wanted to, and that the students and faculty who were involved had all been made aware of the incident and had been directed to ensure that a repeat did not occur.

25. Complainant indicated in the reports that she filed in relation to this incident that the smoke and fire injured her eyes and singed her hair. Complainant was not wearing eye safety equipment such as safety goggles or safety glasses at the time. Complainant also indicated that she didn't feel her supervisors reacted quickly enough to the fire when she reported it to them.

26. On the morning of May 10, 1994, upon reporting to work, complainant was advised by Ms. Herrmann in writing that she was scheduled to attend a meeting/tour with Mr. Krezoski and a DILHR inspector on Friday, May 13, at 9:00 a.m.

27. The meeting and tour were conducted as scheduled on May 13, 1994. During this meeting and tour, complainant pointed out areas in the Chemistry Building which she and other BMHs felt did not comply with safety and health requirements. Some of these areas had been brought to complainant's attention that morning by BMH Kent Wilburn and complainant had jotted them down in a personal notebook at that time. Others complainant had been aware of for a longer period of time (e.g., smoking, deteriorating disposal containers), had not recently been brought to the attention of Custodial Supervisors or other supervisory staff by complainant or Mr. Wilburn, and had not been entered on the log in Ms. Herrmann's office.

28. In a memo to Dexter Domahoski, Director of UW-M Physical Plant Services, dated May 13, 1994, Mr. Fueger stated as follows, in pertinent part:

I ask your assistance in having custodians report their safety concerns immediately to their building custodial supervisors and/or building chairs to preclude a situation that I encountered this morning with Peggy McKibbins, a custodian in the Chemistry Building.

During an inspection this morning by Richard Brandt of DILHR, Peggy brought to my attention several safety concerns that she had made in a formal complaint to DILHR. In several instances, this was the first I had heard of these concerns. It does the safety posture of our building no good for her to write them in her notebook, pass them on to the union and/or DILHR and not let us know about them. In many instances they can be corrected immediately by the appropriate person and we don't need to bring them to the attention of DILHR. For example, she pointed out to me evidence of an individual's cigarette smoking residue in one of our offices. I immediately directed the individual

concerned that this was a no smoking area. Peggy expressed fear that her supervisors would get mad at her if she reported these instances. I told her that this was a misconception of hers - I need to know about safety concerns so that they can be corrected. I firmly believe that our custodians must work very closely with the personnel in the chemistry laboratories to prevent accidents and to stay informed about the environment in which they work.

Once again, I ask for your support in getting the message to the custodians that they need not be fearful of reporting safety concerns to their immediate supervisors who can influence the action much better than outside sources.

29. In a memo to Custodial Employees dated June 9, 1994, Mr. Domahoski stated as follows:

It appears in some instances there is a breakdown in the procedure to follow in reporting a safety issue or problem. As safety is everyone's concern I am encouraging and requesting the following procedure be followed.

Employees aware of safety problems or issues are to report them to their supervisors as soon as possible. If the problem is one that the building Chair is responsible for, the issue will be raised with that individual for their action. Physical Plant Services will follow up on problems falling under their jurisdiction.

It is in everyone's best interest to resolve safety issues. Your promptness in calling them to the attention of your supervisor is appreciated.

30. On or around June 23, 1994, Ms. Herrmann completed an evaluation of complainant's work performance for the period June of 1993 to June of 1994. This evaluation stated as follows, in pertinent part:

Overall Rating: M

Comments: Peggy is very concerned with the safety of the custodians in Chemistry Building. She is well liked by the staff in her area.

Goals for next review period: Continue to maintain the area assigned to standards. Report safety problems to supervisor as they occur.

1. Remove all trash from assigned areas on a daily basis. M  
Ongoing inspections by supervisor.
2. Dust, clean, and polish all surfaces on established E  
frequency schedules. Ongoing inspections by supervisor.

3. Maintain floors and carpets on a daily basis, and as indicated by need and floor maintenance schedules. Ongoing inspections by supervisor. E

4. Remove debris, dirt, and snow from exterior entrances, stairs, and other areas as necessary. Inspections by supervisor when appropriate. M

Peggy is reminded that when snowfall occurs, its removal is a priority task, employees must attend to it at the beginning of the shift.

5. Maintain custodial closets, supply carts, and equipment in a clean, sanitary, and safe condition. Periodic inspection by supervisor. E

6. Exercise good judgment and proper safety precautions while performing tasks. M

Peggy is very concerned with safety issues in Chemistry Building. She should wear safety glasses when emptying trash in the labs.

7. Communicate effectively with supervisors, peers, and the University community. DN<sup>1</sup>

Peggy has failed at times to properly communicate with her supervisors. She must report any safety problems in a timely fashion to her supervisors.

Ms. Herrmann's snow-shoveling comment in regard to #4., above, related to an incident in which complainant refused to shovel snow on a day when the temperature was -35° F, claiming that she had had frostbite as a child.

Complainant continued to refuse even after Ms. Herrmann suggested that she remain outside for only short periods of time, and Ms. Herrmann shoveled the walks herself. BMHs are trained that snow-shoveling is a top priority and it is their responsibility to dress for the weather. Ms. Herrmann's "communication with supervisors" comment in regard to #7., above, related to incidents such as the one in which complainant called Leonard Skodinski, Supervisor of Physical Plant Services Buildings and Grounds, instead of Ms. Herrmann when she had a questions relating to keys; and the one in which complainant refused to lock a key box when asked to do so by Custodial Supervisor 1 Robert Joyce because he was leaving early that day.

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<sup>1</sup> This rating category is "Does Not Meet Standard."

31. Complainant and Ms. Herrmann met on June 23, 1994, at 7:00 a.m. to discuss this evaluation. At this meeting, Ms. Herrmann expressed her concern that complainant was not reporting her health and safety concerns in accordance with the procedure she had played a role in establishing, but instead was reporting her concerns first to entities such as DILHR and EHS.

32. Complainant filed two (2) Abnormally Hazardous Task Reports on June 28, 1994.

33. On one occasion, Ms. Herrmann asked complainant to assist a probationary employee in completing an Abnormally Hazardous Task Report.

34. Complainant is a cigarette smoker who has gone outside the Chemistry Building in temperatures -35° F and below to smoke a cigarette.

35. Kent Wilburn, a BMH assigned to the Chemistry Building at all time relevant here, filed frequent complaints about the improper disposal of chemicals and other health and safety concerns, particularly on the 7th floor. Mr. Wilburn logged some of these concerns in the log in Ms. Herrmann's office at least until June 16, 1994. Mr. Wilburn never received a DN rating on any of his performance evaluations at UW-M. Mr. Wilburn's 1994 performance evaluation was completed in April of 1994.

36. Of the BMHs assigned to the Chemistry Building, two (2) are black males (one of these is Mr. Wilburn), one (1) is a white male, one (1) is a white female (complainant), and one (1) is a black female.

37. Ms. Herrmann supervises twenty-two (22) BMH positions and has given an average of 7 DN ratings per year. During 1993 and 1994, she gave DN ratings on one or more rating criteria to the following BMHs:

1993:           1 Hispanic female  
                  2 black males  
                  1 black female  
                  1 white male

1994:           2 black males  
                  1 white male  
                  1 white female

38. In 1993 and 1994, Ms. Herrmann gave four (4) BMHs an overall rating of E each year. These BMHs in each year were both minority and non-minority, were male and female, and were not the same individuals both years.

39. At least one individual in a supervisory position offered as one of several solutions to the continuing concerns of complainant and Mr. Wilburn



that their health was threatened by their employment in the Chemistry Building their possible transfer to another building. Neither complainant nor Mr. Wilburn requested or received such a transfer. The record indicates that such a solution was one of several offered by Mr. Kazmierski, Assistant Superintendent of Buildings and Grounds. Mr. Kazmierski played no role in the preparation of complainant's 1994 performance evaluation.

#### Conclusions of Law

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and 230.45(1)(g), Stats.
2. The complainant has the burden to prove that she was discriminated against on the basis of her race or sex in regard to her 1994 performance evaluation.
3. The complainant has failed to sustain this burden.
4. The complainant has the burden to prove that she was retaliated against based on protected public employe health and safety activities in regard to her 1994 performance evaluation.
5. The complainant has failed to sustain this burden.

#### Opinion

The parties agreed to the following issue in this matter:

Whether respondent discriminated against complainant on the basis of race or sex, in violation of the Wisconsin Fair Employment Act (Subch. II, Ch. 111, Stats.), or retaliated against complainant in violation of the Occupational Safety and Health Act (§101.055), Stats.), in connection with her 1994 performance evaluation.

#### Race and Sex Discrimination

The Commission has applied the method of analysis of disparate treatment cases set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 2481, 101 S. Ct. 1089, 25 FEP Cases (1981). Pursuant to this method of analysis, the initial burden 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 legitimate, non-discriminatory reason for its action which the complainant may, in turn, attempt to show was a pretext for discrimination.

In the context of this case, a prima facie case would be demonstrated if the evidence showed that: (1) the complainant is a member of a protected group, (2) the complainant suffered an adverse term or condition of employment, and (3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.

The record shows that complainant is a member of protected groups based on her sex and her race; and that, as the result of certain ratings and comments on her 1994 performance evaluation, she suffered an adverse term or condition of employment. Complainant points to the fact that Mr. Wilburn, a black male, did not receive a DN rating on his 1994 performance evaluation in support of her contention that circumstances exist here which give rise to an inference of discrimination. Although, as discussed below, complainant's situation was not parallel to that of Mr. Wilburn in regard to certain key elements, for purposes of this analysis, it will be assumed that a sufficient inference of discrimination could be drawn from the record and that complainant has established a prima facie case.

The burden then shifts to respondent to articulate legitimate, nondiscriminatory reasons for its actions. Respondent has stated that complainant's failure to notify her supervisors of health and safety violations in the Chemistry Building, her failure to communicate effectively with her supervisors on other occasions, her failure to carry out a snow-shoveling assignment, and her failure to wear proper safety equipment resulted in the subject ratings and comments on her 1994 performance evaluation. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to demonstrate that the stated reasons are a pretext for discrimination.

In regard to the snow-shoveling incident, the record shows that complainant was assigned to shovel snow when the temperature was -35 degrees; that complainant refused to do so, even when her supervisor suggested frequent inside breaks; and that complainant explained her refusal as the result of having suffered frostbite as a child. The Commission agrees with the respondent that complainant's explanation was not credible in view

of the fact that complainant went outside to smoke when the temperature was 35 degrees below zero or colder; and that complainant's failure to carry out this assignment not justified in view of the fact that BMH training explains that snow-shoveling is a top priority and that BMHs should bring appropriate clothing with them in order to carry out this assignment. Complainant has failed to demonstrate pretext here.

In regard to the comment relating to safety glasses and the M rating she received on factor #6 on her performance evaluation, the record shows that BMH training and other health and safety information provided to BMHs emphasizes that proper safety equipment, including safety eyewear, should be worn at all times in laboratory environments. Despite this, complainant was not wearing safety eyewear when the materials in her trash barrel caught on fire on March 2, 1994, and her eyes were injured as a result. Although complainant appears to argue by implication that safety eyewear had not been issued to her or that use of safety eyewear had not been a part of her training, this is not sustained by the record and complainant has failed to demonstrate pretext in this regard.

Finally, in regard to the comments and ratings relating to communication with supervisors, the record shows that many of the safety and health problems complainant pointed out to the DILHR inspector had not been reported to her supervisor; that complainant, on another occasion, had requested information from a higher level supervisor instead of her first-line supervisor; and that complainant had refused to carry out a request to lock a key box despite a direct request from Custodial Supervisor 1 Robert Joyce. (See Finding of Fact 30, above).

Complainant argues in regard to this point that many of the problems she pointed out to the DILHR inspector were problems brought to her attention only that morning by Mr. Wilburn and, since they existed on the floors to which Mr. Wilburn was assigned, were not problems she would have been aware of earlier or would have had any reason to report earlier. The record shows, however, that only some of the problems complainant pointed out fit into this category, and that there were other problems that she reported to the DILHR inspector which existed in areas to which complainant was assigned and which she had failed to report earlier to her supervisor as required.

Complainant also argues that she had failed to report these problems to her supervisor because it was her impression that those problems she had

reported to her supervisor were not investigated by her supervisor or cured by the staff of the Chemistry Department. The record shows, however, that complainant was not necessarily aware of the efforts by her supervisor to follow up on problems reported in the log. More importantly, however, it is clear from the record that complainant was required, by the applicable health and safety reporting plan which she had helped to develop, to report safety and health problems on the log in her supervisor's office; that she had apparently done so consistently during the previous evaluation period; and that she had failed to do so consistently during the 1993-94 evaluation period.

Complainant points to the fact that Mr. Wilburn did not receive a DN rating on his 1994 performance evaluation, despite his failure to report safety and health problems which were brought to the DILHR inspector's attention, as evidence of pretext. However, the record shows that Mr. Wilburn's 1994 performance evaluation was completed before the date of the DILHR inspection, and that Mr. Wilburn had reported some health and safety problems on the log in his supervisor's office during his 1993-94 evaluation period, i.e., his supervisor would have had no reason to believe when preparing his 1994 evaluation that he was not consistently reporting health and safety problems on the log. Complainant also appeared to contend that no other BMH had received a DN rating. This contention was not borne out by the record (See Finding of Fact 37, above). In addition, the record does not show a pattern of awarding DN or E ratings on the basis of race or sex.

Complainant contends that respondent's "threat" to transfer complainant if she was unhappy about the safety and health conditions in the Chemistry building constitutes direct evidence of a discriminatory/retaliatory motive. However, the record shows that complainant's characterization of this threat is overblown. The record shows that the option to transfer was one of several discussed with complainant to address her concern that working in the Chemistry building was endangering her health.

Complainant has failed to demonstrate pretext and has failed to show that she was discriminated against on the basis of her sex or race.

#### Public Employee Health and Safety Retaliation

Section 101.055(8)(a), Stats., prohibits retaliation against a public employee who has exercised a right afforded by §101.055, Stats., related to occupational safety and health. Complainant meets the definition of a public

employe and respondent is a public employe as those terms are used in that subsection.

In analyzing claims arising under the public employe health and safety provisions, the commission has applied the same basic analysis as used for claims of retaliation under the whistleblower law, except that there is a different standard of causation.

In Strupp v. UW-Whitewater, 85-0110-PC-ER, 7/24/86, aff'd by Milwaukee County Circuit Court, Strupp v. Pers. Comm., 715-622, 1/28/87, the Commission held that under §101.055(8)(a), Stats., an adverse employment action

may be based in part on [the] protected activity, so long as the protected activity was not a "substantial reason" for the [adverse employment action], or it if can be said that the [adverse employment action] would have taken place "in the absence of" the protected activity.

The Commission based its holding on the language of §101.055(1), Stats., directing that the rights under the law were to be the equivalent to those available to private sector employes under OSHA. Therefore, §101.055(8)(a), Stats., identifies various rights which, once exercised, entitle the employe to protection from retaliation.

The method of analysis applied in public employe health and safety retaliation cases is similar to that applied in the context of retaliation claims filed under the Fair Employment Act (FEA). To establish a prima facie case of public employee health and safety retaliation, there must be evidence that (1) the complainant engaged in a protected activity and the alleged retaliator was aware of this activity; (2) the complainant was "discharged or otherwise discriminated" against (§101.055(8)(b), Stats.); and (3) there is a causal connection between (1) and (2).

Complainant filed Abnormally Hazardous Task Reports with respondent, and other disclosures to DILHR, relating to health and safety conditions in the Chemistry Building during the relevant evaluation period (See Findings of Fact 22, 24, and 27), which are protected public employe health and safety activities. See Sadlier v. DHSS, Case Nos. 87-0046, 0055-PC-ER (3/30/89). It is undisputed that complainant's supervisor Ms. Herrmann, who completed the subject performance evaluation, was aware of these reports and disclosures.

Respondent argues that, in regard to the second element of the prima facie case, comments and ratings on a performance evaluation do not meet the de minimis standard articulated by the Commission in Sadler v. DHSS. The Commission disagrees based upon the impact that a negative performance rating or comment could have on career advancement opportunities or perceptions by future supervisors, among other possibilities.

The relationship in time between these disclosures and reports and the subject performance evaluation provide evidence that a causal connection could exist. The Commission concludes that complainant has established a prima facie case of retaliation.

Once the complainant has established a prima facie case, the burden then shifts to the respondent to articulate legitimate, non-retaliatory reasons for the action. The burden then shifts back to the complainant to show that respondent's articulated reasons were pretextual.

This part of the analysis parallels that discussed above in relation to the allegations of race and sex discrimination, and complainant has offered no additional pretext arguments in regard to the retaliation issue.

Viewing the circumstances under consideration here as a whole, certain facts stand out. First of all, complainant had reported safety and health problems over a considerable period of years not only to her supervisors but also to the Chemistry Department, the union, the UW-M labor/management body, and the EHS unit, and had not only not suffered any adverse employment consequences as a result of this reporting but had been complimented, recognized, and rewarded for her efforts. Secondly, it was only during the 1993-94 evaluation period that complainant apparently did not consistently report such problems to her supervisors, and her supervisors learned of some of these problems for the first time when complainant pointed them out to the DILHR inspector. As a result of these facts, it is concluded that it is more likely that the basis for the DN rating and the comments relating to complainant's communication deficiencies were the result not of complainant's reporting of safety and health problems per se but of complainant's failure to report such problems in accordance with the established procedures. Complainant has failed to show that she was retaliated against for engaging in protected public employe health and safety activities.

Order

This complaint is dismissed.

Dated: \_\_\_\_\_, 1994      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner

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