STATE OF WISCONSIN PERSONNEL COMMISSION

VIRGINIA BENTZ,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 95-0080-PC-ER

DECISION AND ORDER

BACKGROUND

A hearing was held in the above-noted case on June 22-23, and July 28, 1997, to resolve the following issues:

1. Whether respondent's decision to terminate complainant's employment in May of 1995, constituted discrimination based on sex or handicap or whistleblower retaliation.
2. Whether respondent sexually harassed or retaliated against complainant for engaging in whistleblower activities during the course of her employment, in regard to the terms and conditions of her employment.

The parties' request to file post-hearing briefs was granted, with the final brief due by November 20, 1997.[1] A proposed decision and order was issued on January 15, 1998. No objections were filed. The Commission adopts the proposed decision and order as its final order. The margins have been widened in printing the final copy of the document and typographical errors have been corrected. The only change of a substantive nature was to add a sixth conclusion of law.

[1] Complainant filed neither an initial nor a final brief.

FINDINGS OF FACT

1. Complaint commenced employment with DOC on March 21, 1994, at the "Academy" where she was enrolled in a 6-week course to become a correctional officer. The training included a physical and a classroom component. Complainant was unable to complete the physical component because she broke her leg in the 2nd or 3rd week of training. The healing period was six weeks during which time she performed "light duty" work. Her doctor would not release her to return to the physical component of training after the healing period ended because the doctor feared complainant would suffer another broken leg.[2]

2. Complainant transferred to the Waupun Correctional Institution (WCI) on October 30, 1994, to work as a Food Production Assistant 1 (FPA-1) which required her to serve an original six month probationary period. (Exh. R-107) She successfully completed probation as of April 29, 1995, and she received written confirmation to that effect by letter dated April 27, 1995. (Exh. R-102) WCI terminated complainant's employment effective May 19, 1995, the same day as she received verbal and written notice of the discharge decision. (Exh. R-101)

3. As a food service (FS) worker, complainant's first-line supervisor was Dennis Glass, a FS Administrator who has known complainant since grade school. Her second-line supervisor was William Turner, also a FS Administrator. Both supervisors developed the two performance evaluations of complainant's work during her probationary period (Exhs. R-103 and R-104) and recommended that complainant pass probation.

4. The FS function was comprised of the following four areas: a) the dock where food goods were received, b) the kitchen where food was prepared, c) the bakery/meat departments and d) the dining room which also included a serving line and a dish room. The bakery and meat departments were on a different floor than the other

[2] The information in ¶1 of the Findings of Fact is provided for background only. The period of employment described therein was not an issue for hearing.

areas. Supervisor Glass had an office on the same floor as the dock, kitchen and dining room. Supervisor Turner had an office on the same floor as the bakery/meat departments.

5. Security for the FS function was provided by correctional officers. Typically one correctional officer was assigned to the dock, one to the kitchen and one to the bakery/meat departments. Typically, two correctional officers were assigned to the dining room area. (Turner testimony)

6. Up to 50 inmates worked in the FS area. (Exh. R-150, p. 2) About 400-600 inmates were fed at the breakfast and supper meals, with the number being higher for the noon meal. Security was a valid concern for staff working in the area.

7. About 3 days after complainant starting working at WCI, she found herself on the serving line without either of the two assigned correctional officers present as they both had gone to the dock (a smoking area). She approached Supervisor Glass and requested the use of a body alarm or radio for security when she was the only staff person on the line with inmate workers. Supervisor Glass called the absent correctional officers (the names of the officers are not identified in the record) into his office and "chewed them out" for leaving their posts. Thereafter, Officer Vanden Boom approached complainant and asked her to come to Security with problems rather than to Supervisor Glass (or to anyone else). (Exh. R-150, p. 2) Officer Vanden Boom's request was contrary to the expectations of complainant's supervisors. Specifically, Supervisor Glass expected complainant to report problems to him when he was present and, in his absence, to report problems to Supervisor Turner.

8. Male and female correctional officers then began "picking on" complainant in different ways, including the filing of "bogus" incident reports against her. The inappropriate nature of the incident reports was recognized by respondent and no disciplinary action resulted against complainant. These officers did not "pick on" the other female FS worker, Diana Cupp. Ms. Cupp had not reported the officers for any

work rule violations. Some examples of how officers picked on complainant are recited below.

a. Complainant had the responsibility to assign inmates to different work tasks in the kitchen and to post the assignments. Officer Steven Kaczik on 4-5 occasions between October 1994, and January 1995, reviewed the posted assignments and shouted out the errors he found, often using profanity. (Exhs. R-135 and R-150, pp. 2-3) Complainant never told Supervisor Glass or Turner about these incidents. (R-150, p. 3)

b. Officer Michelle Pringle accused complainant of giving a large piece of cake to an inmate even though the allegation was without merit because the cake was cut before it was delivered to the institution. (Testimony of complainant and Capelle.) Complainant did not indicate that Officer Pringle wrote out an incident report against her or that Supervisors Glass and Turner should have been aware of the incident in any other way.

c. Officer Jay Cerney told complainant that a prison was not a place for a woman to work. (Complainant's testimony.) Complainant did not report this comment to Supervisor Glass or Turner.

d. Incident report #256289 dated 11/25/94, written by Officer Casey against complainant over a petty allegation about replacing a piece of chicken for an inmate, a problem which was resolved fully on the date it occurred. (Exhs. R-140 & R-156)

e. Incident report #153837 dated 12/29/94, written by Officer Casey against complainant. This complaint related to an inmate telling Officer Casey that the inmate's food tray was missing a piece of bacon. Inmates were supposed to raise questions of missing food items before leaving the tray line as it otherwise would be presumed that the claimed missing items were eaten already by the inmate. It was inappropriate for Officer Casey to file this report against complainant. (Exhs. R-140 & R-156)

f. Incident report #243767 dated 1/2/95, written by Officer Kaczik and incident report #256886 dated 1/2/95 written by Officer Goble. Officer Goble noted that two seated inmates claimed they were missing the oranges off their trays and yet complainant would not allow them

replacements because the inmates left the food line without noting missing items. Officer Kaczik's report faulted complainant for her order that an inmate return the two "replacement" oranges to her rather than giving them to the seated inmates. Officer Kaczik filed the report as a safety concern based on the inmate's anger after complying with complainant's request. (Exhs. R-140 & R-156)

g. On January 12, 1995, an inmate cook was kept in the kitchen for overtime work. He was missed in the inmate count and, accordingly, the count was off. Security staff (Lieutenant Strahota) criticized complainant for the error, which was inappropriate since complainant was the least senior staff person working in the kitchen and yet she was the only person brought into Mr. Glass' office by the security staff. Officer Kaczik inappropriately wrote an incident report (#243921) against complainant about this. (Exh. R-140; R-150, p. 5; R-152, p. 2; R-156, pp. 16-17 and R-147, p. 2) A new policy was then created whereby the most senior chef was required to sign the overtime sheet with security staff.

h. On January 13, 1995, Officer Cerney wrote incident report #243914 against complainant over alleged food items missing from inmates' trays. (Exhs. R-140 & R-156)

9. Other individuals also felt that the officers were "out to get" complainant, as noted below.

a. Brenda Hubertus was the baker at WCI when complainant was hired. Officer Kaczik told her he was "out to get" complainant. Officer Kaczik made this statement to Ms. Hubertus sometime in November 1994, at which time he also indicated he "was going to make it his business" to see complainant did not pass probation. Ms. Hubertus told Supervisor Glass and complainant about Officer Kaczik's statement in mid-January, 1995. (Exhs. R-140, R-150 & R-152)

b. Officer Ralph Koehler's shift on the dock started after Officer Sharon Hodge's dock-shift ended. In November 1994, Officer Koehler told Officer Hodge that complainant would be "out of the institution." Officer Hodge did not report the comment to management.

10. Complainant also reported the officer's violations of work rules relating to "stealing food" which she observed as noted below. Stealing food is a continuing problem at WCI (testimony of Glass).

a. On November 24, 1994 (Thanksgiving Day), complainant prepared bag lunches for each cell hall. She called each cell area first to determine how many she needed. She prepared the lunches and sent them out. Officer Ralph Koehler called complainant and said he needed 20 extra bags. Complainant telephoned Supervisor Glass at home to report the missing bags and Supervisor Glass talked to the officer about it.

b. Similarly, on Christmas day in 1994, Officer Koehler requested 5 additional bags, an event complainant did not report until February 7, 1995. (Exh. R-150, pp. 4-5)

c. On January 15, 1995, complainant observed an inmate kitchen worker making sub sandwiches in the storeroom on the dock and when confronted by complainant (who suspected the inmate was making the sandwich for an officer) the inmate responded by asking complainant if she wished to eat the sandwich too. Complainant filed an incident report at Mr. Glass' request naming only the inmate as a wrongdoer. The inmate was removed from kitchen work as a result. (Exh. R-150, p. 6 and Exh. 156, pp. 20-24) **This was the first written report filed by complainant.**

11. A final incident led complainant to file an internal complaint of harassment. On January 29, 1995, complainant heard Officer Koehler order an inmate cook to make him some onion rings. The request was inappropriate because the onion rings were not on the menu for the day.[3] Complainant told Officer Koehler that he could not

[3] Mr. Knaup in an investigative statement dated February 10, 1995, told WCI that he had given permission for the officer to have the onion rings. Mr. Knaup appeared at hearing and provided testimony about the onion rings. Initially, he indicated he did not recall if he gave the officer approval. Then he indicated he wished the officer had asked him for approval before having the inmate prepare the onion rings. The examiner found most credible Mr. Knaup's statement that the officer did not seek prior approval for having the onion rings cooked. Accordingly, the officer's actions were a violation of WCI's food policy.

tell the cook to make him onion rings. Officer Koehler responded: "The hell I can't." Shortly thereafter, complainant went to the dock area where she saw Officers Koehler and Kaczik eating the onion rings in such a way (slurping them) that complainant felt they were trying to goad her. She reported the matter to Todd Knaup (a FS coworker) who was in Supervisor Glass' office. Apparently, an inmate overheard part of the conversation because the office phone rang a few minutes into complainant's entering the office. Complainant answered the phone to find Officer Kaczik calling. He told complainant she would not get away with "bad mouthing" officers in front of inmates and then he hung up. Towards the end of complainant's shift, she was the sole kitchen staff person on duty. She was in Supervisor Glass' office doing paperwork. Officer Kaczik came into the office and asked: "What's this I hear about you getting my job?" He also said the union was after her job and when he finished the paperwork that day she would be done. Additional words were exchanged with complainant opening the office door and asking Officer Kaczik to leave. On his way out the door he referred to complainant as a "bitch" and/or a "slut". This comment was overheard by inmate workers. Complainant telephoned Supervisor Glass about the incident and he instructed her to report it to the officer's supervisors, which she did. Captain Dittmann and Captain Pat Garro spoke with complainant the same day and took her allegations of harassment seriously. They asked complainant to write a statement about what occurred on January 29, 1995, which she did giving the Captains a copy the same day. (Exh. R-155). On January 30, 1995, Supervisor Turner and Capt. Robert Hable conducted an "intake interview" with complainant in response to the report she had made to Capt. Dittmann. The events of January 29, 1995, were reviewed in this interview. (Exh. R-154)

12. During an investigatory interview on February 8, 1995, complainant indicated that the majority of harassment had been inflicted by Officers Kaczik, Pringle, Cerney and Koehler (Exh. R-150). Respondent conducted an investigation which found all named officers to be evasive in answering questions and which found Officer

Kaczik mainly responsible for the harassment. Officer Kaczik was disciplined but not the other named officers.

13. In a disciplinary investigation report dated March 2, 1995 (Exh. R-135, pp. 4-6), respondent alleged that Officer Kaczik violated work rules as noted below.

a) DOC work rules #2 and #5, in regard to his actions described in ¶8 above, which WCI characterized as "ridiculing" complainant in front of inmates about her scheduling of inmates' work assignments on 4 or 5 occasions prior to 1/29/95.
(Work Rule #2 prohibits deliberately causing mental anguish to others. Work Rule #5 prohibits disorderly or illegal conduct including the use of loud, profane or abusive language. (Exh. R-122))

b) DOC work rules #2 and #5, in regard to his telephone call to complainant on 1/29/95 (¶11 above), where he said she would not get away with bad mouthing security officers.

c) DOC work rule #7, for making false statements about the prior incident during WCI's investigation in February 1995.
(Work Rule #7 prohibits an employe's failure to provide accurate and complete information when required by management. (Exh. R-122))

d) DOC work rules #1, #2 and #5, in regard to calling complainant a "bitch" (¶11 above) on 1/29/95.
(Work Rule #1 prohibits disobedience, insubordination, etc. This violation was imposed for Officer Kaczik's violation of DOC's policy against sex harassment.)

14. Under respondent's Guidelines for Employee Disciplinary Action (Exh. R-125), work rule violations are characterized either as a Category A, Category B or Category C, with Category A containing the least severe offenses and Category C the most severe. Officer Kaczik's infractions of work rule #2 are Category C violations. His infractions of work rules #1, #5 and #7 are Category B violations. The progressive discipline noted in the guidelines for violations of Category B offenses are a written reprimand for a first violation, a one-day suspension without pay for a second violation, a three-day suspension without pay for a third violation and a five-day suspension or termination for a fourth violation. The guidelines further state that Category B

violations "which seriously jeopardize or disrupt the security, health, safety and/or operation of the institution . . . or staff" may be exempted from progressive discipline. The discipline noted for violations of Category C offenses is described as "normally subject to severe discipline up to and including discharge as determined by the Appointing Authority."

15. Officer Kaczik was informed by letter dated May 15, 1995 (Exh. R-134), that WCI concluded that he did violate work rules as alleged in the investigative report (see ¶13 above) and, consequently, WCI would impose discipline. The violations collectively were referred to therein as his "first violation under DOC Disciplinary Guidelines, Category B & C." Unexplained in this record is why respondent counted his work rule violations collectively as one violation under Category B and one violation under Category C, when the Category B violations occurred on 6-7 separate dates and when the Category C violations occurred on 5-6 separate dates. He was suspended without pay for one day (March 30, 1995), and was reassigned from the FS area for a period of one year, penalties viewed by WCI management as sufficient to stop his harassment of complainant and as sufficient to send a message to other officers that such conduct would not be tolerated by management. Management especially viewed as significant, the prohibition against Officer Kaczik returning to the FS area for one year because he otherwise would have had contractual rights to work in the FS area. Officer Kaczik's harassment of complainant stopped after the discipline was imposed and the cause of his changed behavior was the discipline imposed.

16. On or about January 30, 1995, an inmate informed complainant that an officer told him to write her up in an incident report. The inmate would not tell complainant which officer said to write her up. Complainant reported the matter to Mr. Turner the following day. On February 7, 1995, Mr. Walker told complainant the inmate complaint was resolved and that Officer Jay Cerney was the person who had prompted the inmate to report. The record does not indicate what type of discipline, if any, was imposed on Officer Cerney for attempting to get an inmate to file a baseless

report against complainant. (Exh. R-150, p. 10) Officer Cerney's statement was taken on February 7, 1995, but his role in attempting to get an inmate to file a report against complainant was not discussed. He was angry because complainant had reported him leaving his FS post on 5 occasions in the 2 months that he worked there and because she had reported other officers for leaving their posts. He realized complainant was concerned for her safety, but he inappropriately failed to view her concerns as a serious matter. (Exh. R-151, p. 3-4; testimony of Hodge, Capelle and Knaup.)

17. Harassment continued after complainant filed her harassment complaint and while the matter still was being investigated. An *incomplete* [4] enumeration of the continuing harassment reported to Supervisor Glass, is noted below. None of the incidents occurred after May 15, 1995, when discipline was imposed against Officer Kaczik.

a. Complainant submitted a written report to Supervisor Glass about incidents of January 31, 1995 (Exh. C-10). Her main complaint was that Officers Pringle and Mays were uncooperative with her request for them to "watch the line" so she could complete inventory. She further noted that no officers were present during the last 5 minutes of her shift. Complainant reported the matter to one of the officer's supervisors. Supervisor Glass could not recall whether he talked to Officer Pringle about the report and was unaware if anything was done in regard to this complaint.

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[4] Complainant indicated at hearing that her ability to present evidence regarding the many occurrences of harassment was hampered significantly. Specifically, she kept a book as a written diary to record the incidents of harassment and she kept this diary in her locker at work. On the day she was discharged, she was not allowed to clean out her own locker but respondent had a staff person do it for her. The book was missing, as were complainant's own copies of complaints she filed about coworkers. WCI's own copies of these complaints turned up missing too, with the exception of Exh. R-161 (per testimony from Mr. Glass). This claimed disadvantage is most significant to the continuation of harassment after February 7, 1995. Events prior to that date were preserved in Exh. R-150, because complainant had access to the diary when she provided information to respondent about her claim of harassment (Exh. R-150, p. 5).

b. Complainant reported to Supervisor Glass about an incident which occurred on March 12, 1995 (Exh. C-12). Specifically, Officer David Harding criticized complainant by saying the men's bathroom was unclean. This criticism was without merit as complainant's job duties did not include cleaning bathrooms. Supervisor Glass discussed this incident with Officer Harding.

18. On March 16, 1995, complainant reported to Supervisor Turner that Lt. Jon Stevens had questioned complainant. Supervisor Turner reported this to Lynn L. Oestreich, Associate Warden. The matter was investigated. Complainant's statement was taken on March 22, 1995 (Exh. R-130), at which time she said Lt. Stevens questioned her based on comments he had overheard at a local bar. Complainant felt he asked the questions because he wanted to know what was going on. Complainant did not feel threatened by Lt. Stevens even though he did say it was not a good idea to "tick off" officers. A coworker who overheard parts of the conversation interpreted Lt. Stevens' comments in a more negative light than complainant. (Exh. R-129) Lt. Stevens said he stopped in to talk to complainant to let her know that not all security staff were out to get her (Exh. R-128). The investigative summary to Warden McCaughtry is dated March 27, 1995 (Exh. R-127), which concludes that Lt. Stevens violated no work rules but showed poor judgment "in questioning Ms. Bentz based on the fact that he knew she had recently filed a complaint and that an investigation was in progress or had recently been completed." Cindy O'Donnell, Security Chief for the Division of Adult Security Institutions, discussed the incident with Lt. Stevens. She told him the warning against ticking off officers was extremely inappropriate because it evidenced his meddling in the investigation of complainant's harassment claim and because his comment created a "chilling effect" on complainant's and other worker's reporting of inappropriate behaviors. This incident was noted in Lt. Stevens' performance evaluation and played a part in respondent's decision not to pass him off probation. As a result, he no longer worked at WCI, but does continue to work at a different institution. (Testimony of complainant and Jeff Capelle.)

19. During the last few months of complainant's employment (from about 3/19/95 - 5/19/95), complainant would come into Supervisor Glass' office very upset and stressed. She would be crying because the officers were ganging up on her. The harassment suffered by complainant was the worst Supervisor Glass has seen in his 13 years working at WCI, and was the worst Supervisor Turner has seen in his 19 years working for respondent. Supervisor Turner confirmed that he observed complainant crying in Supervisor Glass' office three times.

20. There are "cliques" of officers at WCI who "steal" food and who regularly leave their work stations in the FS area but who are not reported to management for fear of retaliation. (Testimony of Sandra Markus, Sharon Hodge). In fact, when complainant told Officer Hodge (in Hodge's role as EAP coordinator) that complainant had reported Officer Koehler for "stealing" food, Officer Hodge said this "could be disastrous in terms of retaliation." Nor were employees likely to report Officer Kaczik for work rule violations. He was "a very rude person" who seemed to think he was an army officer with the authority to issue orders to complainant and Brenda Hubertus, the baker. (Hubertus testimony.)

21. Complainant never informed Supervisor Glass (or anyone else in management at WCI) that she had a disability. She did tell Supervisor Glass that she was seeing a doctor due to job stress, but she did not characterize this as a handicap or disability. Nor did Supervisor Glass perceive that complainant was disabled. Supervisor Glass referred complainant to Officer Hodge, a coordinator in respondent's Employee Assistance Program. (Testimony of Supervisor Glass.) Complainant never informed respondent's affirmative action office of any disability connected with her FS work. (Testimony of Jo Winston.)

22. Complainant collects wristwatches as a hobby. In or about March 1995[5] (prior to the end of her probationary period), she wore a watch to work which she had

[5] Complainant indicated in a statement given to WCI on May 16, 1995, that she gave the watch to inmate Dorrough 1-1/2 to 2 months prior to giving the statement. (Exh. R-116, p. 2)

purchased the night before at Shopko for $6.38. Inmate Dorrough worked in the kitchen and told complainant it was a nice watch. He pointed out that the face of the watch had a drawing and words about "Black heritage" and asked if she had any Black heritage. She replied in the negative. She did not wear her glasses (which she needs for reading) when she purchased the watch and had not realized what the watch face said. She was embarrassed as she felt someone might be offended by her wearing the watch when she was not Black. On the spur of the moment she gave it to inmate Dorrough. After she had time to reflect, she knew she could be terminated for giving inmate Dorrough the watch and so she considered trying to get it back from him, but did not as she felt it would make matters worse. She did not report the matter to her supervisor. (R-116, pp. 1-2) Supervisors Glass and Turner were unaware of this incident at the time they recommended that complainant pass probation. They would not have made the same recommendation if they had known that this event had occurred. (Turner and Glass testimony.)

23. In March 1995 (Exh. R-113, p. 3) (after complainant gave inmate Dorrough the watch[6]), he passed her a handwritten note while they were working in the kitchen. Complainant put the note in her pocket without reading it right away. Later, she went to Supervisor Glass' office (which was vacant at the time) to read the letter. She glanced at it and noticed the closing words: "Kiss Kiss." She tore it up and threw it in Supervisor Glass' wastebasket. Inmate Dorrough approached complainant while she was still in Supervisor Glass' office and asked if she had read the letter. She indicated she had and told him not to do it again. Complainant did not inform her supervisors about this, although she knew she should have. (Exh. R-113, pp. 3 & 5; Exh. R-115, p. 2)

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[6] Complainant testified at hearing that inmate Dorrough passed her the note in January, February or March 1995. However, she indicated in a statement given to WCI on May 16, 1995, that inmate Dorrough passed her the note after she had given him the watch. (Exh. R-116, p. 11)

24. On May 8, 1995, another inmate informed Lt. Donald Strahota that complainant had given a watch to inmate Dorrough. Lt. Strahota did not solicit this information. He investigated the inmate's report and apprised management of the same, all pursuant to usual and expected procedure. His report was not motivated by a desire to get complainant in trouble. (Exh. R-117) A search was conducted of inmate Dorrough's cell at which time the watch was discovered, along with a handwritten letter Dorrough wrote to complainant but never mailed. (Exh. R-116, p. 20; and R-115, p. 2) The text of the unmailed letter (Exh. R-116, p. 20) is shown below:

> "Unconditional Love" /Trust "Me"
>
> Hi Lady,
>
> I know that I will never find someone so true, you're one of a kind and I'm not afraid to let you know that I'm going to let my feelings show. My mind is clear, lady I'm sincere. My heart is an open door for you so please enter.
>
> I have the impression that we could be special friends to each other. Hey my dear, we started out as friends who really love being together never knowing we would find that special "thing".
>
> Gin, I cherish every moment with you, and holding back can be a big mistake, and the pressure just keeps on building.
>
> Gin, I can only ask of you . . . what I hope you want from me, so in this moment when passion calls I'm a slave of what's to be.
>
> Gin, I say this from my sparkling heart, you know that I trust you with my heart. Hey my dear, I'm a very good understanding person.
>
> "Kiss Kiss"
>
> Love always "Me"

25. An investigatory interview was held with complainant on May 16, 1995, to ask her about giving the watch to inmate Dorrough. (Exh. R-116) The watch inci-

dent was discussed, as was the letter found in inmate Dorrough's cell. At this meeting, complainant disclosed that she also mailed inmate Dorrough a birthday card the prior evening. She said she sent the card because she was told inmate Dorrough had no visitors and she felt sorry for him. (Exh. R-116, pp. 2-3) Copies of the birthday card are in the record as Exh. R-118, pp. 1-3. The envelope the card was mailed in contains no return address. Complainant signed the birthday card as "You know who!", instead of signing with her name. The unsigned handwritten letter enclosed in the card stated as follows:

> Hi Grady.
>
> I'm going to make this brief. I wish it could be longer but under the circumstances I don't think it's wise. I want to wish good things come to you in the future and that pleasant thoughts are with you for the remainder of the time you have left. I'm sure good things will happen to you when you're released as you have loyalty, dedication, and sensitivity needed to survive in society during these times.
>
> Make the best of your birthday and know better things are to come.

26. It was a violation of respondent's fraternization policy for an employe to have personal contacts (verbal or written) with inmates or to provide goods to inmates. (Exh. R-122, p 3, items e) and f) of the definition of "relationship".)

27. Respondent concluded that complainant's conduct constituted three separate violations of respondent's fraternization policy (Exh. R-112 characterized as "misconduct" which were considered "Category B" violations for insubordination/disobedience.)[7] Respondent characterized complainant's offenses as sufficiently

[7] Respondent did not explain why complainant's actions would be considered as three separate violations occurring on three separate dates, while Officer Kaczik's violations occurring on separate dates were counted only as one offense. In any event, both Supervisors Glass and Turner testified they would not have recommended that complainant pass probation if they had known of her first violation of the fraternization policy which occurred while she was on probation.

serious to be exempt from progressive discipline and to warrant termination. The termination letter signed by Warden Gary R. McCaughtry (Exh. R-101) contains the following excerpted information:

> By your conduct you have displayed extremely poor judgment and have posed a serious risk to staff and inmates at this institution. Your actions have compromised the safety and security of [WCI]. Any of the Fraternization Policy violations would be sufficient cause to warrant discharge.
>
> Your misconduct is so serious that your continued employment as a Food Production Assistant cannot be continued. Therefore, you are hereby notified that, pursuant to authority vested in me by the Department of Corrections, you are discharged from employment as Food Production Assistant 1 at [WCI] effective today, May 19, 1995.

28. Officer Mark Gerber, a male, gave property to an inmate but was suspended for either three or ten days, rather than terminated. Several differences exist between his situation and complainant's. First, Officer Gerber had brought ice cream in for a group of inmates which was different than the one-on-one personal aspect associated with complainant's situation. Second, the ice cream was a consumable item as opposed to a watch which could be seen as an ongoing symbol of a special personal relationship. Third, Officer Gerber reported his violation to management (albeit after some inmates inappropriately attempted to use the incident to exert pressure on him) whereas complainant's gift of the watch was not self-reported. Fourth, Officer Gerber had a fairly long employment history without discipline prior to the ice cream incident. Further, complainant also mailed the inmate a birthday card which constituted a second, separate offense which was a factor not present in Officer Gerber's situation.

29. Officer Vanden Boom, a male, was investigated for gambling with inmates and he received a fairly healthy suspension but was not terminated. The gambling was over sporting events and Officer Vanden Boom paid his gambling debt with cigarettes. Several differences exist between his situation and complainant's. First, the gambling occurred fairly early after Warden McCaughtry became warden – which was

8 ½ years prior to the hearing. Second, Officer Vanden Boom had a long-standing record of discipline-free conduct. Third, the gambling incident occurred prior to issuance of the current fraternization policy. This last-mentioned factor is important as the record shows termination would have been the most likely outcome under the current fraternization policy. (Testimony of Warden McCaughtry and of the Security Chief.)

30. Officer Darrell Fugget was terminated for bringing an item to an inmate which had a value of less than $10.00. (McCaughtry testimony.)

31. The potential security risk of complainant's violations of the fraternization work rule was less serious than the potential security risks posed by the officers who left her alone on the FS line to take unauthorized breaks. Yet those officers (male and female) received no discipline.

32. Two male officers violated a work rule when they left inmate Jeffrey Dahmer unguarded with the result that Mr. Dahmer was assaulted and killed by other inmates, yet those officers were not discharged.

CONCLUSIONS OF LAW

1. Complainant failed to meet her burden of proof to establish that respondent discriminated against her based on her participation in an activity protected under the Whistleblower Law in regard to the terms and conditions of her employment (harassment).

2. Complainant failed to meet her burden of proof to establish that respondent discriminated against her based on her participation in an activity protected under the Whistleblower Law in regard to the termination of her employment.

3. Complainant failed to meet her burden of proof to establish that respondent's decision to terminate her employment was related to her claimed handicap.

4. Complainant failed to meet her burden of proof to establish that respondent's decision to terminate her employment was related to her sex.

5. Complainant failed to meet her burden of proof to establish that the negative terms and conditions of her employment was due to sex harassment.

6. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.[8]

OPINION

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).

Handicap Claim In Re Termination

Complainant has the threshold burden to establish that she is handicapped in order to prevail on her claim that she was terminated because of her handicap. Section 111.32(8), Stats., defines a "Handicapped individual" as an individual who: (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work, (b) has a record of such an impairment; or (c) is perceived as having such an impairment. Complainant failed to establish that she suffered from a physical or mental impairment during her employment at WCI.

It may be that in some cases medical testimony would be unnecessary where the claimed handicap is obvious to the lay person. For example, it probably would not be necessary to provide expert medical opinion to establish the fact that an employe broke his/her leg if respondent knew of the accident and of the cast worn during the recovery period. Here, however, complainant wishes to establish a mental handicap caused by stresses at work under circumstances where it would not be obvious to a lay person that

[8] The new paragraph 6 of the Conclusions of Law was added for clarification.

the stresses constituted a handicap because complainant continued to be able to perform her job duties, she did not suggest to respondent that she suffered from a handicap, and respondent did not perceive her as handicapped. She attempted to establish that a mental impairment existed by letters from a "D.O." (medical qualifications unknown) dated April 18, 1997 (Exh. C-13) and June 4, 1996 (Exh. C-14). Respondent objected to accepting these exhibits in the record because they post-dated the end of the employment relationship and because complainant had not disclosed the "D.O." as a witness thereby depriving respondent of the right to cross examine the witness. Respondent's objection was sustained due to the lack of an opportunity to cross examine the offered medical opinion.

Even if the above-noted evidentiary ruling were considered incorrect, complainant would not meet the statutory definition of a handicapped individual because she failed to show that the stress she experienced at work due to officers picking on her made achievement unusually difficult or limited her capacity to work. In fact, the record shows she was able to perform her FS work despite the stress she experienced. Furthermore, she did not inform respondent that she had a handicap during her employment and respondent did not perceive her as being handicapped.

It also is worth noting that when initially asked at hearing to explain the basis of her handicap claim, complainant said she felt females, including herself, were being picked on creating a situation which "handicapped" her from doing her job in a "happy, healthy way." About an hour later in her testimony, she characterized her handicap claim as relating to the "stress and turmoil" (presumably caused by the retaliatory behaviors previously described) which she claimed caused her judgment to suffer (presumably in regard to the events with inmate Dorrough which lead to her termination), a claim which is not addressed or supported by the excluded exhibits C-13 and C-14.

Sex Discrimination In Re Termination

In the case of a discharge, the elements of a prima facie case are that: 1) complainant is a member of a class protected by the Fair Employment Act (FEA), 2) complainant was qualified for the job, and 3) despite her qualifications she was discharged under circumstances which raise an inference of discrimination.

Complainant established a prima facie case of sex discrimination in regard to the termination of her employment. Her sex is a protected status under the FEA, she was qualified for the FS job as evidenced by her passing probation, yet she was discharged for violations of the fraternization policies whereas some males were not discharged for violating the same policy and whereas some males were treated more favorably for violations of work rules other than the fraternization policy.[9]

Respondent offered a legitimate, non-discriminatory reason for terminating complainant in that two of her three violations of the fraternization policy were serious and occurred during her probationary period. Further, the record is clear that if respondent had known of even just the first violation (giving a watch to the inmate) while complainant was still on probation, she would not have passed probation. Complainant's own testimony and conduct support the legitimacy of respondent's explanation. Specifically (as noted in ¶22 of the Findings of Fact) she knew she could be terminated for giving inmate Dorrough the watch. Similarly (as noted in ¶23 of the Findings of Fact) she knew she should have reported to her supervisor that inmate Dorrough had passed her a personal note. Further, her sending of the birthday card to inmate Dorrough was covert (as noted in ¶25 of the Findings of Fact) as indicated by the failure to include a return address or to sign the birthday card which, again, indicates complainant knew her actions could result in discharge if respondent knew about them. Despite

[9] It also could be argued that Officer Cerney's statement to complainant that a prison was not a place for a woman to work (¶8, Findings of Fact) is an incident which raises a suspicion of sex discrimination relative to the third element of her prima facie case. Mr. Cerney, however, was not involved in the decision to terminate complainant's employment and the attitude reflected by his statement was not shown to have been shared by the decision makers.

the cited strong evidence that complainant agrees with the legitimate reason offered by respondent, she offered arguments of pretext as discussed below.

Complainant first attempted to show pretext by comparing herself to males who also violated the fraternization policy yet were not discharged. The first comparison was to Officer Gerber (¶28 of the Findings of Fact), who was suspended for 3 or 10 days for sharing ice cream with a group of inmates. The different resulting discipline, however, is reasonable due to his longer employment history without discipline as compared to complainant's violations which occurred during her initial probationary period.

The second comparison was to Officer Vanden Boom who gambled with inmates with cigarettes as stakes (¶29 of the Findings of Fact). The Commission agrees that the gambling incident appears more significant from a security-risk analysis than complainant's actions and yet he received a "healthy suspension" which is more favorable treatment than the discharge imposed on complainant. However, the mitigating factors which prevent a finding of pretext are that respondent's fraternization policy was not in place at the time of Officer Vanden Boom's violation and respondent recognized that termination likely would have been the result if such violation had occurred under the later policy, as well as the fact that Officer Vanden Boom had a long-standing record of discipline-free conduct while complainant's violations occurred during her probationary period. Furthermore, evidence exists of treating males and females the same under the fraternization policy, as illustrated by the situation with Officer Fugget (¶30 of the Findings of Fact).

Complainant also attempted to show pretext by comparing her termination to other situations where males violated a work rule other than the fraternization policy and received what complainant perceived as favorable treatment for more serious offenses. The typical approach of establishing pretext is complainant's prior comparison of herself to Officers Gerber and Vanden Boom who were "similarly-situated" because they had violated the same fraternization rule as complainant. The Commission is un-

willing to say that more remote comparisons may never be probative to the question of pretext but concludes they are not determinative here when complainant's comparisons to those who violated the same work rule indicate that males and females are treated the same under the fraternization policy. As the U.S. Supreme Court reminded litigants in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 62 FEP Cases 96 (1993), once an employer provides a legitimate reason for its actions, the trier of fact must proceed to determine whether the employe has proven that the employer intentionally discriminated and it is the employee who at all times bears the ultimate burden of persuasion on this question. *Id.*, 62 FEP at 100. The examples offered by complainant regarding violations of work rules other than the fraternization rule may call into question whether respondent has correctly assessed the comparative seriousness of certain types of work rule violations, but they do not shed light on whether respondent treats females less favorably than males in imposing discipline for violation of the fraternization work rule.

Sex Harassment Claim In Re: Terms and Conditions of Employment

The FEA recognizes two forms of sexual harassment commonly referred to as: 1) quid pro quo harassment, and 2) hostile environment. (§111.36(1)(b), Stats.) Ms. Bentz' case involves a claim of hostile environment which is described in the statute as shown below:

> (1) Employment discrimination because of sex includes . . . any of the following actions by any employer . . . or other person:
>
> (b) Engaging in sexual harassment . . . permitting sexual harassment to have the purpose or effect of substantially interfering with an employe's work performance or of creating an intimidating, hostile or offensive work environment. Under this paragraph, substantial interference with an employe's work performance or creation of an intimidating, hostile or offensive work environment is established when the conduct is such that a reasonable person under the same circumstances as the employe would consider the conduct sufficiently severe or pervasive to interfere sub-

> stantially with the person's work performance or to create an intimidating, hostile or offensive work environment. . .
>
> (3) For purposes of sexual harassment claims under sub. (1)(b), an employer . . . is presumed liable for an act of sexual harassment by that employer . . . or by any of its employes . . . if the act occurs while the complaining employe is at his or her place of employment or is performing duties relating to his or her employment, if the complaining employe informs the employer . . . of the act, and if the employer . . . fails to take appropriate action within a reasonable time.

Ms. Bentz was subjected to many aggravations by the officers assigned to the kitchen but most of these were due to her reporting the officers for leaving their posts and for stealing food and not due to her sex. There were two incidents based on her sex; first, Officer Cerney told complainant (on a date unknown) that a prison was not a place for a woman to work (see ¶8 of the Findings of Fact) and second, Officer Kaczik referred to complainant on January 29, 1995, as a "bitch" and/or a "slut" (see ¶11 of the Findings of Fact). All the other harassment of which she complains was based on her reporting officers for failing to comply with rules and not based on her sex, as supported by the entire record which includes the facts that one of the alleged harassers was a female (Officer Pringle) and that the other female FS worker who did not report officer violations was not picked on by the officers.

Complainant has not established that a reasonable person under the same circumstances would have considered the two incidents of sex harassment (both occurring within her first 3 months of employment) as sufficiently severe or pervasive to interfere substantially with her work performance or to create an intimidating, hostile or offensive work environment. Complainant did not report the first incident to respondent and did not establish at hearing that the comment made by Officer Cerney reflected an attitude which was pervasive at the institution; rather it was an isolated comment reflecting one person's opinion. While complainant reported the second incident to respondent, a reasonable person facing the same two separate incidents would not view them, either

separately or collectively, as sufficiently severe or pervasive as to amount to sex harassment under the statute.

Even if complainant had established that the two incidents were sufficiently severe or pervasive to interfere substantially with her work performance or to create an intimidating, hostile or offensive work environment, respondent took prompt remedial action when it learned of the comment made by Officer Kaczik. The remaining question would be whether respondent's remedial action was "appropriate", within the meaning of §111.36(1)(b), Stats. The analysis used to determine whether the remedial action was appropriate involves an objective test of whether respondent took reasonable steps to correct the offensive behavior. *Smith v. UW-Manitowoc County*, 93-0173-PC-ER, 4/17/95. It was reasonable for respondent to believe that the discipline imposed would redress the sex harassment especially with Officer Kaczik's removal from the FS area. Also probative to this question is the fact that no further acts of sexual harassment occurred either by Officer Kaczik or by any other staff.

Whistleblower Retaliation Claim In Re: Terms & Conditions of Employment

To establish a prima facie case in the whistleblower retaliation context, there must be evidence: 1) that the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) that there was a disciplinary action, and 3) that there is a causal connection between the first two elements. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89.

Ms. Bentz undeniably was mistreated by the officers assigned in the FS area and such mistreatment was motivated by an intent to get back at complainant for reporting that officers took food and abandoned their posts. However, there are two legal problems with attempting to redress the officer's retaliatory conduct under the Whistleblower Law. The first relates to the timing of any protected disclosure and the second pertains to the fact that the officers were complainant's coworkers. Each problem is discussed in detail in the following paragraphs.

The first element of the prima facie case (noted above) is comprised of three components: a) whether the complainant disclosed information using a procedure described in §230.81, Stats., b) whether the disclosed information was of the type defined in §230.80(5), Stats., and c) whether the alleged retaliator was aware of the disclosure. Complainant reported officers assigned to the FS area to her supervisor for leaving their posts and for stealing food. Her supervisors then spoke to the officers to correct the situation and, consequently, the alleged retaliators were aware of complainant's reports to her supervisor. The element not discussed yet which is a prerequisite for protection under the Whistleblower Law is the requirement that such disclosures be made in writing to the supervisor. §230.81(1)(a), Stats.

The first written disclosure made by complainant was on January 15, 1995 (see ¶10 of the Findings of Fact), meaning that all prior acts of the officers could not be considered as having been inflicted in retaliation for a subsequent protected disclosure. Furthermore, this first written disclosure did not involve the type of information defined in §230.80(5), Stats., the text of which is shown below:

> (5) "Information" means information gained by the employe which the employe reasonably believes demonstrates:
> (a) A violation of any state or federal law, rule or regulation.
> (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

This first written disclosure faulted the conduct of an inmate rather than of an employee and, accordingly, is insufficient to meet the definition of "information" found in §230.80(5)(a) or (b), Stats.

Complainant's second written disclosure occurred on January 29, 1995 (Exh. R-155, pp. 2-3) when she provided a written statement (as requested by Captains Garro and Dittman) about being harassed by FS officers. While the written report was not to complainant's immediate supervisor, it was given to the Captains who were designated by respondent to handle the matter and, accordingly, meets the disclosure requirements

of §230.81(1)(a), Stats. This disclosure also was sufficient to meet the requirements of §230.80(5)(a), Stats., as a disclosure which complainant reasonably believed demonstrated a violation of a state or federal law. Again, however, actions by the FS officers which occurred prior to this protected disclosure on January 29, 1995, could not have been inflicted as retaliation for this subsequent protected disclosure.

The second major legal problem with complainant attempting to redress the conduct of the officers assigned to the FS area under the Whistleblower Law is that the FS officers were coworkers as opposed to the chief officer of the governmental unit or one of the chief officer's agents, or a supervisor or an administrator. Employe protection against retaliation under the Whistleblower Law is governed by §230.83(1), Stats., the text of which is shown below:

> No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe.

The appointing authority in this case would be the WCI Warden, by operation of §230.80(1m), Stats. (which defines appointing authority as the chief officer of any governmental unit), and by §230.80(4), Stats. (which defines governmental unit as a institution created by law). (WCI is an institution created by law. See, e.g., §302.01, Stats.)

Four alleged incidents of harassment occurred after the protected disclosure of January 29, 1995 (as noted in ¶¶16-18 of the Findings of Fact). The first involved Officer Cerney's attempt to persuade an inmate to submit a concocted report against complainant. The second and third incidents involved conduct by Officers Pringle, Mays and Harding. Even if the officers' conduct could be considered as harassment, within the meaning of §230.80(2)(a), Stats., their conduct would have to be considered in the role of agents for the WCI Warden to be actionable under the Whistleblower Law, pursuant to the specific language of §230.83(1), Stats., which does not include protection

against retaliation by coworkers. The evidence is insufficient to show that the officers were acting as agents of the WCI Warden. Respondent by its discipline of Officer Kaczik sent the message that such behaviors would not be tolerated. Nor is there any other persuasive evidence from which it would be reasonable to conclude that respondent fostered or condoned the officers' actions to such degree that the officers should be considered as agents of the WCI Warden.

The final incident of harassment which occurred after the protected disclosure of January 29, 1995, involved Lt. Stevens who told complainant on March 16, 1995, that it was not a good idea to "tick off" officers. This is an action of a supervisor for which potential liability could attach under §230.83(1), Stats., if the action meets the statutory definition of "retaliatory action" found in §230.80(8), Stats., as further defined by the term "disciplinary action" found in §230.80(2), Stats. The text of both statutes are shown below in pertinent part:

> (8) "Retaliatory action" means a disciplinary action taken because of any of the following:
>
> (a) The employe lawfully disclosed information under s. 230.81 . . .
>
> (c) The . . . supervisor believes the employe engaged in any activity described in par. (a) . . .

> (2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
>
> (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay . . .

The Commission has interpreted these terms to require that the alleged act of harassment had a substantial or potentially substantial negative impact on the employee. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; aff'd. by Outagamie Circuit Court, *Vander Zanden v. DILHR*, 91-CV-378, 4/19/91. The Commission has applied

the same standard in subsequent cases. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89; and *Holubowicz v. DHSS*, 88-0097-PC-ER, 9/5/91.

The incident involving Lt. Stevens did not have a substantial or potentially substantial negative impact on complainant. Her own statement of her conversation with Lt. Stevens supports this conclusion. (Exh. R-130) Complainant felt Lt. Stevens just wanted to know what was going on between complainant and FS correctional officers. She did not view the conversation as threatening. In fact, her statement of events did not include Lt. Stevens' statement that it was not a good idea to tick off officers. Rather, one of the interviewers asking a follow up question asked her if the statement had been made which she answered in the affirmative. Thereafter, she continued to maintain that Lt. Stevens was just curious and that she did not feel threatened by his comments.

Whistleblower Retaliation in Re: Termination

To establish a prima facie case in the whistleblower retaliation context, there must be evidence: 1) that the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) that there was a disciplinary action, and 3) that there is a causal connection between the first two elements. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89.

Complainant participated in a protected activity when she provided Capts. Garro and Dittmen with a written statement about the events of January 29, 1995. The termination decision was made by Warden McCaughtry (Exh. R-101). The Warden's decision was based in part on Captain Greg Schaller's report dated May 17, 1995, which charged complainant with misconduct in connection with violations of the fraternization policy; and in part on a report of a pre-disciplinary meeting conducted by Supervisor Glass and Personnel Manager Smith on May 17, 1995 (Exh. R-114). The parties do not dispute that these three individuals knew of complainant's harassment statement dated January 29, 1995. These facts establish the first element of her prima facie case.

The termination is a "disciplinary action" within the meaning of §230.80(2), Stats., which establishes the second element of the prima facie case.

The third element of a prima facie case is established if the record shows that a causal connection existed between the first two elements of the prima facie case. The Whistleblower Statute creates certain presumptions regarding causation, as shown below in relevant part:

> 230.85(6)(a) If a disciplinary action occurs . . . within the time prescribed under par. (b), that disciplinary action . . . is presumed to be a retaliatory action . . . The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action . . . was not a retaliatory action . . .
>
> (b) Paragraph (a) applies to a disciplinary action under s. 230.80(2)(a) which occurs . . . within 2 years . . . after an employe discloses information under s. 230.81 which merits further investigation . . .

The termination occurred on May 19, 1995, which was well within two years after she made her protected disclosure on January 29, 1995; a disclosure which respondent investigated, and ultimately imposed discipline on Officer Kaczik. These facts are sufficient to conclude that the employer determined the protected disclosure merited further investigation. Accordingly, the rebuttable presumption of causation applies here and establishes the third element of her prima facie case.

Respondent successfully rebutted the presumption of causation by establishing that complainant would have been discharged if Supervisors Glass and Turner had been aware that she had violated the fraternization rule during her probationary period. Supervisors Turner and Glass recommended that complainant pass her probation and such recommendation was endorsed by Warden McCaughtry in April 1995 (Exhs. R-102 & R-103), after her protected Whistleblower disclosure occurred, was investigated and resolved by imposition of discipline on Officer Kaczik. Furthermore, Warden McCaughtry sent complainant a memo dated March 3, 1995, in which he thanked her

for bringing her harassment concerns forward to management. The only change in the situation which could account for her termination was respondent later learning that she violated the fraternization policy during her probationary period. Her violation of the fraternization policy is a legitimate, non-retaliatory reason for terminating complainant's employment and such reason has not been shown to be pretext.

ORDER

This case is dismissed due to complainant's failure to meet her burden of proof to establish her claims of discrimination and retaliation.

Dated: March 11, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR
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Parties:
Virginia Bentz
129 N. Grove Street
Waupun, WI 53963

Michael J. Sullivan
Secretary, DOC
149 E. Wilson St., 3rd Fl.
P. O. Box 7925
Madison, WI 53707-7925

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.