STATE OF WISCONSIN PERSONNEL COMMISSION

JUDY OLMANSON
Petitioner,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

DECISION
AND
ORDER

Case Nos. 97-0106-PC, 97-0183-PC-ER

These matters were the subject of an administrative hearing convened on nine days between June 7 and August 17, 1999. There was a lengthy delay before complainant was able to obtain a completed transcript of the proceeding. There were also several delays during the post-hearing briefing schedule. The final submission was filed on September 5, 2000. The issues for hearing are as follows:

Case No. 97-0183-PC-ER:

1. Whether respondent discriminated against petitioner on the basis of petitioner's marital status with respect to the following alleged conduct resulting in petitioner's alleged constructive discharge:

a. The withdrawal of a job assignment to serve as tribal liaison for petitioner's Bureau of Children, Youth and Families;

b. Ms. Hisgen's statement to petitioner that her function was reduced to merely keeping Ms. Hisgen informed.

c. Ms. Hisgen's statement to Regional Director Waller that petitioner thought the work group was a waste of time;

d. Ms. Hisgen directed petitioner to write an apology on behalf of Susan Dreyfus;

e. Supervisor Mitchell told petitioner to cancel workshops petitioner was to conduct at the State Child Abuse and Neglect Conference.

f. Supervisor Mitchell told petitioner that Ms. Hisgen did not want petitioner to continue her work assignment with the Children's Justice Act Conference.

2. Whether respondent discriminated against petitioner on the basis of sex with respect to the following alleged conduct:

a. The withdrawal of a job assignment to serve as tribal liaison for petitioner's Bureau of Children, Youth and Families;

b. Ms. Hisgen's statement to petitioner that her function was reduced to merely keeping Ms. Hisgen informed.

c. Ms. Hisgen's statement to Regional Director Waller that petitioner thought the work group was a waste of time;

d. Supervisor Mitchell told petitioner to cancel workshops petitioner was to conduct at the State Child Abuse and Neglect Conference.

e. Supervisor Mitchell told petitioner that Ms. Hisgen did not want petitioner to continue her work assignment with the Children's Justice Act Conference.

f. Comments by Ms. Hisgen during a meeting with petitioner on or about September 15, 1995;

g. Comment by Ms. Hisgen the day after the Women in Government Conference in May of 1996, to petitioner: "You know this is where people go to see and be seen."

h. Ms. Hisgen directed petitioner to write an apology on behalf of Susan Dreyfus;

i. Petitioner was ordered to provide written justification for presenting a workshop called "Advocating for Children."

j. Respondent singled out petitioner by questioning her on her travel associated with a project designed to develop an organized media approach to recruiting foster families;

k. Supervisor Mitchell gave the impression that it was petitioner's error to have called a meeting on or about January 23, 1997, to discuss improvements in the foster care system;

l. Ms. Higgens stated the January 23rd meeting was a "waste of time."

m. Ms. Higgens questioned petitioner's selection of a title for her draft recommendations.

o. Later on January 23, 1997, Supervisor Mitchell and Ms. Hisgen expressed unfounded dissatisfaction with petitioner's work;

p. Also on January 23, 1997, Supervisor Mitchell told petitioner: "About your relationship with Mike Sadlier, there are people upstairs who do not like your involvement with a married man."

q. Also on January 23, 1997, Supervisor Mitchell questioned petitioner about a hotel bill arising from petitioner's work-related travel.

Case No. 97-0106-PC:

Whether respondent's decision in September 1997 to not hire petitioner for the Assistant Area Administrator position was illegal or an abuse of discretion.

FINDINGS OF FACT

1. Petitioner holds a masters degree in public policy and analysis. Her work history includes employment by the Sauk County Department of Human Services as Child Protection Services supervisor, approximately 2 years with the Children Services Society, approximately 2 years as a child protective services investigator for a county in Minnesota, and experience providing direct care to developmentally disabled adults as a human services technician in a hospital.

2. Respondent hired petitioner effective February 26, 1995, as an Administrative Assistant 5 with responsibilities as an Out-of Home Care planner. Petitioner's employment was based in Madison.

3. At the time petitioner was hired, her immediate supervisor was Barbara Barnard. Linda Hisgen was petitioner's second-level supervisor

Petitioner's marital/dating history

4. When she was hired in February of 1995, the petitioner had been married to Eric Olmanson for a number of years.

5. In May of 1995, petitioner began a romantic relationship with Michael Sadlier, who is also employed by respondent.

6. At all times relevant to this proceeding, Mr. Sadlier has been married and has lived and worked out of Rhinelander.

7. Petitioner's second-level supervisor, Linda Hisgen, first developed a suspicion that petitioner and Mr. Sadlier were engaged in a romantic relationship when Ms. Hisgen saw them during a meeting held at a hotel in Milwaukee during the first part of September of 1995. 2Tr.76[1] Ms. Hisgen's suspicion was based on how petitioner and Mr. Sadlier appeared when they walked together and sat together at a bar in the early evening. 2Tr.82

8. Petitioner separated from her husband in August of 1995 and she moved out of their apartment.

9. In approximately mid-September of 1995, Ms. Hisgen received a letter at home from Eric Olmanson, petitioner's husband. The letter read, in part:

> Sometime in May, Judy began a love affair with Michael Sadlier, Assistant Area Administrator out of Rhinelander . . . You might have noticed that Judy has been focusing solely on the northern part of the state and has also asked to become the resident expert on Native American out-of-home placements. At least in part this has been to see Mr. Sadlier more. Currently, Judy is unwilling or unable to break off her relationship with Mr. Sadlier. Judy's current work commitments complicate this already complicated situation. . .
>
> Except for the fact that Judy's travel calendar is heavily slated toward Wausau and Stevens Point and she is engaged in working on important projects with Mr. Sadlier, I think that our marriage would stand a fighting chance. [A]s I said, she has worked very hard to get this job, she deserves it, and she is good at it. I risk writing this letter to you because I hope that there is some way to give Judy the option -- if and only if she desires -- to rearrange her out-of-town schedule in such a way that she could avoid contact with Mr. Sadlier. She would not ask this on her own because although she has told me that she likes you very much and respects you, she also fears you. Judy does not know that I am writing

[1] The transcript for each day of the proceeding has been assigned a different volume number. Therefore, this reference is to page 76 of volume 2 of the transcript, which reflects the proceedings on June 8, 1999.

this letter to you. If she finds out, I am sure she will be furious with me. But I am desperate.

10. On the day after Ms. Hisgen received this letter she asked petitioner to speak with her. During the subsequent brief conversation, Ms. Hisgen told petitioner she had received the letter from petitioner's husband and was not pleased to get it because it related to a personal matter. Ms. Hisgen told petitioner to be discreet, not to embarrass the department and that the letter did not jeopardize petitioner's job. Ms. Hisgen did not express any moral disapproval nor did she tell petitioner that she was not to associate with Mr. Sadlier at work, in public or outside of work hours.

11. Eric Olmanson filed for divorce in October of 1995. The court entered a judgment of divorce on September 19, 1996, and ordered petitioner to pay family support.

12. Petitioner and Mr. Sadlier attended, as a couple, the Women in Government annual recognition dinner held on May 14, 1996, at the Holiday Inn in Madison. Ms. Hisgen and Ms. Barnard also attended the event, which is not an official government function but is attended by a wide range of individuals. 7Tr.221. Ms. Hisgen saw petitioner and Mr. Sadlier at the dinner and the three engaged in "pleasant chit-chat." 6Tr.211.

13. Respondent organized a picnic on a weekday in July of 1996, to recognize the end of its Division of Community Services which ceased to exist on July 1, 1996, as a consequence of a reorganization. Both petitioner and Mr. Sadlier had been employees of the Division of Community Services. Employees and their families were the primary invitees. The picnic began late in the afternoon and lasted until late at night. It was held at a Madison park. Approximately 200 persons attended, beer and soda were served and there was a live band for dancing.

14. Michael Sadlier and petitioner danced together at the picnic in a sexually suggestive and provocative manner. Petitioner and Mr. Sadlier intertwined their legs, rubbed against each other and slid their hands up and down each others' sides, feeling each other. They danced together for 4 to 6 dances. No one else on the dance floor

was dancing similarly. Petitioner wore short shorts and a midriff top shirt. Mr Sadlier wore shorts and a shirt with numerous buttons unbuttoned.

15. Various persons at the picnic noted the nature of the dancing by petitioner and Mr Sadlier and commented on it. Gerald Born, who had been the Administrator of the Division of Community Services, asked another observer whether petitioner and Mr. Sadlier were married and if they had a relationship. 7Tr.147 Employees Mark Mitchell, Diane Waller, Carol Vaughn and Linda McCann all saw the dancing and felt it was suggestive and inappropriate.

16. The day after the picnic, Carol Vaughn mentioned the dancing incident to Linda Hisgen, petitioner's second level supervisor, who had left the picnic before the dancing started. Ms. Vaughn knew petitioner as a co-worker and also interacted with her on a social basis.

17 On September 26, 1996, petitioner hosted a party to celebrate her freedom from marriage. Petitioner invited Ms. Hisgen and other co-workers to attend. Ms. Hisgen attended the party and brought both food and a small gift. Mr. Sadlier also attended the party and spent the night.

18. Petitioner broke up with Mr Sadlier in November of 1996 but they got back together late in January of 1997, just before petitioner resigned her employment with respondent. After she resigned, petitioner moved out of Madison so that her residence was close to that of Mr. Sadlier and his wife. Petitioner, Mr. Sadlier and Mr. Sadlier's spouse continue to have an "open marriage" kind of relationship, the same type of relationship they had before November of 1996. 7Tr 105

Medical information

19. At the time she resigned, petitioner was seeing a psychiatrist and a psychologist for recurrent major depression. 6Tr.197 She was also taking an antidepressant medication. Petitioner's mental state was substantially due to her divorce and concerns she had about her relationship with Mr Sadlier and Mr Sadlier's wife. 6Tr.199, 7Tr.103, 7Tr.105

Organization structure

20. At the time she was hired in February of 1995, petitioner served as one of two Out-of-Home Care Planners/Specialists in the Services for Family Section. The other Out-of-Home Care Specialist was Mark Mitchell, who served as the lead worker Mr Mitchell had worked as an Out-of-Home Care Specialist since 1988.

21. Petitioner and Mark Mitchell filled two of approximately 15 positions in the Services to Family Section. Barbara Barnard, petitioner's immediate supervisor, was section chief. Ms. Barnard reported to Linda Hisgen, director of the Bureau for Children, Youth and Families. (Resp. Exh. 131) At all times relevant to this proceeding, Ms. Hisgen has been petitioner's second-level supervisor Ms. Barnard resigned April 30, 1996. Respondent promoted Mr Mitchell to fill the vacancy on August 16, 1996.

22. The Bureau for Children, Youth and Families was one of nine bureaus within the respondent's Division of Community Services. Gerald Born served as the Administrator of the Division.

23. The Bureau of Regional[2] Operations was another of the nine bureaus within the Division of Community Services. Diane Waller headed that bureau which included up to 7[3] regional offices throughout the state. One of the regional offices was in Rhinelander That office had responsibility for the northern area of the State and was supervised by David[4] Peterson, the Area Administrator Mr Sadlier, an Assistant Area Administrator, reported to Mr. Peterson. Both Mr. Sadlier and Mr. Peterson work out of Rhinelander. At all times relevant to this proceeding, Mr Peterson has been Mr Sadlier's immediate supervisor and Diane Waller has been Mr Sadlier's second level supervisor. Ms. Waller works out of Madison.

24. Respondent reorganized its operations effective July 1, 1996, and abolished the Division Community Services. Since that date, the Division of Children and Family Services has encompassed petitioner's position while Mr Sadlier's position in

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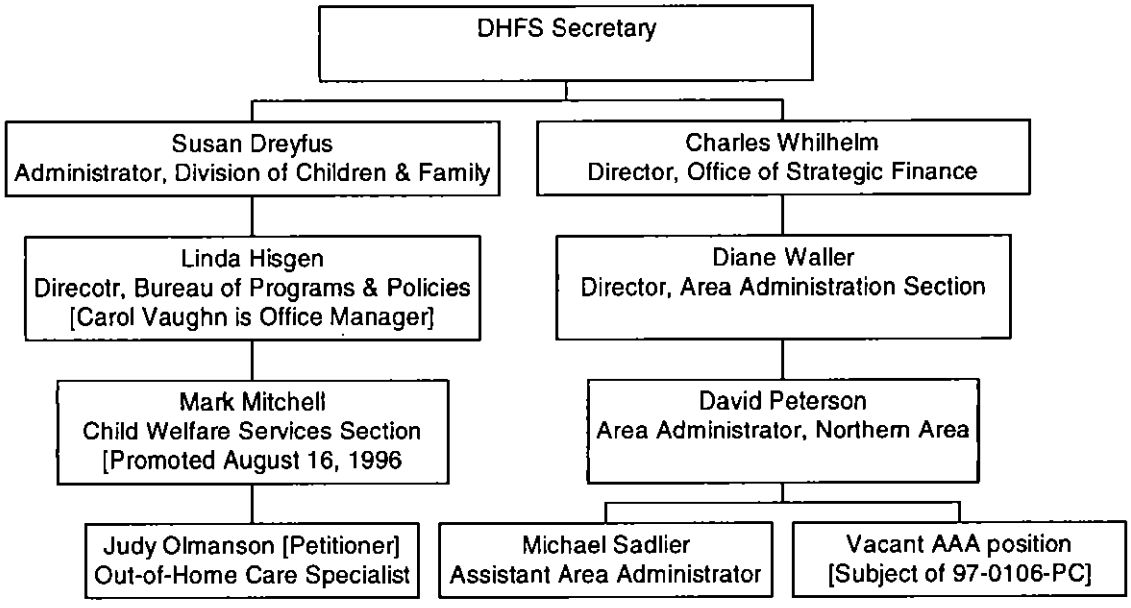
[2] The proposed decision was modified to correct the bureau name.
[3] This proposed decision was modified to more accurately reflect the number of offices.

Rhinelander has been part of the Office of Strategic Finance. Susan Dreyfus is the Administrator of the Division of Children and Family Services and Ms. Hisgen heads the Bureau of Programs and Policies within that division. Charles Wilhelm is the Director of the Office of Strategic Finance and supervises Diane Waller who heads the Area Administration section. This reorganized structure is reflected in the following chart:

Truncated Organization Chart (After Reorganization)



25. Mr Mitchell, petitioner and Ms. Hisgen all worked on the 4th floor of the Wilson Street State Office Building, Susan Dreyfus worked on the 5th floor and the Office of the Secretary was on the 10th floor[5] of that building.

Workload

26. At all times relevant to these matters, the workload for the Out-of-Home Care staff and the rest of the work unit containing the Out-of-Home Care positions has been very high. While petitioner had some leeway in terms of how to carry out her re-

[4] The proposed decision was modified to correct Mr. Peterson's first name.
[5] Respondent suggests the Office of the Secretary was on the 6th floor. However, the record supports the finding that it was on the 10th 6Tr.42

sponsibilities, her superiors assigned work to her and, as the work level demanded, pulled her off one duty and placed her on another. 6Tr. 172 The supervisors had to constantly shift priorities for the staff. Ms. Barnard restricted participation in training and conferences, directed staff to use video conferencing as an alternative to travel, and directed them to hire others to provide training.

Duties, generally

27 Out-of-Home Care refers to children who have been removed from their homes and placed in foster homes or group homes.

28. The petitioner's position description (Pet. Exh. 4) included the following position summary:

> [T]his position is responsible for the analysis of state and county services to families and children at risk of, or placed in, out-of-home care. As such, the person maintains state of the art knowledge in interventions to divert children from the out-of-home care system and methodologies to achieve reunification of families. Additional responsibilities include strengthening the out-of-home care system through analysis of out-of-home care data, staff and provider training needs, system improvements and resource allocation.

The position description also includes the following worker activities related to the training provided by the incumbent:

> A1. Maintain expert knowledge in state of the art reunification, kinship, guardianship and long term placement programs and services.
>
> C2. Provide technical assistance and training on the standards and guidelines in Section A1 to county agencies and foster parents.
>
> F2. Develop training curricula and training plans and provide specialized training to local agency staff on issues related directly or indirectly to stated job objectives as directed by the Section Chief.

29. In addition to the Out-of-Home Care Specialists, there were two Child Protection Specialists in the Child Welfare Section. The Child Protection Specialists had responsibility for all aspects of child abuse and neglect.

30. One of petitioner's long term priorities was to create an Out-of-Home Care Handbook that collected all rules, regulations and laws relating to Out-of-Home

Care into one binder for easy reference. This responsibility was assigned to petitioner in 1995 but had not been completed at the time petitioner resigned her employment. In a memo dated January 13, 1997, Mr. Mitchell asked petitioner for a schedule for completing the handbook.

Specific duties: Tribal responsibilities

31. No employee of the Bureau of Children, Youth and Families was ever designated, either formally or informally, as the "tribal liaison" for the Bureau. Petitioner as well as the other employees in the Bureau had various interactions with tribes in the State. Had petitioner been denominated as "tribal liaison" for the Bureau, it would have entailed spending additional time in the Northern area, and would have involved working directly with Mr. Sadlier as well as with other staff in the Northern area office. 7Tr.36

32. The Bureau and regional staff were responsible to monitor a contract, established by statute, allowing the Red Cliff tribe to receive funds to develop their own child welfare system. 8Tr.38. Given the high profile and political sensitivity of the program, Linda Hisgen was directly involved. Mark Mitchell, rather than petitioner, did the vast majority of the work performed by the Bureau on this topic because of his extensive knowledge and experience. 8Tr.40

Specific duties: County/tribal welfare conference ("First Step in a Journey")

33. The respondent organized a conference to discuss tribal children in Wisconsin's child welfare system. The conference was ultimately held on November 14 and 15, 1995, in Wausau. The staff of the Bureau of Regional Operations, Ms. Waller's Bureau, had lead responsibility for putting on the conference.

34. Planning for the conference began in approximately October of 1994. 8Tr.199 From the start of the planning process, Ms. Hisgen placed a relatively low value on the conference. Mark Mitchell and Barbara Barnard were to be the primary people from Ms. Hisgen's bureau involved in the planning. Because of their workloads, they could not always attend. Petitioner first became involved in the planning process in June of 1995. 6Tr.80

35. At some time on or before August 17, 1995, Ms. Hisgen told petitioner that her function relative to the "First Step in a Journey" conference was merely to keep Ms. Hisgen informed. However, Ms. Hisgen did not prohibit petitioner from doing more than just reporting to her and petitioner in fact did do much more. Petitioner participated in the planning group discussions, attended the two-day conference, spoke at the session meetings, was an official recorder for one of the discussion groups, was an alternative facilitator and worked on the evaluation tool for the conference. 6Tr.87

Specific duties: "Advocating for Children" workshop

36. During the fall of 1996, Dick Lorang was the Deputy Secretary for the Department of Health and Family Services.

37 Mr. Lorang saw a notice in the foster care association newsletter that petitioner and Mike Sadlier were scheduled to present a workshop entitled "Advocating for Children" at an upcoming conference. Mr. Lorang was concerned that the workshop referenced an intention to lobby elected officials. He sent a note to Mark Mitchell with a copy of the conference announcement and asked why state employees were presenting the conference. Mr Mitchell in turn asked petitioner to prepare a written justification of her participation in the conference. Petitioner prepared the justification and she was permitted to participate in the workshop, in part due to the short time period before the workshop was scheduled to take place.

38. The first "Advocating for Children" workshop was held during the fall conference of the Wisconsin Federation of Foster Parent Organizations on October 26, 1996, in Lake Geneva. The agenda for that workshop (Pet. Exh. 16) includes references to "Educating elected officials" and "How can government, generally, and the child welfare system, specifically, be more responsive to the needs of foster children?" A second conference was scheduled in April of 1997

39. The focus of the workshop was beyond the parameters of the petitioner's job responsibilities.

Specific duties: Children's Justice Act Conference

40. The Department of Justice planned a conference to be held in April of 1997 to provide training to state and tribal professionals who worked in the area of child abuse investigation and prosecution. (Resp. Exh. 170) The conference was funded under the Children's Justice Act which is designed to enhance the quality of prosecutions relating to child protective issues. 8Tr.44 Barbara Barnard assigned Jan Brindl, a Child Protective Services Planner in the Services to Family Section, to represent the bureau in the planning process for the conference. However, Ms. Brindl resigned from her job with respondent and effective May of 1996, Ms. Barnard assigned petitioner to the task. Mr. Sadlier also participated in the planning. 6Tr.138

Specific duties: Foster Parent Advisory Group

41. Petitioner's duties included serving as the staff person for a group of persons from throughout the state who were to provide input on ways in which the child welfare system could be more supportive of foster families. Petitioner was responsible for coordinating the project and handling all the details. 6Tr.106 The initial meeting of the Foster Parent Advisory Group was from 9:00 a.m. to 3:00 p.m. on September 26, 1996, in Madison. Petitioner drafted and typed the letters (Resp. Exh. 152) to the 11 citizen members of the group. Those letters, dated September 6, 1996, were signed by Susan Dreyfus, and they confirmed the time, location and subject matter of the initial meeting.

42. Petitioner, Mr. Mitchell, Ms. Hisgen and Ms. Dreyfus all attended the September 26th meeting. 8Tr.51. Ms. Dreyfus had to leave the meeting in the morning and promised to return in the afternoon. However, she did not return. Petitioner was directed to write a letter conveying Ms. Dreyfus' apologies to the citizen participants. Petitioner prepared a draft of the letter but Ms. Dreyfus rejected it as not sufficiently sincere. Petitioner redrafted the letter and prepared the hard copies for Ms. Dreyfus' signature. The completed letters were 6 sentences long and they were sent to 10 individuals. (Pet. Exh. 22)

Mr. Sadlier's duties

43. Mr. Sadlier's responsibilities as an Assistant Area Administrator in the Northern area were focused on child neglect and abuse issues, but also included family preservation and support, and out-of-home care. His duties were not limited to those areas. He spent only approximately 40% of his time in his Rhinelander office. The rest of the time he was on the road.

Petitioner's travel practices

44. While the vast majority of the petitioner's responsibilities involved working in the central office in Madison, some of her responsibilities did necessitate travel. Petitioner spent approximately 1 day every 2 weeks outside of Madison.

45. Ms. Hisgen regularly reviewed the sign-out sheets at her bureau and has raised concerns about employee travel with various employees over the years. Ms. Hisgen determined that petitioner was regularly traveling to the Northern area of the state. As a general matter, Mr. Mitchell did not share Ms. Hisgen's concerns about petitioner's travel to the Northern area. However, he was concerned about the amount of time petitioner was travelling and not in the central office. In a memo dated October 9, 1996 (Resp. 167c), Mr Mitchell told petitioner to be "a little more selective" about attending certain regional meetings.

46. Petitioner traveled to the Northern area during 1995 and 1996 to participate in 3 or 4 meetings for the Northern Regional Foster Care Coordinators Media Recruitment Project. Mr. Sadlier was also involved in this project and petitioner did not miss any meetings.

47 At some point, Mr. Mitchell concluded that the Media Recruitment project was taking an inappropriate amount of the petitioner's time. He asked petitioner whether it was necessary for her to attend the next meeting. Petitioner explained that county agency representatives would be present for that particular meeting and that the counties were providing financial support to the project. In light of this information, Mr. Mitchell told petitioner that she should attend the meeting. 4Tr.25

48. Sometime after receiving the letter from Eric Olmanson, Ms. Hisgen commented to Mr. Mitchell that petitioner seemed to "be spending a lot of time up north." Ms. Hisgen did not direct Mr. Mitchell to review petitioner's travel practices.

Petitioner's work performance, generally

49. During the period she served as petitioner's supervisor, Ms. Barnard found petitioner's work to be acceptable. Mr. Mitchell felt petitioner was very bright and capable of performing her job, but he felt her work had slipped by late 1996 in terms of the quantity of work produced as well as the amount of editing Mr Mitchell did of her written work. 116t Mr Mitchell wrote petitioner various memos suggesting that certain assignments needed to be completed. (Resp. Exh. 167) Ms. Hisgen was also dissatisfied with the amount of work produced by petitioner and mentioned her concerns to Mr Mitchell on several occasions. 7Tr 194, 8Tr 118

50. Ms. Hisgen asked Mr. Mitchell to hold a supervisory meeting with petitioner to discuss the quality and quantity of her work and her behavior with Mr Sadlier at public events. (This is the same meeting referenced in Finding 80.)

51. Mr Mitchell delayed scheduling the supervisory meeting with petitioner for several months because, in part, he was uncomfortable dealing with those issues. He hoped the problem would disappear somehow

52. Mr Mitchell scheduled a meeting with petitioner on January 15th to go over various issues relating to petitioner's work.

Supervisory meeting on January 15, 1997

53. The supervisory meeting was held in Mr. Mitchell's office on January 15, 1997, and the door was closed. Mr Mitchell asked petitioner how she was doing and about her health. Mr. Mitchell then discussed both the quantity and the quality of the petitioner's work. He also discussed her relationship with Mr Sadlier. With respect to the latter topic, he told petitioner that he didn't care who she was dating but that she needed to avoid drawing attention to the relationship. He told her she had to be discreet and to act professionally when petitioner and Mr Sadlier were seen together He did not tell petitioner that she could not be together with Mr Sadlier at de-

partmental events. Petitioner commented that she felt it was not Mr. Mitchell's business.

54. This exchange on January 15th was the only instance in which Mr. Mitchell counseled petitioner about her relationship with Mr. Sadlier.

55. During the supervisory conference, Mr. Mitchell pulled out a bill (Pet. Exh. 18a) for petitioner's stay at the Lakewoods Resort and Lodge in Cable, Wisconsin. The bill was for one adult and no children for three nights, starting on October 21, 1996. The bill included the following typed notation by the resort: "Check how many people in room. Looks like 2 slept." Carol Vaughn, the office manager for the Bureau of Programs and Policies, had brought the bill to Mr Mitchell's attention.

56. In response, petitioner explained to Mr. Mitchell that someone in housekeeping at the resort may have come in to the room and seen petitioner and Mr Sadlier working together and assumed they were staying together. Petitioner said she had taken care of it with the resort. Mr Mitchell accepted the explanation and made no further mention of the bill.

57 Mr. Sadlier had spent at least one of the three nights in petitioner's room at the Lakewoods Resort.

58. Motel management had questioned petitioner when she was checking out of the resort whether she was the only one in the room. Petitioner acknowledged to them that someone had stayed with her and she paid the differential in the room rate.

59. During the January 15, 1997, supervisory conference, Mr. Mitchell told petitioner she could not use work time to present two workshops at the State Child Abuse and Neglect Conference scheduled in April of 1997 in Stevens Point. Petitioner was to have been a co-presenter of the "Advocating for Children" workshop with Mr Sadlier at the conference. This was essentially the same workshop that had been questioned by Deputy Secretary Lorang in the fall of 1996. Petitioner was also scheduled to present a second workshop at the same conference. The second workshop was entitled "Professionals recovering from child abuse."

60. Mr. Mitchell told petitioner to discontinue her involvement with the planning for the Children's Justice Act Conference being organized by the Department of Justice and scheduled for April of 1997 (See Finding 40) Mr Mitchell did not tell petitioner that the task was being reassigned because of her relationship with Mr Sadlier Mr. Mitchell did not tell petitioner that Ms. Hisgen did not trust the petitioner to represent the bureau's viewpoint.

61. The focus of the Children's Justice Act Conference fit better with the responsibilities of the child protective service specialists than it did with the petitioner's duties as an Out-of-Home Care specialist.

62. Mr. Mitchell told petitioner during the supervisory conference that Ms. Hisgen felt petitioner was not doing enough work. Mr. Mitchell suggested petitioner might want to automatically copy Ms. Hisgen on any of the e-mails that petitioner prepared. 7Tr.60

Meeting regarding petitioner's draft of a report on the Foster Parent Advisory Committee

63. Petitioner was responsible for drafting a report based on the activities of the Foster Parent Advisory Committee, referenced above in Findings 41 and 42.

64. Mr. Mitchell had directed the petitioner to schedule a meeting to be attended by Ms. Hisgen, Mr. Mitchell, Ms. Dreyfus and the petitioner, in order to review the draft report. The meeting was held on January 15, 1997.[6]

65. Although petitioner had distributed a copy of her draft (Pet. Exh. 13, Resp. Exh. 136) in advance of the meeting, Ms. Dreyfus had not read it as of the time the meeting began. The title of the draft was "Supporting Foster Families." The draft was 5 pages long plus a cover sheet. During the meeting, Ms. Hisgen expressed dissatisfaction with this title and indicated that the title should explain why foster families were being supported. Both Mr. Mitchell and Ms. Hisgen had concerns about the content of the draft and Ms. Hisgen told Ms. Dreyfus that the report was not of the

highest quality, that the meeting on the report was not worthwhile, and asked why the meeting was held. Ms. Hisgen promptly terminated the meeting.

66. The final version of the report was issued in September of 1997 It was 19 pages long plus a cover sheet. (Pet. Exh. 14) The final version reflected substantial revisions to petitioner's draft.

Reactions to petitioner's separation, divorce and dating: Ms. Hisgen

67 Ms. Hisgen holds the opinion that married people who are not married to each other should not appear in public to be engaged in a romantic relationship. Ms. Hisgen has the opinion that this view is generally held by others.

68. Ms. Hisgen was concerned that a romantic relationship between petitioner and Mr. Sadlier, at a time when one or both were married to other persons, was not good for respondent's image. She was concerned about how others who interacted with her work unit would perceive the relationship. She was concerned that the relationship might have a negative effect on credibility and on the ability of the unit to advance a policy or issue. 7Tr.203, 7Tr.235

69. During the period in which petitioner was employed by respondent, petitioner and Ms. Hisgen occasionally traveled together, smoked together, socialized together and attended many of the same conferences. 7Tr.12

70. After she received the September of 1995 letter from Mr. Olmanson referenced in Finding 9, Ms. Hisgen asked to meet privately with Ms. Barnard, petitioner's supervisor. Ms. Hisgen reported to Ms. Barnard that Mr Olmanson's letter alleged petitioner was having an affair with another employee. Ms. Hisgen said that petitioner's private life was petitioner's own business but that Ms. Barnard should be alert to the situation. 4Tr.218

71. Ms. Hisgen offered to loan petitioner furniture when she separated from her husband and moved into her own apartment.

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[6] The issues for hearing refer to this meeting as having occurred on January 23rd. Ms. Dreyfus' calendar, (Pet. Exh. 12) includes a reference to the meeting at 2:00 p.m. on January 15. There is no evidence to indicate the meeting was held on January 23rd

72. On May 15, 1996, the day after the Women in Government dinner referenced in finding 12, petitioner and Ms. Hisgen took a smoking break together at work. During their conversation, Ms. Hisgen made the following reference to the Women in Government dinner: "That is where people go to see and be seen."

73. Ms. Hisgen did not observe petitioner and Mr Sadlier dance at the Division of Community Services picnic in July of 1996. (Finding 14) However at least three of respondent's employes, including Linda McCann and Carol Vaughn, talked to her about it the next day. Ms. Vaughn described the dancing as "pretty suggestive." 8Tr 137 Ms. Hisgen concluded that the dancing was inappropriate for the occasion and that petitioner and Mr Sadlier were not being discreet. 7Tr.232

74. Ms. Hisgen also gave Mr. Peterson a "heads up" that Mr Sadlier and petitioner seemed to be having an affair, and that he, as Mr. Sadlier's supervisor, had a right to know. 7Tr.239

Reactions to petitioner's separation, divorce and dating: Mr. Mitchell

75. Mr Mitchell believed that petitioner's public conduct showed she was engaged in a romantic relationship with Mr Sadlier He believed petitioner's conduct adversely affected how petitioner was viewed by others because she was not acting in a professional manner He believed, as a consequence, that it had an adverse effect on petitioner's ability to perform her job. 4Tr.74

76. Petitioner confided to Mr Mitchell about her marital problems on a regular basis. Mr Mitchell was a "close friend" of the petitioner

77 Mr Mitchell learned of the letter from Eric Olmanson when it was received by Ms. Hisgen.

78. Mr Mitchell helped petitioner move after she had separated from her husband. Mr. Mitchell also loaned her furniture. He loaned his truck to petitioner and Mr Sadlier to move petitioner

79. Mr Mitchell received several complaints from county staff and other sources that petitioner's relationship with Mr Sadlier and their public behavior were inappropriate. 2Tr.204

Reactions to petitioner's separation, divorce and dating: Generally

80. Because of the interrelationship of the work of their units, Ms. Hisgen and Ms. Waller met on a regular basis to discuss common issues. At one of those meetings, Ms. Hisgen and Ms. Waller agreed that petitioner's immediate supervisor, Mr. Mitchell, and Mr Sadlier's immediate supervisor, Mr Peterson, would discuss the conduct of petitioner and Mr Sadlier and take a coordinated approach.

81. Due to a breakdown in communication at an indeterminate point in the process, only Mr. Mitchell ended up in expressing concern to his subordinate about public appearances with Mr Sadlier. (See finding 53) Mr Peterson did not speak to Mr. Sadlier about the issue.

82. Although he had received reports from a variety of sources, including from other area administrators and from Ms. Hisgen (2Tr.108), that Mr. Sadlier was engaged in an affair with the petitioner, Mr Peterson refused to consider these reports to be more than unsubstantiated rumors. It was not until August of 1997, when Mr. Sadlier told Mr. Peterson of Mr. Sadlier's affair with petitioner, that Mr. Peterson accepted it as fact. 2Tr288, 291 During the same conversation, Mr Sadlier said he had also had an affair with his second-level supervisor, Diane Waller. Mr. Peterson reported this statement to Ms. Waller.

83. At all times relevant to this proceeding, Susan Dreyfus, Administrator of the Division of Children & Family, was unaware of the romantic relationship between petitioner and Mr. Sadlier. (Pet. Exh. 37)

Resignation

84. Shortly after the January 15th supervisory conference, petitioner sent Mr. Mitchell separate e-mails about her travel during the previous several months (Resp. Exh. 167m) and her use of sick leave, vacation and personal time during the same period. (Resp. Exh. 167n)

85. During the morning of January 30, 1997, petitioner wrote the following e-mail message to Mr Mitchell: "As of today, I am resigning as the Out-of-Home Care Planner. My last working day will be Friday, Feb. 7, 1997 " (Pet. Exh. 6)

86. Both Mr. Mitchell and Ms. Hisgen were surprised when petitioner resigned. Petitioner explained that she just wanted to try something else. 4Tr.86 She did not contend that she was forced to leave her job.

87 On her last day of work, February 7th, petitioner wrote a message to Mr. Mitchell and several other employees. (Pet. Exh. 7) The front page read:

> In the fine tradition of this bureau I'd like to leave you all with the attached. It's been inspiring for me and I hope will be for you. I loved working with all of you and have learned so much. It's been an honor to work with the best. Thank you."

The attached page included the following language, preceded by a drawing of a galloping horse:

> They've taken & burnt your caravan, they've thrown away your pots and pans and your half-mended wicker chairs.
> They've pulled down your sleeves and buttoned up your collar. They've forced you to sleep beneath a self-respecting roof with no chinks to let the stars through. But they haven't caught me yet!
> Come! Come away!
>
> Heaven preserve me from littleness and pleasantness and smoothness. Give me great glaring vices and great glaring virtues. But preserve me from the neat little neutral ambiguities.
>
> Be wicked, be brave, be drunk, be reckless, be dissolute, be despotic, be an anarchist, be a suffragette, be anything you like -- but for pity's sake be it to the top of your bent.
>
> Live fully, live passionately, live disastrously.
> Let's live, you and I, as none have ever lived before.

Also on her last day of work, petitioner invited Mr. Mitchell to her apartment for a beer Mr Mitchell accepted. There was no discussion as to why petitioner left and petitioner did not criticize Mr. Mitchell or Ms. Hisgen.

88. After her resignation and after she had moved to the Tomahawk area, petitioner and Mr Sadlier attended the October 1997 Foster Parents Association conference together They saw Mr Mitchell in a hotel bar and petitioner asked him to buy her a beer. She then told Mr Mitchell that she had left her Out-of-Home Care Planner position because it was not the respondent's business what she did in her private life.

Case No. 97-0106-PC (Assistant Area Administrator position vacancy)

89. Through 1996, there had also been a Northwest area based in Spooner that was staffed by 2 Assistant Area Administrators. These two positions were co-supervised by Gary Nicholson, the Area Administrator in Eau Claire, and David Peterson, the Area Administrator in Rhinelander However, the incumbents of the two AAA positions in Spooner resigned within a matter of days of each other and a decision was made in March or April of 1997 to close the Spooner office, assign one position to the Western area office (Eau Claire) and the other to the Northern area office (Rhinelander). From the start, the focus of the two new positions was to relate to the subjects of alcohol and other drug abuse (AODA) and mental health. This decision was based on the lack of expertise by existing staff in both the Northern and Western areas as to both topics.

90. The job announcement (Pet. Exh. 21, Resp. Exh. 127) for the AAA positions was issued on June 2, 1997. The announcement referenced the two existing vacancies but noted that the register created from the process would also be used to fill future vacancies. The announcement referred to job duties and knowledge required for all AAA vacancies, rather than just the two vacant positions with the AODA and mental health focus.

91. The focus on AODA and mental health was specifically reflected in the achievement history questionnaire used as the examination for creating an employment register to fill the positions. (Resp. Exh. 159, page 2)

92. However, the position descriptions for the two positions were generic AAA position descriptions. They made no special reference to the particular area of expertise that had already been established for those positions.

93. Three people served as interview panelists for the vacant AAA position in Rhinelander: David Peterson, Area Administrator[7] for the Northern area; Diane Waller, Director of the Area Administration Section; and Peter DeSantis, who had a lengthy tenure as program director and chief executive officer at Northcentral

Healthcare, a very large provider of mental health and AODA services. It was standard practice to have both the Director and the relevant Area Administrator on the interview panel.

94. If petitioner had been selected for the Rhinelander AAA vacancy, she would have worked across the hall from Mr. Sadlier 2Tr.289

95. It was not until after the August 5, 1997, interviews had been conducted and a selection decision made that Mr. Sadlier told Mr Peterson of the sexual relationship with petitioner. 2Tr.296 Mr Sadlier also stated that he had had a sexual relationship with Diane Waller.

96. Mr. Peterson established the interview questions and selected the interview panel. While no rating scale was specified, respondent established a list of acceptable responses prior to the interviews.

97 Respondent followed a uniform procedure when conducting the interviews. All of the candidates had an opportunity to read the questions and write notes before coming into the interview room. All candidates were asked if anyone on the panel would be biased against them. None of the candidates objected to anyone on the panel. The panelists considered the candidates' responses and their resumes but did not do any numerical scoring. The panel conferred at the end of all of the interviews. The panelists did not discuss the candidate's personal lives. Mr. DeSantis was the first panelist to volunteer his assessment of the candidates after the interviews were concluded. He rated Patrick Cork as the top candidate.

98. The panel considered each candidate's relevant work experience, education and interpersonal skills. All three of the panelists focused on the candidate's qualifications relating to mental health and AODA program areas. Knowledge of the tribal system was not a requirement.

99. All three panelists felt Mr. Cork was the most qualified candidate, with Lori Groskopf a distant second.

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[7] The proposed decision has been modified to correct Mr. Peterson's job title.

100. Mr Cork's resume showed that since November of 1990, he had served as Vice President of the Family Service Association in Green Bay with the following responsibilities:

> Provide program administration, leadership, and development for Outpatient Psychotherapy Program, Outpatient Alcohol and Other Drug Abuse Program, Intensive In Home Counseling Programs and a Juvenile Restitution Program; combined budget for programs exceeds 1.8 million per annum.
>
> Responsible for over twenty staff including masters and bachelors level professionals. Design and administer quality assurance, utilization review, and outcome research processes. The outpatient programs are certified by the State of Wisconsin and the Council on Accreditation (COA) as providers of psychotherapy and substance abuse treatment.
>
> Responsibilities as vice president include administrative management of programs (budgets, staffing, marketing, program development) supervision, grant writing, community and employee relations. Develop and maintain contractual relationships with public and private funding bodies, including managed care systems for medicaid populations. Computer literate in Microsoft Windows, Wordperfect, Dbase, and many other software applications. Serve nationally as a peer reviewer for the Council on Accreditation (COA).

Mr. Cork also had experience for three years as a clinical supervisor for two different treatment programs that included the area of mental health. He had 10 years of experience as a psychotherapist and social worker including 2 years as a psychiatric social worker with an outpatient community mental health/AODA clinic. Mr. Cork was also serving as an adjunct instructor at two local colleges, teaching courses titled "Abnormal Psychology" and "Introduction to Social Services." He held a masters degree in Social Work. (Resp. Exh. 115)

101 Mr. Cork was impressive and thorough during the interview. Mr. Cork and Ms. Groskopf provided more complete answers than the other candidates.

102. Lori Groskopf had approximately 5 years of experience as a planner and program coordinator for the Northern Area Agency on Aging, Inc., where she provided technical assistance, oversight, training, and information to Aging Units, and promoted networking among elderly service providers. She was assigned to various functional

areas including Mental Health/AODA. Among the "major accomplishments" she listed in her resume were the following:

> Initiated, coordinated, and facilitated Vilas/Oneida/Forest Elderly Mental Health/AODA Task Force, a consortium of mental health, AODA, Social Service, long term care, community care, and aging services professionals. Organized, obtained state regional and local funding for, and ran four major elderly mental health trainings, advocated with the state for community based care, encouraged networking which resulted in new, cooperative programs between aging, hospitals, mental health providers, and others, assisted with successful Rural Health Outreach Grant application to provide home and community based services, and enhanced awareness of aging/mental health needs and issues.

103. Ms. Groskopf held a BA degree in psychology.

104. The focus of petitioner's experience was in the area of child abuse and neglect, which was not directly relevant to the AAA vacancy.

105. The resume (Pet. Exh. 23c, Resp. Exh. 124) that petitioner provided to the interview panel provided little information about petitioner's work experience. Her resume consisted of a series of lists and included the following headings: "Education"; "Work Experience"; "Professional Standing"; "Skills, Knowledge and Abilities"; "Volunteer Experience"; "Graduate Seminars"; "Presentations"; "Publications"; and "References." The entire contents of the "Work Experience" section is as follows:

Independent Consultant	Phoenix Rising
Program and Policy Analyst 5	Wisconsin Dept. of Health and Family Services
Child Protective Services Supervisor	Sauk County Dept. of Human Services
Social Worker	Childrens' Service Society of Wisconsin
Counselor	Tellurian Community, Inc.
Nurturing Program Specialist	Dane County Head Start
Child Protection Specialist	LeSueur County Dept. of Human Services

Petitioner failed to provide any specific information about her work experience. She did not show the dates of her employment. She did not describe her duties. She did not identify her major accomplishments.

106. The resume also showed that petitioner held a MA in Public Affairs and Analysis and a BA in Psychology.

107 In her resume and during the interview, petitioner failed to identify any significant experience in the area of mental health.

108. Mr. DeSantis commented at the end of the interview that he wouldn't want to hire petitioner because she used the "I" word too much, i.e. she talked too much about herself when she was responding to the interview questions.

109. Mr. Peterson checked Patrick Cork's references and then made the final recommendation to hire Mr. Cork.

110. Respondent hired Mr. Cork to fill the vacant AAA position in Rhinelander. Respondent used Hiring Above the Minimum (HAM) procedures to pay Mr. Cork more than the minimum pay rate because he was an exceptional candidate.

111. The successful candidate for the vacant AAA position in Eau Claire (i.e. in the Western area of the state) was Fred Heffling. Mr. Heffling had extensive AODA and mental health experience and this experience was a very important factor in the hiring decision. He had been responsible for certifying mental health and AODA programs for 19 counties for respondent's Bureau of Quality Compliance as a program certification specialist. He had also worked for a county. He did not have a MA in Social Work.

112. Petitioner declined to be interviewed for the AAA vacancy in Eau Claire.

CONCLUSIONS OF LAW

Case No. 97-0183-PC-ER

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Petitioner has the burden to prove that she was discriminated against as alleged.

3. Petitioner has failed to sustain her burden.

Case No. 97-0106-PC

4. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

5. The petitioner has the burden to prove that respondent acted illegally or abused its discretion when she was not selected to fill the Assistant Area Administrator position in Rhinelander.

6. Petitioner has failed to sustain her burden.

OPINION

I. Credibility of petitioner's testimony

The Commission did not find the petitioner to be a particularly credible witness. Petitioner made several statements that placed her credibility into question.

She testified that her romantic relationship with Mr Sadlier was "open and notorious" but she had previously used far different words to describe that relationship as just a friendship. Her relevant testimony is as follows:

> Q In the interrogatories you were asked whether you had a love affair or a sexual relationship with Michael Sadlier at any time during the period of time that you worked for the Department of Health and Family Services.
>
> And in response you admitted that you had an ongoing romantic relationship which was open and notorious from May of 1995 to February 7 of 1997, when you resigned, excluding the period of December 1996 through January of 1997; is that correct?
>
> A Correct.
>
> Q And and that is in fact true?
>
> A Yes 6Tr.26-27

Petitioner's testimony may be contrasted with her written comments in a document she prepared in April of 1998 (Resp. Exh. 134) in which she described her relationship as "collegial" (p. 2) and wrote, "I was a family friend of the Sadliers." (p. 4) There is a significant difference between having a "collegial" relationship with someone and having an "open and notorious" romantic relationship. Similarly, there is a significant difference between being a "family friend" of a couple and engaging in an "open marriage" kind of relationship with the Sadliers. Petitioner's writing deceitfully described the true nature of her relationship with Mr. Sadlier.

Petitioner's credibility is also undermined by her testimony[8] in which she described how she danced with Mr Sadlier at the Division of Community Services picnic in July of 1996:

> Q How long did you stay at that picnic?
>
> A Oh, till the very end. I was one of the last people to leave.
>
> Q Did, when you were dancing close to Mr Sadlier, did you dance cheek to cheek from time to time?
>
> A I don't recall.
>
> Q Okay.
>
> A Probably.
>
> Q All right. Did you do anything different than others that you observed?
>
> A No, I didn't.
>
> Q Okay.
>
> A I was having fun. 3Tr.83-84

[8] In her written summary that she prepared in April of 1998 (Resp. Exh. 134), petitioner also declared that she and Mr. Sadlier "did not present as a 'couple'" at the picnic. This written description is inconsistent with how numerous witnesses described petitioner's and Mr. Sadlier's conduct on the dance floor.

No other witness corroborated petitioner's description of her conduct at the picnic. Her description directly conflicts with testimony of Mark Mitchell[9], Gerald Born[10], Carol Vaughn[11] and Linda McCann[12]

A third example undermining petitioner's credibility was her reaction during the January 15, 1997, supervisory conference when Mr Mitchell showed her the Lakewoods Resort bill that referenced the possibility of more than one person having spent the night. At the time, petitioner explained to Mr. Mitchell that someone in

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[9] According to Mr. Mitchell, petitioner and Mr. Sadlier were dancing "provocatively" while others were not. Mr. Mitchell testified that both petitioner and Mr. Sadlier were doing "a lot of sliding hands up and down." 2Tr.243

[10] According to Mr. Born, petitioner and Mr. Sadlier were dancing "extremely close," "more of hugging kind of dancing. typical of people who wouldn't know there was anybody else around almost." 7Tr.116

[11] According to Ms. Vaughn, the other couples who were dancing were making contact with each other "but not in the way that Judy and Mike were." 7Tr.142

> Q And can you describe the nature of their dancing.
> A Well, they were dancing very close. It reminded me of the movie Dirty Dancing.
> Q While you were there, did you see anybody else dancing in the same manner?
> A No.
> Q Did their dancing suggest anything about their relationship or what their relationship was?
> A Well, when I watched them dirty dancing, and I watched them dance, to me it has a sexual connotation.
> Q Okay.
> A So that was the feeling that I had that night. I was embarrassed and left shortly afterwards and went outside to another area.
> Q Did your leaving have anything to do with your embarrassment?
> A Yeah, I was embarrassed and actually kind of disgusted. 8Tr.132-35

[12] Ms. McCann offered the following testimony:

> Q And could you please describe the manner in which they were dancing.
> A Dirty dancing, seductively. Inappropriate for that party.
> Q Did you have an opinion at that time as to the appropriateness of their style of dancing at that picnic?
> A Yes, I thought it was inappropriate.
> Q Okay. Do you recall at the time whether anyone else was dancing in the same manner.
> A No one was dancing similarly. 8Tr.172-73

housekeeping must have come in and seen Mr. Sadlier and petitioner working together in the room and assumed they were staying together. However, petitioner acknowledged at hearing that the cashier had brought up the topic when she was checking out of the resort and she had paid for the extra guest at that time.

For all of the above reasons, the Commission places little weight on the accuracy/truthfulness of the petitioner's testimony.

II. Petitioner's discrimination claims (Case No. 97-0183-PC-ER)

The specific issues for hearing relating to petitioner's claims of discrimination are set forth at the beginning of this decision. In her post-hearing arguments, petitioner attempted to recast those issues. For example, petitioner advanced the view that all of the allegedly discriminatory events that are specified as part of her sex discrimination claim should also be considered to be part of her marital status discrimination claim. Respondent did not agree to the petitioner's restatement of the issues. Therefore, the Commission will address the issues that were previously agreed to by the parties.

A. Discrimination analysis generally

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 petitioner meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken, which the petitioner 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).

In the context of this matter, the elements of a prima facie case are that 1) the petitioner is a member of a class protected by the Fair Employment Act (FEA), 2) she 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 unlawful discrimination.

The petitioner is female and is within a protected class in terms of her claim of sex discrimination. The petitioner was married during a portion of the relevant period, she separated from her husband in August of 1995 and was divorced on September 19, 1996. Her marital status at the time of each allegedly discriminatory action places her within a protected class with respect to her claim of marital status discrimination.

B. Marital status claims: Effect of *Federated Rural Electric Ins. v. Kessler*

Respondent argues that because petitioner's supervisors were concerned about affairs where either of the two employees are married, any adverse action against petitioner because of her relationship with Mr. Sadlier did not constitute discrimination based on marital status, citing *Federated Rural Electric Ins. v. Kessler*, 131 Wis.2d 189, 388 N.W.2d 553(1986). In *Kessler*, the employer had an unwritten rule prohibiting the romantic association of any employee with a married employee.

> The rule quite apparently applied equally to prohibit both parties to an extramarital affair from engaging in such conduct. A single or married person could not have an affair with another married employee, and a married employee was prohibited from having an affair with another employee, whether single or married. 131 Wis.2d 189, 198

The employer decided to discharge Kessler and partially relied on the perception that he had violated the work rule. The Supreme Court held that such a rule does not impermissibly discriminate against employees on the basis of marital status, because it prohibits a course of conduct and because it applies to both married and unmarried employees.

> The circuit court reasoned that the rule was not facially discriminatory because it prohibited all employees, regardless of marital status, from being party to an extramarital affair The court stated that the prohibition of the rule applied to the *conduct* of being involved in such an affair, rather than to the status of being married or single. Single persons were as much within the prohibition of the rule as married persons. Thus, according to the circuit court, the sanction of the rule did not discriminate on the basis of marital status.
>
> We agree with the analysis of the circuit court. In this case, Federated's rule proscribed certain conduct among employees which all employees

> were required to honor. The sanction of the rule is not triggered by the offending employee's marital status. The rule does not require the offending person to be married for its application because a person can be a party to an extramarital association regardless of their own marital status. In this case, for instance, Kessler would have been prohibited from associating with Farin, a married person, whether [Kessler] had been married, separated, divorced widowed or single. His marital status was irrelevant to his discharge because Farin was married. Thus, Federated's rule prohibited a course of conduct rather than a status. The rule simply does not condition employment on having a specific marital status. 131 Wis.2d 189, 207-08 (emphasis in original)

The Supreme Court went on to consider whether the employer's rule was impermissibly discriminatory on a disparate impact[13] analysis. The court concluded that the rule was consistent with public policy goals and did not impermissibly discriminate against the class of married employees:

> The circuit court. concluded that prohibiting married employees from having extramarital associations does not adversely affect an employee's status because such a limitation is fully consistent with public policy. The court reasoned that a work rule which compels conformity with fundamental public policy cannot be considered an "adverse" condition of employment. We agree. We also expand upon the court's reasoning, however, by specifically discussing the meaning of the term "marital status" as used in the Madison equal opportunities ordinance.
>
> Protection against marital status discrimination is a relatively recent innovation in legislative enactments which prohibit various forms of discrimination. The Madison ordinance at issue in this case simply prohibits employment discrimination on the basis of marital status. Madison General Ordinances 3.23(2)(1) states that the term marital status "shall include being married, separated, divorced, widowed, or single."
>
> The Wisconsin Fair Employment Act similarly prohibits employment discrimination on the basis of marital status and defines that term identical [sic] to the Madison ordinance.
>
> Our analysis leads us to conclude that the ordinance is not intended to protect an employee's right to engage in an extramarital affair We construe the protection against marital status discrimination to fully encompass the very personal decision of an employee to marry, to remain single, or to divorce. An employer's rule which pressures a person to make

[13] Here, petitioner does not raise a disparate impact theory.

> a particular choice about marriage intrudes into an area where the Madison ordinance prohibits employer interference.
>
> A person who has voluntarily made a decision to become married, however, can be compelled to honor the commitment of that decision while he remains married. Under such an employment rule, the employee constantly controls his options regarding marriage or divorce. The employee can make whatever choices regarding his marital status that he wishes without compulsion from the employer He can marry. He can remain single. He can divorce.
>
> Discrimination is the label society gives to employer decisions that contravene public policy We conclude that the public policy of the Madison equal opportunities ordinance forbids intrusion into the decision of an employee to marry, divorce or remain single. It does not violate public policy, however, to limit extramarital affairs among employees because married employees are not similarly circumstanced to single employees in respect to the right to associate with other employees while married. 131 Wis.2d 189, 211-13

The relevant facts in *Federated Electric* are similar to those in the present case.[14] Respondent takes the position it would have responded the same way if either Mr. Sadlier or petitioner had not been married. Because Mr. Sadlier was married, petitioner's status as married, divorced, separated or single was irrelevant. The policy in the present case was not a division or department-wide rule, but it was a policy as viewed by Ms. Hisgen. Ms. Hisgen's policy did not proscribe affairs by employees with married co-employees. It was to have those individuals conduct any such affairs discreetly so as not to undercut the credibility of the department and the employees.

If the employer's rule in *Federated Electric* (prohibiting a married employee from having an affair with another employee, whether single or married) does not violate public policy, then a policy that employees must be discreet when they carry out an

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[14] Per petitioner's brief, page 17·

> Ms. Hisgen applied her own personal rules and biases which did discriminate on the basis of marital status. The employees over which she exercised authority were not free to be married and have an extra-marital affair. Rather, the employee would need to be either single or divorced. Thus, the marital status of the offending employee was the key issue.

extramarital affair certainly does not violate public policy. Therefore, any alleged action by respondent that was premised on Ms. Hisgen's acknowledged policy of requiring employees to be discreet when they carry out an extramarital affair did not violate the Fair Employment Act. This means that petitioner has failed to meet her burden with respect to all alleged incidents of marital status discrimination directly attributable to Ms. Hisgen rather than to some other management employee.[15] However, the Commission will proceed to address each allegation individually as if *Federated Electric* was inapplicable.

B. Adverse action analysis

Respondent claims that many of the actions that serve as the bases for petitioner's allegations of discrimination based on marital status and sex do not rise to the level of adverse actions.

In *Dewane v. UW,* 99-0018-PC-ER, 12/3/99, the Commission offered the following analysis of the requirement that a Fair Employment Act claim arise from an adverse employment action:

> In order to prevail on a claim of discrimination or retaliation under the FEA, a complainant is required to show that he or she was subject to a cognizable adverse employment action. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 In the context of a discrimination claim, §111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment."

---

[15] The following allegations of marital status discrimination are *not* affected by this conclusion:

> a. The withdrawal of a job assignment to serve as tribal liaison for petitioner's Bureau of Children, Youth and Families;
>
> e. Supervisor Mitchell told petitioner to cancel workshops petitioner was to conduct at the State Child Abuse and Neglect Conference.
>
> f. Supervisor Mitchell told petitioner that Ms. Hisgen did not want petitioner to continue her work assignment with the Children's Justice Act Conference.

> The applicable standard, if the subject action is not one of those specified in these statutory sections, is whether the action had any concrete, tangible effect on the complainant's employment status. *Klein, supra,* at 6. In determining whether such an effect is present, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. . .
>
> *See, Rabinowitz v. Pena*, 89 F.3d 482 (7th Cir 1996) (plaintiff failed to establish prima facie case of retaliation under Title VII – lower performance rating and work restrictions were, at most, mere inconveniences, not adverse employment actions); *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) (lateral transfer resulting in title change and employee reporting to former subordinate may have caused "bruised ego" but did not constitute adverse employment action); *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989) ("humiliation" claimed by school principal to result from transfer to another school did not constitute adverse employment action because "public perceptions were not a term or condition" of plaintiff's employment).
>
> Here, the only acts of alleged age discrimination are the comment made to complainant by one of her supervisors during a meeting asking whether she had anything to add, i.e., allegation 1.a., above. The first of these does not come close to the standard of having a "concrete, tangible effect" on complainant's employment status. . .
>
> If a negative performance evaluation does not in and of itself constitute an adverse employment action, (see, *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99; *Smart, supra*,) then certainly the solicitation or acceptance of negative comments from an employee's co-workers, standing alone, does not rise to that level. Similarly, if the lateral transfer of an employee to a different branch or school or position does not constitute an adverse employment action (*Crady, Flaherty, Spring, supra*), then it stands to reason that a physical move to an equivalent nearby office does not either. In addition, interference with complainant's receipt of some work-related information through informal discussions is not sufficiently adverse to equate with the examples of adverse employment actions provided by the Commission and the courts, e.g., termination, demotion accompanied by a decrease in pay, material loss of benefits, or significantly diminished material responsibilities.

Embedded in this language are eight examples of situations that have been held to not constitute "adverse actions"

1. Lower performance rating and work restrictions;

2. Lateral transfer resulting in title change and employee reporting to former subordinate;

3. Transfer to another school;

4. Comment made to complainant by one of her supervisors during a meeting asking whether she had anything to add;

5. Negative performance evaluation;

6. Solicitation or acceptance of negative comments from an employee's co-workers;

7 Physical move to an equivalent nearby office, and

8. Interference with complainant's receipt of some work-related information through informal discussions.

The Commission will apply the standard in *Dewane* when addressing petitioner's individual allegations, below.

C. Analysis of individual allegations

Allegation 2f. Comments by Ms. Hisgen during a meeting with petitioner on or about September 15, 1995 *(sex discrimination)*

After she received the letter from Eric Olmanson (Finding 9), Ms. Hisgen met with petitioner Ms. Hisgen commented that she was not pleased to receive the letter. She told petitioner to be discreet, not to embarrass the department and that the letter would not jeopardize her job. As noted in Finding 10, Ms. Hisgen did not express any moral disapproval to petitioner, nor did she instruct petitioner not to associate with Mr Sadlier

Ms. Hisgen's comments during this meeting with petitioner did not have any "concrete, tangible effect on the complainant's employment status." *Dewane v. UW*, 99-0018-PC-ER, 12/3/99. Ms. Hisgen specifically declined to implement Mr Olmanson's suggestion that she modify petitioner's travel schedule. Ms. Hisgen did not discipline petitioner because of the letter. Ms. Hisgen simply acknowledged receipt of the

information in the letter and told petitioner to be discreet. The conversation did not have a tangible effect on petitioner's employment status. Ms. Hisgen's comments to petitioner upon receipt of Mr Olmanson's letter did not constitute an adverse employment action.

Even if the comments fit the category of an adverse employment action, petitioner has failed to offer any evidence giving rise to an inference of sex discrimination. Ms. Hisgen's comments were consistent with her desire, as petitioner's supervisor, to minimize the potential for loss of credibility or for embarrassment to the department. There is no indication that Ms. Hisgen made these comments because of the petitioner's sex. There is no evidence that Ms. Hisgen ever reacted differently upon receipt of similar information regarding a male subordinate. Mr. Sadlier was not a subordinate of Ms. Hisgen so the fact that Ms. Hisgen did not make a similar statement to Mr Sadlier is inconsequential.

Petitioner has failed to establish sex discrimination as to allegation 2f.

Allegation 2g. Comment by Ms. Hisgen the day after the Women in Government Conference in May of 1996, to petitioner: "You know this is where people go to see and be seen." ***(sex discrimination)***

It is undisputed that Ms. Hisgen made this comment to petitioner on the day after petitioner attended the Women in Government recognition dinner, while petitioner and Ms. Hisgen were both on a smoking break. (Findings 12 and 72) Ms. Hisgen acknowledged that she intended to communicate to petitioner that she should be more discreet with respect to her relationship with Mr. Sadlier and not appear as a couple at a such a public event. 7Tr.224

Ms. Hisgen's comment did not have any "concrete, tangible effect on the complainant's employment status." *Dewane v. UW,* 99-0018-PC-ER, 12/3/99. Ms. Hisgen did not discipline petitioner, did not restrict her work and did not comment negatively on petitioner's work performance. At most it can be viewed as an expression of concern by petitioner's second-level supervisor. The comment was certainly several levels

below a negative performance evaluation which, pursuant to *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, is not, in and of itself, an adverse employment action. The comment did not have a tangible effect on petitioner's employment status.

Even if the comments fit the category of an adverse employment action, petitioner has failed to offer any evidence giving rise to an inference of sex discrimination. The comment (as well as the intention behind the comment) was consistent with Ms. Hisgen's view about extramarital affairs. Nothing suggests that Ms. Hisgen would not have made a similar comment had petitioner been a male subordinate, rather than a female subordinate. It is true that Ms. Hisgen did not make a similar comment to Mr. Sadlier However, Mr Sadlier was not Ms. Hisgen's subordinate and they did not share smoking breaks. In addition, the record shows that Ms. Hisgen did hold a similar opinion relative to Ms. Sadlier's role in the romantic relationship. This conclusion is supported by the fact that Ms. Hisgen spoke with Mr Peterson about Mr. Sadlier's relationship, and that Ms. Hisgen tried to orchestrate a consistent response by both Mr Sadlier's immediate supervisor and petitioner's immediate supervisor. (Finding 80)

Petitioner has failed to establish sex discrimination as to allegation 2g.

> **Allegation 1a. The withdrawal of a job assignment to serve as tribal liaison for petitioner's Bureau of Children, Youth and Families *(marital status discrimination)***
> **Allegation 2a. The withdrawal of a job assignment to serve as tribal liaison for petitioner's Bureau of Children, Youth and Families. *(sex discrimination)***

Respondent contends these allegations do not describe an adverse action:

> "[I]f Ms. Hisgen or Mr. Mitchell had withdrawn an assignment Ms. Barnard had given Ms. Olmanson, this would not have been an adverse employment action because it was common practice in the bureau to change assignments on the basis of changing priorities and because Ms. Olmanson failed to register any sign of protest or disagreement at the time." Respondent's post-hearing brief, page 48

"Significantly diminished material responsibilities" is one of the examples of adverse employment actions listed in *Dewane v. UW*, 99-0018-PC-ER, 12/3/99. Therefore, if

petitioner had established that she been denominated as the tribal liaison for the bureau, that this was a material responsibility for her position and that the responsibility was later withdrawn based on her marital status and/or sex, respondent's argument that there was no adverse employment action would fail.

The Commission does not reach the point of determining whether an assignment as tribal liaison was a "material responsibility" because petitioner has failed to show she ever received such an assignment in the first place. There is no credible evidence in the record to confirm petitioner's contention that Ms. Barnard told her she was to be the tribal liaison. Ms. Barnard did not recall such a designation and Mr. Mitchell was unaware petitioner held tribal liaison status or had any special responsibility to the tribes. In light of Mr. Mitchell's role as leadworker for the Out-of-Home Care specialists, he certainly would have known of any special assignment by Ms. Barnard to petitioner.

Petitioner's allegations also fail because the "rescission" of the tribal liaison responsibilities allegedly occurred when Mark Mitchell began to work on the Red Cliff tribe special project. Mr. Mitchell had 10 years of experience in the Out-of-Home Care area, while petitioner was a new employee. Given the political sensitivity of the Red Cliff project and Mr Mitchell's superior experience, it was logical respondent assigned Mr. Mitchell to the project. Both Ms. Barnard and Ms. Hisgen confirmed that Mr Mitchell was the logical choice for the assignment. 8Tr.40

For all of the above reasons, the petitioner has failed to establish a prima facie case with respect to her "tribal liaison" allegations of discrimination based on marital status and sex.

Allegation 1b. Ms. Hisgen's statement to petitioner that her function was reduced to merely keeping Ms. Hisgen informed. ***(marital status discrimination)***
Allegation 2b. Ms. Hisgen's statement to petitioner that her function was reduced to merely keeping Ms. Hisgen informed. ***(sex discrimination)***

These allegations relate to petitioner's role in a statewide county/tribal welfare conference entitled "First Steps in a Journey." Diane Waller chaired the work group that planned the conference. Petitioner testified that she understood she was to do nothing, other than to keep Ms. Hisgen informed, in light of Ms. Hisgen's comment.

Respondent contends that the statement was not an adverse employment action. The petitioner acknowledged that her conduct was unaffected by the comment. She participated in the planning group discussions, attended the two-day conference, spoke at the session meetings, was an official recorder for one of the discussion groups, was an alternative facilitator and worked on the evaluation tool for the conference. Petitioner's conduct would be completely inconsistent with a conclusion that Ms. Hisgen's statement had a "concrete, tangible effect on the complainant's employment status." *Dewane v. UW,* 99-0018-PC-ER, 12/3/99.

Even if the Commission concluded that these two allegations related to an adverse action, petitioner has failed to connect the conduct to her protected status. Petitioner testified Ms. Hisgen made the alleged comment during the first or second planning meeting for the conference. 6Tr.82 The first planning meeting petitioner attended was on June 21, 1995, in Wausau. 6Tr.80 The next planning meeting was held on August 17, 1997, and was also in Wausau. Resp. Exh. 130 Therefore, the comment was made no later than August 17th The second meeting took place before Ms. Hisgen received the letter from Eric Olmanson, dated September 21, 1995, and before she developed her first suspicion that petitioner and Mr. Sadlier might be having an affair. (Finding 7) Given this lack of knowledge (or suspicion) by Ms. Hisgen and given the theoretical basis for petitioner's marital status and sex discrimination claims, there is no prima facie case that Ms. Hisgen's statement was based on petitioner's marital status or sex.

The Commission also notes the following with respect to all of petitioner's claims of discrimination based on marital status. Pursuant to §111.32(12), Stats: "'Marital status" means the status of being married, single, divorced, separated or widowed." Based upon this definition, petitioner's marital status changed from "married"

to "separated" in August of 1995 and from "separated" to "divorced" on September 19, 1996.

Petitioner contends that respondent treated her differently on six separate occasions because of her marital status. One marital status allegation (Issue 1b, the statement by Ms. Hisgen to petitioner that her function was reduced to merely keeping Ms. Hisgen informed) arose from events that occurred in either June or August of 1995 which was before Ms. Hisgen first suspected that petitioner and Mr. Sadlier were romantically involved. There is no evidence that Ms. Hisgen was aware of petitioner's separation from her husband in August of that year As noted elsewhere, petitioner failed to establish that respondent withdrew the tribal liaison job assignment (Issue 1a) or that Ms. Hisgen ever stated to Ms. Waller that petitioner thought the work group was a waste of time (Issue 1b). The three remaining allegations (Issues 1d, 1e and 1f) all occurred after September 19, 1996, i.e. after petitioner's marital status changed to "divorced."

The fact that these occasions occurred both before and after petitioner's divorce tends to undercut her claim that they were based on her marital status. In other words, if the petitioner was correct in her allegation that Mr. Mitchell's and Ms. Hisgen's actions before September 19, 1996, were based on petitioner's status of being married, then it is unlikely that arguably similar actions by Mr. Mitchell and Ms. Hisgen after September 19th would be based on petitioner's new "divorced" status.

> **Allegation 1c. Ms. Hisgen's statement to Regional Director Waller that petitioner thought the work group was a waste of time *(marital status discrimination)***
> **Allegation 2c. Ms. Hisgen's statement to Regional Director Waller that petitioner thought the work group was a waste of time *(sex discrimination)***

These allegations also relate to the "First Step in a Journey" conference, and specifically to the efforts of the planning work group.

The Commission's conclusion that allegations 1b and 2b do not describe an adverse employment action applies as well to petitioner's allegations 1c and 2c. Petitioner

did participate in the planning group discussions. She also attended the two-day conference, spoke at the session meetings, was an official recorder for one of the discussion groups, was an alternative facilitator and worked on the evaluation tool for the conference. Petitioner's conduct would be inconsistent with a conclusion that Ms. Hisgen's statement, about what petitioner thought, had a "concrete, tangible effect on the complainant's employment status." *Dewane v. UW,* 99-0018-PC-ER, 12/3/99.

Even if these allegations related to an adverse personnel action, petitioner failed to establish that the comment allegedly attributed to Ms. Hisgen was ever made. The record shows Ms. Hisgen held the opinion that the conference was of limited value. Ms. Waller testified that Ms. Hisgen felt this way when conference planning was begun (8Tr.199), in approximately October of 1994, which was well before the petitioner became involved in conference planning.[16] Despite Ms. Hisgen's own feeling about the planning effort, there is no evidence that Ms. Hisgen ever made a statement to the effect that *petitioner* felt the work group was a waste of time.[17] Petitioner failed to establish a prima facie case as to these allegations.

Allegation 1d. Ms. Hisgen directed petitioner to write an apology on behalf of Susan Dreyfus *(marital status discrimination)*
Allegation 2h. Ms. Hisgen directed petitioner to write an apology on behalf of Susan Dreyfus *(sex discrimination)*

Petitioner contends that Ms. Hisgen was improperly motivated by petitioner's sex and marital status when she directed petitioner to write an apology from Ms. Dreyfus for not attending part of the September 26, 1996, meeting of the Foster Parent Ad-

[16] The fact that Ms. Hisgen held this opinion before petitioner was even hired also tends to undercut petitioner's allegations.

[17] There is no evidence that Ms. Hisgen actually made the alleged statement. During the investigative stage of this case, petitioner submitted a written response to respondent's answer to the complaint of discrimination. That response, Resp. Exh. 134, page 10, includes the following statement: "Ms. Hisgen did tell Ms. Waller that I thought this conference was a waste of time as this is what Ms. Waller told Mr. Sadlier." Mr. Sadlier did not testify in these matters. Petitioner failed to establish the alleged comment through the testimony of either Ms. Hisgen or Ms. Waller.

visory Group. (Finding 41) Petitioner contends that this assignment was "piddly" and inconsistent with her status as a professional. She contends the letters should have been prepared by Ms. Dreyfus' personal secretary.

Respondent argues that these two allegations do not describe an adverse employment action. The Commission agrees that an assignment to draft a letter on behalf of petitioner's third-level supervisor did not have a "concrete, tangible effect on [petitioner's employment status." *Dewane (supra).* The assignment was quite limited and only took petitioner a brief time to complete. It did not represent a significant and continuing responsibility for petitioner, and it was not the type of assignment that would have been reflected in a revision to her position description. It certainly did not represent a significant diminution of petitioner's responsibilities.

Even if respondent's alleged conduct met the standard for an adverse employment action, petitioner failed to connect the assignment to her marital status or to her ssex. Respondent very clearly established that this assignment was consistent with petitioner's responsibilities as the primary staff person assigned to the Foster Parent Advisory Group. Petitioner acknowledged she was responsible for coordinating the project and handling all the details. It was petitioner who prepared all of the letters, signed by Ms. Dreyfus, inviting the citizens to the September 26th meeting. It was only logical that petitioner would be the one who would prepare the letters that thanked those citizens for attending the meeting. Those letters, which were also signed by Ms. Dreyfus, included the apology by Ms. Dreyfus for not attending the afternoon session. Both Ms. Hisgen and Mr. Mitchell testified they had written apology letters for their superiors. (8Tr.53 and Resp. Exh. 156) Petitioner failed to establish a prima facie case as to these allegations.

Allegation 2j. Respondent singled out petitioner by questioning her on her travel associated with a project designed to develop an organized media approach to recruiting foster families. *(sex discrimination)*

This allegation arose from when Mr. Mitchell asked petitioner whether it was necessary for her to attend another meeting for the Northern Regional Foster Care Co-ordinators Media Recruitment Project. (Finding 47) Once petitioner explained the reason for this meeting and said that county agency representatives would also participate, Mr. Mitchell told petitioner she should go ahead and attend the meeting. Mr. Mitchell testified:

> There came a point where, at least it appeared to me, that there was a lot of time being taken on this.
>
> And on one particular occasion I asked her if she really needed to be at this meeting again, just because there was a lot of work that needed to be done. and she explained that this was not going to be a usual meeting because the county agency directors were also going to be there and they were financial partners in this. So I said in that case you should be there.
>
> Q. Did you question her because you did not want her to be working with Mr Sadlier in a situation where they might be presenting themselves as a couple?
>
> A. No. (4Tr.25)

Mr. Mitchell's action of merely posing the question to petitioner as to whether she needed to attend the meeting did not have a "concrete, tangible effect" on petitioner's employment status. Mr Mitchell did not bar petitioner from attending the meeting. *Cunningham v. DOC*, 98-0206-PC-ER, 99-0050-PC-ER, 7/20/99 (See discussion under Allegation 2i)

Mr Mitchell's action of questioning petitioner whether she needed to travel once more to participate in a meeting on this program was due to Mr. Mitchell's concerns about his unit's workload. There is no evidence that Mr. Mitchell raised the topic as a consequence of complainant's sex. Instead, his conduct was consistent with his management style and his interest in a high level of productivity. He asked a question, accepted petitioner's response and approved of petitioner's decision to attend the meeting. Petitioner attended the meeting.

Underlying petitioner's claim is the argument that respondent failed to question Mr. Sadlier about attending the same meeting. This argument is premised on the theory that respondent should have treated petitioner and Mr Sadlier identically as to this particular meeting.[18] That theory does not hold water when the allegedly inconsistent treatment is an everyday interaction[19] between two employees and two different supervisors. Petitioner and Mr. Sadlier were not supervised by the same individual. Travel expectations were different for petitioner's position than for Mr Sadlier's position. There was no single way in which respondent required its supervisors to respond to this set of circumstances.

Petitioner failed to sustain her burden as to issue 2j.

Allegation 2i. Petitioner was ordered to provide written justification for presenting a workshop called "Advocating for Children." ***(sex discrimination)***

This allegation relates to Mr Mitchell's directive to petitioner. Mr Mitchell was responding to Deputy Secretary Lorang's inquiry about whether it was appropriate for state employees to provide lobbying instructions. (Finding 37)

Respondent argues this was not an adverse employment action, citing *Cunningham v. DOC*, 98-0206-PC-ER, 99-0050-PC-ER, 7/20/99. In *Cunningham*, the Commission dismissed the complainant's claim of military reserve membership discrimination arising from respondent's action of requiring him to present his annual drill schedule as documentation for his request for military leave. Complainant provided the drill schedule and respondent granted him the leave. The allegation in the present case is very similar. Petitioner was merely required to submit justification for the workshop. She produced it, it was reviewed, and she was allowed to participate in the workshop. The respondent did not engage in one of the personnel actions specifically listed in the

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[18] Mr. Sadlier's supervisor, Mr. Peterson, did question Mr. Sadlier about attending a different conference, where the conference was held outside of the Northern region.

[19] This is not a situation where respondent decided to severely discipline one employee but not to discipline another employee who had engaged in substantially similar misconduct and the discipline was reviewed by common individual or was imposed pursuant to written policy.

Fair Employment Act and the action of requiring her to justify her participation in the workshop did not rise to the level of an adverse employment action.

Even if this allegation had met the "adverse action" standard, petitioner failed to present any connection between her sex and the action that was taken. Mr. Lorang did not testify. It was undisputed that he, rather than either Mr. Mitchell or Ms. Hisgen, raised the question about the appropriateness of the workshop. Mr. Lorang's concern arose because the workshop proposed to instruct participants in how to effectively lobby elected officials. This was a legitimate concern that was unrelated to petitioner's sex. Petitioner failed to establish a prima facie case of sex discrimination with respect to this allegation.[20]

Issues 2p, 2q, 1e, 2d, 1f and 2e all relate to statements or actions by Mr. Mitchell that allegedly occurred during a supervisory meeting he held with petitioner in mid-January of 1997. While the issues for hearing reference the meeting as having occurred on January 23rd, there is no evidence in the record supporting that date. The record shows that the meeting was actually held on January 15, 1997.

> **Allegation 2p. Also on January 23 [15], 1997, Supervisor Mitchell told petitioner: "About your relationship with Mike Sadlier, there are people upstairs who do not like your involvement with a married man." *(sex discrimination)***

Petitioner testified that she assumed that "people upstairs" was a reference to Susan Dreyfus, Administrator of the Division of Children and Family and petitioner's third-level supervisor. The record shows that petitioner, Mr. Mitchell and Ms. Hisgen all worked on the 4th floor of the Wilson Street State Office Building, Susan Dreyfus worked on the 5th floor and the Office of the Secretary was on the 10th floor of that

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[20] The written justification requirement related only to the October 1996 workshop on "Advocating for Children." Petitioner participated in the October conference. At the January 15, 1997, supervisory conference that is referenced in various other issues for hearing, Mr. Mitchell told petitioner that she could not use work time to participate in a second "Advocating for Children" workshop that petitioner had agreed to present at the Wisconsin Conference on Child Abuse and Neglect in mid-April of 1997. The question as to whether Mr. Mitchell had a

building. The only evidence to support petitioner's version of events is petitioner's own testimony. Mr Mitchell denies he referenced "people upstairs" during his supervisory meeting with petitioner. He also denied he ever had a conversation with Ms. Dreyfus or anyone in the Secretary's office in which they expressed concern about petitioner's affair with Mr. Sadlier. Ms. Dreyfus testified she was unaware of petitioner's affair and there is no evidence that anyone in the Secretary's office was aware of it. The Commission has already expressed its findings regarding petitioner's credibility in this matter. Therefore, the Commission concludes that Mr Mitchell did not make the statement that petitioner attributed to him in Allegation 2p.

Allegation 2q Also on January 23 [15], 1997, Supervisor Mitchell questioned petitioner about a hotel bill arising from petitioner's work-related travel. ***(sex discrimination)***

This allegation relates to the Mr Mitchell's discussion with petitioner about a bill from Lakewoods Resort and Lodge in Cable. (Finding 55) Carol Vaughn, the Bureau's office manager, gave the bill to Mr. Mitchell. Mr. Mitchell referenced the bill in the context of his entreaty to petitioner that she "be discreet." He accepted petitioner's explanation of the circumstances surrounding the bill and did not ask her any follow-up questions.

This allegation does not involve an adverse employment action. It is another example of a situation where respondent merely asked the petitioner to provide some justification for certain conduct and it is comparable to the facts in *Cunningham v. DOC*, 98-0206-PC-ER, 99-0050-PC-ER, 7/20/99.

Even if the allegation related to an adverse employment action, petitioner failed to establish any connection between Mr. Mitchell's conduct and petitioner's sex. There is nothing in the record suggesting that Mr. Mitchell had ever received a comparable bill relating to a male employee. He acted reasonably when he mentioned the bill and

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discriminatory motive in taking this action in January of 1997 is addressed in the sections relating to that supervisor conference.

there is nothing that suggests his action of referencing the bill was premised upon the petitioner's sex, rather than on her possible misconduct.

Petitioner failed to establish a prima facie case of sex discrimination as to allegation 2q.

> **Allegation 1e. Supervisor Mitchell told petitioner to cancel workshops petitioner was to conduct at the State Child Abuse and Neglect Conference.** ***(marital status discrimination)***
> **Allegation 2d. Supervisor Mitchell told petitioner to cancel workshops petitioner was to conduct at the State Child Abuse and Neglect Conference.** ***(sex discrimination)***

Mr. Mitchell told petitioner that she could not use work time to present two workshops at the conference scheduled for April of 1997 in Stevens Point. (Finding 59) It is unnecessary to address the question of whether respondent's action constituted an adverse employment action because petitioner has failed to sustain her burden of establishing that Mr. Mitchell was motivated by petitioner's marital status or her sex.

Mr. Mitchell's actions were consistent with concerns raised by Dep. Sec. Lorang regarding petitioner's participation in the "Advocating for Children" workshop in October of 1996. (Finding 37) Petitioner contends that the child abuse workshop was relevant to her duties as Out-of-Home Care planner because some of the counties' staff members were victims of child abuse, and petitioner needed to take care of them so they could provide direct services to children. 6Tr. 127 This argument is unpersuasive. It suggests that employees of the Child Welfare Services Section are permitted to present workshops that have the effect of easing the worries of conference attendees, or in some other way to provide counseling to the section's clients. This concept would presumably include providing workshops or one-on-one counseling to counties' staff members about investments that might ease money management worries of the counties' staff. Petitioner's contention is not logical and she has failed to produce any evidence that other persons in the section were permitted to engage in such activities.

Ms. Barnard, petitioner's first supervisor, testified that shortly after petitioner started work, she proposed and was allowed to do a workshop at the Child Abuse and

Neglet Conference on sexual assault. Ms. Barnard testified that while she approved the workshop the first year, she "probably advised her that it was off the mark. It was out of the realm of what her job description was." 4Tr.222

The record includes reaction from Deputy Secretary Lorang, Ms. Barnard and Mr. Mitchell that these workshops were outside of the scope of petitioner's duties. The fact that petitioner was permitted to present a workshop once does not mean that she was going to be allowed to present it indefinitely, where the workshop was outside the scope of her duties and there were outstanding problems with her work performance.

The petitioner has failed to show that the reasons articulated by respondent for Mr Mitchell's comment was pretextual.

> **Allegation 1f. Supervisor Mitchell told petitioner that Ms. Hisgen did not want petitioner to continue her work assignment with the Children's Justice Act Conference.** ***(marital status discrimination)***
> **Allegation 2e. Supervisor Mitchell told petitioner that Ms. Hisgen did not want petitioner to continue her work assignment with the Children's Justice Act Conference.** ***(sex discrimination)***

These allegations also arise from the supervisory conference on January 15th It is unnecessary to address the question of whether respondent's action constituted an adverse employment action because petitioner has failed to sustain her burden of establishing that Mr Mitchell was motivated by petitioner's marital status or her sex.

Petitioner claims Mr. Mitchell said that Ms. Hisgen did not trust the petitioner to represent the respondent's viewpoint with respect to the conference. Mr Mitchell denied that statement and the Commission adopts Mr. Mitchell's testimony. Given that someone from protective services had initially been responsible for participating in the planning for this conference, rather than someone from the out-of-home care area, it was logical that petitioner would not continue in that role indefinitely. She held the planning responsibilities from May of 1996 until the January 1997 supervisory conference. Petitioner did not establish that the stated reasons for shifting this responsibility

from petitioner (that the petitioner had too much to do and that the child protective services planner duties were more closely related) were pretextual.

Allegation 2o. Later on January 23 [15], 1997, Supervisor Mitchell and Ms. Hisgen expressed unfounded dissatisfaction with petitioner's work. ***(sex discrimination)***

Petitioner has failed to specify the expressions of dissatisfaction that serve as the basis for this allegation of sex discrimination.[21]

Respondent contends the alleged conduct does not constitute an adverse employment action. A negative performance evaluation does not reach the level of an adverse employment action. *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99. An "expression of dissatisfaction" by a supervisor is even less concrete and tangible than a written performance evaluation. Therefore, the Commission agrees that the alleged conduct does not rise to the level of an adverse employment action.

The Commission also notes that the comments made by Mr Mitchell and Ms. Hisgen on January 15th regarding petitioner's work performance were based on reasonably held perceptions of the petitioner's work. Nothing in the record suggests that either Mr Mitchell's or Ms. Hisgen's conclusions about petitioner's work performance were based on petitioner's sex.

Petitioner has failed to establish a prima facie case of sex discrimination.

Allegations 2k, 2l and 2m all relate to a meeting held on January 15, 1997, regarding petitioner's draft of the Foster Parent Advisor Committee Report:

Allegation 2k. Supervisor Mitchell gave the impression that it was petitioner's error to have called a meeting on or about January 23, 1997, to discuss improvements in the foster care system. ***(sex discrimination)***

Allegation 2l. Ms. Hisgen stated the January 23rd meeting was a "waste of time." ***(sex discrimination)***

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[21] To the extent those expressions are the subject of other sex discrimination claims by petitioner, they are discussed in other portions of this decision.

Allegation 2m. Ms. Hisgen questioned petitioner's selection of a title for her draft recommendations. ***(sex discrimination)***

This meeting is described in Findings 63 to 66. Ms. Dreyfus had not read the draft of the report before the meeting began. Ms. Hisgen was dissatisfied with the title that petitioner had selected for the report and both she and Mr Mitchell had concerns about the content of the draft. Ms. Hisgen told Ms. Dreyfus that the report was not of the highest quality and that it was not worthwhile to hold a meeting on the report. Ms. Hisgen asked why the meeting had been held.

None of petitioner's three allegations relating to this meeting describe adverse employment actions. None of the three supervisors present at the meeting disciplined the petitioner. Ms. Hisgen's and Mr. Mitchell's comments were not written. They had no stronger effect on petitioner's employment than a negative performance evaluation might have, and as previously noted, a negative performance evaluation is not an adverse employment action. *Lutze, supra.*

Even if these allegations could be viewed as describing adverse employment actions, there is nothing in the record to support a conclusion that Ms. Hisgen or Mr. Mitchell treated petitioner more harshly because petitioner is female rather than male. Nothing suggests that a similar draft prepared by a male employee would have generated a different response. Ms. Hisgen was clearly dissatisfied with the draft report. Mr Mitchell also had misgivings about it. Ms. Hisgen's concerns about petitioner's work performance had existed for some time. While the final version of the report contains much of the information found in petitioner's draft, the body of the report was substantially reorganized and expanded. The title was revised and numerous sections were added. The 5 page draft plus a cover sheet ended up as 19 pages plus the cover sheet. These extensive changes to the title, length and structure of petitioner's draft tend to support the view that Ms. Hisgen and Mr. Mitchell were dissatisfied with the report because of problems they perceived in the draft, rather than because of petitioner's sex.

Petitioner failed to establish sex discrimination as to these allegations.

The Commission has found that petitioner failed to sustain her burden of proof as to all six of the sub-issues that are part of her marital status discrimination claim. Based on these findings, the Commission must also conclude that the petitioner has failed to sustain her burden as to the introductory language of the marital discrimination issue: "Whether respondent discriminated against petitioner on the basis of petitioner's marital status with respect to the following alleged conduct resulting in petitioner's alleged constructive discharge."

Nevertheless, the Commission offers the following discussion on the topic of constructive discharge.

In order to establish a claim of constructive discharge, an employee must show that the employer knowingly permitted conditions of employment so intolerable that a reasonable person subject to them would resign. *Farrar v. DOJ*, 94-0077-PC-ER, 11/7/97 The question is not what petitioner may have believed or may have understood. The conclusion must be based on what a reasonable person would have found to be tolerable or intolerable.[22] There is a significant difference between merely "unpleasant" conditions and conditions that meet the standard of "intolerable."

It is noteworthy that respondent did not give petitioner an ultimatum to resign or discharged from employment. She was not told to find another job, nor did respondent threaten to impose any discipline against her Management did not tell petitioner's coworkers to ignore her, to harass her, or to threaten her There was no showing that

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[22] At the time of her resignation, petitioner was under the care of both a psychiatrist and a psychologist for recurrent major depression. In addition, she had broken up with Mr. Sadlier in November of 1996, and was still "not with" Mr. Sadlier as of January 15· 1997. But between January 15th and her resignation on January 30th, petitioner and Mr. Sadlier got back together. There is no question that the petitioner was under a lot of stress at the time of her resignation, but the record supports the conclusion that the stress arose from her relationship with Mr. Sadlier. While petitioner testified that a "substantial" amount of her stress was due to pressure at work due to her relationship with Mr. Sadlier, this testimony is inconsistent with her answers to interrogatories, Resp. Exh. 149, page 7, where she stated she "did not receive any medical treatment for issues or events specifically arising from and/or relating to her employment with Respondent." The stress arising from issues outside of petitioner's work setting may well have caused her to react in a way different than how a "reasonable person" would have reacted.

respondent intended for her to quit.[23] To the contrary, both Mr. Mitchell and Ms. Hisgen testified they were surprised when petitioner resigned.

Petitioner testified that child support issues, her divorce and her relationship with Mr. Sadlier all had "nothing to do" with her decision to quit her job and relocate near Mr Sadlier. 7Tr.107 This testimony is not credible.

Petitioner acknowledged that after she moved to the Tomahawk-Rhinelander area, she told a reporter for a Wausau newspaper that she had gotten burned out in her state job and that she needed to get her life back in harmony. 6Tr.191 This testimony is hardly consistent with a constructive discharge. Petitioner also later declined to be interviewed for a state job vacancy in Eau Claire but interviewed for an identical position in the office in Rhinelander where Mr Sadlier worked. This information also supports the conclusion that petitioner was motivated to leave her job in Madison in order to pursue her romantic relationship with Mr. Sadlier, rather than to escape "intolerable" working conditions.

At the time she left her job as Out-of-Home Care specialist, petitioner wrote Mr. Mitchell and said she "loved working" with him and that it had "been an honor to work with the best." She invited Mr Mitchell to her apartment for a beer. She also distributed verse (Finding 87) which is susceptible to different interpretations. The primary interpretation is consistent with a decision to throw away all vestiges of a traditional family life and to recklessly follow one's passion. For petitioner, that passion was centered on Mr. Sadlier, and not on her job with respondent. It would be a much greater stretch to interpret the verse to show that respondent's actions and comments at work overcame petitioner's will and forced her to quit the employment relationship. It wasn't until October of 1997, eight months after her resignation, that petitioner first told Mr. Mitchell that she felt she had been forced out of her job.

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[23] There is some precedent to the effect that the employer's intent is not relevant to a determination of whether an employee was constructively discharged. The Commission would conclude that petitioner was not constructively discharged even if it did not consider respondent's intent.

For all of the above reasons, it is clear that petitioner was not constructively discharged from her Out-of-Home Care position with respondent.

III. Petitioner's appeal arising from the failure to appoint (Case No. 97-0106-PC)

This case is reviewed pursuant to the Commission's authority under §230.44(1)(d), Stats.:

> A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission held:

> The term "abuse of discretion" has been defined as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Lundeen v. DOA*, 79-208-PC, 6/3/81. The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Petitioner does not contend that any particular statute or rule was violated. Petitioner contends that respondent abused its discretion when selecting Mr. Cork rather than appellant for the vacant position.

The basis for petitioner's abuse of discretion claim is that the panelists were motivated by something other than the credentials of the candidates. The only alleged motivation advanced by petitioner is her relationship with Mr. Sadlier. Petitioner contends that as a consequence of that relationship, the panelists were determined not to select her for the vacancy. This theory breaks down when the three panelists' assessments of the candidates are compared. It is undisputed that Mr. DeSantis was unaware of the relationship between petitioner and Mr. Sadlier. On the other hand, Ms. Waller was aware of it and Mr. Peterson had, at a minimum, heard "rumors" about it. Yet all

three felt that Patrick Cork was the best candidate by far Mr. DeSantis was the first of the panelists to express his conclusions after the last candidate had been interviewed. He clearly identified Mr Cork as the best candidate. He also commented that petitioner used the "I" word too much during the interview.

Expertise in the areas of mental health and AODA was the primary selection criterion for the vacancies in Rhinelander and Eau Claire. Both Mr Cork and the successful candidate in Eau Claire, Fred Heffling had extensive experience in these areas. Mr. Heffling had been responsible for certified mental health and AODA programs for numerous counties while employed with respondent's Bureau of Quality Compliance. He also had experience working for a county.

Mr. Cork's experience in these two areas was, arguably, even more extensive than that of Mr Heffling. Mr. Cork held an important management position for nearly 7 years with an AODA program provider in Green Bay. He was very familiar with dealing with the State as a regulator of that program. He had many years of experience as a clinical supervisor, psychotherapist and social worker with mental health and AODA programs.

The petitioner's qualifications were notably inferior, and she only did a marginal job of presenting herself to the panel. Her resume offered little relevant information. It failed to identify any specifics about her past employment and did not specify any significant AODA or mental health experience, at any level. It failed to describe her administrative experience. Petitioner admitted she did not have a strong background in the service area of mental health. She acknowledged that if respondent was looking for someone with a mental health background, her lack of experience would put her at a disadvantage. 6Tr.165

Petitioner points to portions of the following testimony of Mr Peterson, Area Administrator, to support her claim that Mr. Peterson's analysis of the candidates was tinged by his desire to keep petitioner from working across the hall from Mr Sadlier:

> Q (by petitioner) And it was clear in your mind, was it not, that this situation sounded like a messy situation going on between Mike [Sadlier] and [petitioner], correct?

A Would have been if I was doing it.

Q Sure. And it certainly, that was something that you would not want to get involved in, correct?

A Involved in?

Q In being involved in the rumor and the gossip or anywhere between these two, correct?

A Yes.

Q And you would not want to have that kind of situation in your office, correct? You wouldn't want to have this --

A I wouldn't want that. 2Tr.289

* * *

Q Let me ask you to assume, sir, for one minute that you in fact learned that Mike [Sadlier] and [petitioner] had the tendency to engage in these displays of affection, if such displays would have occurred in the job setting, in your office, would that concern you?

A Yes.

Q Okay. As a supervisor you would not want to have that kind of behavior, would you?

A No I wouldn't.

Q Okay. You would want to keep these people separate and apart so they would not have these displays of behavior, true?

A What do you mean by separate?

Q Well, you would not want them, you would not want them to be engaging in these types of exchanges during work hours, true?

A During working hours, that's right.

Q Or during work-related activities?

A Yes.

Q And the fact of the matter is that by the time [petitioner] applied for this position, you knew that that could be a risk if you would put them together; isn't it true?

A No, I didn't know that that would be risk [sic].

A Well, at least you knew that you would have to talk to somebody, either Mike [Sadlier] or [petitioner]. If she ever got the job, you knew you would have to talk to them about not displaying this affection in public, true?

A I would talk to them about that after it occurred. I'm not going to tell them that you know, gee, you might be talking to each other and these are the rules that are going -- no, that's not -- I wouldn't have done it until it had occurred. 3Tr. 307-9.

However, Mr Peterson's testimony does not indicate he was prejudiced against hiring petitioner for the vacancy It merely shows that he would not like a situation where two employees "engaged in displays of affection" in the workplace or in work-related activities. If that situation occurred, Mr. Peterson would then counsel the employees involved.

Petitioner failed to show that respondent's decision not to select her for the Assistant Area Administrator position in Rhinelander was illegal or an abuse of discretion.

ORDER

These matters are dismissed.

Dated: January 17, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:970106Adec1

JUDY M. ROGERS, Commissioner

Parties:

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

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

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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

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

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

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95