

BRENDA GAYLE PLUMMER,
Complainant,

v.

**Chancellor, UNIVERSITY OF
WISCONSIN - MADISON,**
Respondent.

INTERIM
DECISION AND ORDER

Case Nos. 97-0170-PC-ER and
98-0153-PC-ER

A Proposed Decision and Order (PDO) was mailed to the parties on October 17, 2000. Both parties filed written arguments. The Commission received the final argument on December 6, 2000.

The Commission has reviewed the objections filed by the parties and has consulted with the hearing examiner. The Commission agrees with the hearing examiner's credibility impressions. Changes to the PDO text are made in this decision. Changes are discussed in alpha footnotes except for typographical/grammatical errors and corrections to referenced findings of fact. Alpha footnotes also are used to address arguments raised by the parties. The text of some numerical footnotes changed as noted by bold print. Also, references to briefs were clarified as either a post-hearing brief (e.g. "complainant's final post-hearing brief") or as a brief filed in objection to the PDO (e.g. "respondent's 11/20/00 brief").

Complainant filed an internal discrimination complaint with respondent (hereafter UW Complaint). Respondent, in the context of the UW Complaint, investigated many allegations raised in the cases filed with the Commission. Respondent's investigative body was the Faculty Personnel Committee (FPC) who issued its report in April 1998 (Exh. R-218). Excerpts from the report are included in this decision in the findings pertaining to a particular hearing issue.[^]

[^] This paragraph was added for background information.

The parties agreed to the statement of the issues for hearing (see Conference Report dated 7/13/99 and Commission letter dated 7/20/99). The issues are noted below:

Case No. 97-0170-PC-ER

1. Whether respondent discriminated against complainant based on race and sex with respect to the following *alleged* incidents:
 - a) In July 1991, respondent failed to provide complainant adequate work space,
 - b) In spring 1993, Norman Risjord failed to grant complainant due process with respect to a student complaint against her,
 - c) The Department of Afro-American Studies (AAS) excluded complainant from departmental activities including departmental committee assignments, graduate student assignments, and receptions for visiting scholars and new students.
 - d) In 1993-94, AAS conducted an employment search for a senior historian,
 - e) In spring 1996 after complainant resigned from the AAS's newsletter committee, Chair Nellie McKay threatened complainant with disciplinary action from the Dean if she did not either complete the newsletter or turn over any drafts of the newsletter.
 - f) In spring 1997, complainant became aware of a "Chair file" that had been maintained on her by the History Department (HD) including materials about her outside employment offer, her request to see the file, and some teaching evaluations.
 - g) On April 22, 1997, complainant requested access to her HD "Chair file," but did not gain access to the file until May 1, 1997
 - h) Included as part of the HD's "Chair file" was a letter from Timothy Tyson dated March 23, 1996 to AAS Chair Nellie McKay accusing complainant of "near harassment" and which was never provided to complainant until she saw the file in May 1997
 - i) Timothy Tyson's letter dated March 23, 1996 to AAS Chair Nellie McKay made false and defamatory accusations against the complainant.
 - j) The AAS contributions to the HD's "Chair file" were designed to negatively influence the HD's counteroffer to complainant in May 1996.
 - k) In May 1997, HD's Chair, Connelly, refused to remove the McKay and Tyson letters from complainant's HD "Chair file."
 - l) From 1991-98, complainant's merit increases were lower than comparable male colleagues in the HD and AAS.

- m) In about spring 1997, Nellie McKay excluded complainant from the supplemental salary funds available to AAS.
 - n) On October 31, 1997, respondent denied complainant the opportunity to compete for an internal grant.
2. Whether respondent discriminated against complainant on the basis of sex in regard to compensation paid, within the meaning of §111.36(1)(a), Stats.¹

Case No. 98-0153-PC-ER

- 1 Whether respondent retaliated against complainant for engaging in fair employment activities with respect to the following *alleged* incidents:
- o) On or about April 17, 1998, the Faculty Personnel Committee (FPC) issued its report and failed to provide complainant a fair and complete hearing procedure, and
 - p) On about May 29, 1998, Dean Phillip Certain accepted the recommendations of the FPC for the College of Letters and Science (CLS) and expressed his intention to execute the report's recommendations.
2. Whether respondent discriminated against complainant based on race with respect to the following *alleged* incident:
- q) In June-July 1998, the CLS and AAS failed to adequately explain the basis for the 1997-98 salary increases.

FINDINGS OF FACT

1. Complainant worked for respondent as an associate professor from 1991-1994, and as a professor, starting in June 1994. Her position was in the College of Letters and Science (CLS). She had half-time appointments in the Departments of History (HD) and Afro-American Studies (AAS) (Exh. C-1). Complainant is African-American.

2. The hiring letter (Exh. R-104) is dated July 6, 1990 and stated in pertinent part:

¹ The agreed-upon phrasing of this issue was "Whether respondent discriminated against complainant based on sex with respect to compensation as stated in ¶3 in the Conclusions section of the Initial Determination." (See Commission letter dated July 20, 1999.) Paragraph 3 in the Conclusions section refers to the "Equal Pay for Equal Work" discussion which starts on page 26 of the Initial Determination.

[W]e are pleased to offer you an appointment beginning with the academic year 1990-91

Your salary will be \$50,000 for the nine months of the 1990-91 academic year, which begins on August 27, 1990 and ends on May 26, 1991.

3. Complainant was on research leave (Exh. R-218, pp. 3-4) from August 27, 1990 through May 26, 1991. She arrived at the UW in July 1991.

Issue (a): In July 1991, respondent failed to provide complainant adequate work space.

4.^A HD and AAS were housed in the Humanities Building when complainant was hired. There was a critical shortage of space. AAS had no office space available. HD obtained two offices "after a squawk." One of the newly acquired offices (room #5220) went to complainant and the other (room #5222) went to another new HD hire, Dr. Catherine Price (white). Dr. Price moved to a different office in her second year.² A white male thereafter occupied the office (room #5222). Dr. Stanley Payne, a white male, occupied the office across from complainant's (room #5217) and had been in that office since 1969 when the building opened. Dr. Thongchai Winachakul (Asian) was in the HD and housed on the fifth floor with complainant.

5. The general character of the offices given to complainant and Dr. Price were similar to the rest of the HD offices. The rooms are considered small with space for a desk, a few filing cabinets, bookshelves and one or two other pieces of furniture. The rooms needed painting and were poorly ventilated. The condition of these offices was a chronic and long-standing problem. Some professors painted their own offices and purchased their own touch-tone phones, although they should not be expected to do so.

6. Complainant's office was somewhat worse than the other HD offices. Her office had been used as a storage room before it was relinquished to HD and was not cleaned

^A Changes were made to ¶4 for clarification. Dr. Winachakul's first name was changed to correct an error. The spelling of Dr. Price's first name was corrected as well.

² The record contains information about complainant's requests for a different office being denied as well as her later success in getting a different office. This topic is not part of the defined hearing issue and, accordingly, is not addressed in this decision.

before she came. For the first two months complainant used the office, part of it continued to be used for storage. At times, a dust fell from deteriorating ceiling tiles leaving "fine grit" covering the top of her computer and keyboard (Exhs. C-134, p. 11 & C-54).

7 Complainant submitted written memos complaining about the condition of her office on January 10, 1992 (Exh. C-53) and June 8, 1992 (Exh. C-54) as noted below:

January 10, 1992 memo: Let me add my voice to Catherine Price's to request that our offices be painted this coming spring or summer. Like hers, mine probably hasn't been touched since the building was constructed. It has dirty, greasy walls of nondescript color with big holes that look like machine gun practice targets. [!] I guess this is time to ask, since we are new.

June 8, 1992 memo: I came into my office today and found my desk covered with a layer of soot, dust and grime. Since it also covered the top of the computer, keyboard, and printer, I am removing these articles to prevent them from being damaged. I will be returning them whenever the situation is rectified.

8. Respondent also failed to provide complainant certain office equipment previously promised, as described in her UW Complaint (Exh. 134, p. 11):

My office had no phone. I finally received a rotary phone that could not accept a modem connection and the History offices were not wired to a network at the time. History did not want to buy the 2400 kbps modem that was part of the promised start-up package. Instead, they substituted a 300 kbps [!] modem that proved incompatible with the rest of my equipment.

Issue (b): In Spring 1993, Risjord failed to provide due process to complainant with respect to a student complaint against her.

9.[^] On May 5, 1993, HD's undergraduate advisor, Diane Franzen, consulted Dr Norman K. Risjord, a HD faculty member. It was part of Ms. Franzen's job to handle student complaints about professors. She told Dr. Risjord that a student had come to her in tears about a dispute with complainant. Dr Risjord had never met complainant. The student had

[^] Complainant objected to findings in ¶9 (and others) saying the "Hearing Examiner has not established" certain facts. Her objection suggests she misunderstands the hearing examiner's role vis-a-vis the parties. Specifically, it is the complainant, not the hearing examiner, who has the burden of proof in these cases. Also, complainant objected asserting that no one provided testimony about what grade she gave the student. She is wrong. Dr. Risjord provided testimony on the student's grade.

received a low grade (either a D or F) on a bluebook exam due to complainant's perception that the student's exam included a racial slur. The exam topic was the civil rights movement of the 1960s.

10. Ms. Franzen gave the student's exam to Dr. Risjord. He read the exam the same day (May 5th). He thought it was a poor exam scholastically and that it likely warranted a D grade. He did not detect any racial slur. Ms. Franzen pointed out the specific word to him. The handwriting was poor but he could see where the unknown word might be construed as the word "apes." However, the word in context was a verb so "apes" made no sense to him.^A Dr. Risjord told Ms. Franzen that the matter should be resolved easily. He offered to give complainant a phone call to work it out.

11. Before Dr. Risjord telephoned complainant on May 5th, he received a call from Dr. Ken Sacks who then was Chair of HD. Dr. Sacks said the student also had gone to the Dean of Students to complain primarily about complainant (allegedly) treating him with such hostility. At about the same time, the student's father called the Dean of Students and threatened to file a defamation lawsuit. Dr. Sacks agreed that Dr. Risjord should attempt to resolve the matter by calling complainant.

12.^B Sometime the same day (May 5th), Dr. Risjord discussed the matter with Dr. David McDonald, a good friend in the HD. He also may have consulted with another HD professor, Dr. Barker.

13.^C At about 4:30 p.m. the same day (May 5th) Dr. Risjord called complainant. He made the call from his home to her home. He told her that Ms. Franzen had spoken with him and that he had reviewed the exam and agreed it was poor but asked what the racial slur was

^A This sentence in ¶10 was changed for clarification.

^B The name "McDonnel" was corrected to "McDonald."

^C This paragraph was changed for accuracy. Exhibit C-56 is complainant's summary of the phone call, which she wrote in the last two weeks of May 1993. She indicates therein that the HD secretary previously had advised her that Professor Risjord wished to speak with her the same day. Also, it is unnecessary to resolve certain differences between Dr. Risjord's testimony and complainant's summary (Exh. C-56). The paragraph, accordingly, was changed to include only facts that are either undisputed in comparison to the summary (Exh. C-56), or for which Dr. Risjord provided credible testimony about matters not addressed in the summary.

about. He never got to the point of discussing his opinion that the exam did not contain a racial slur. He got out of the conversation as quickly as he could because she was so angry.

14. On or about May 7, 1993,[^] Ms. Franzen gave Dr. Risjord a letter (dated May 14, 1992) from a different student about complainant's (alleged) anger during the prior year. Ms. Franzen said that this other student did not request action so none was taken. Dr. Risjord felt he knew what the students were talking about from his own telephone call with complainant. He thought a real problem might exist and, accordingly, brought the matter to Dr. Sacks' attention by letter dated May 17, 2000 (Exh. R-113). Dr. Risjord requested in the letter that Dr. Sacks put the two student complaints "on file." Dr. Risjord sent complainant and the Undergraduate Committee a copy of the letter. Complainant responded by letter dated May 18, 1993, stating as shown below (with emphasis as noted in the original document):

When I came into the office Monday morning, May 17, I found a letter in my mailbox from Chairman Risjord addressed to Ken Sacks. Chairman Risjord has suggested to Sacks that letters of complaint against me be placed on file (presumably in some permanent personnel file that is supposed to follow me for life) from [the second student] and his father, and from [the first student].

You are already familiar with the [second student's] case. [The first student] was a student who last year asked me to allow her to take a final at a time other than that scheduled even though she had no genuinely compelling reason to do so. I flatly told her that I would accommodate her if I could but I would make no promises. I fancied myself doing this student a favor. She nevertheless pursued the matter as if I had committed myself. She then apparently made a formal complaint, which I knew nothing about until Chairman Risjord put a copy of the letter, dated May 14, 1992, in my mailbox this weekend.

[The first student] chose not to pursue this matter, but Chairman Risjord has, for reasons of his own. Although one may speculate, it is difficult to understand why, since such matters as due process apparently count for little in his estimation. The Undergraduate Studies Council needs to be aware that not all of its members are being informed of actions taken in its name, and that secretiveness, manipulativeness, and attempts at intimidation of colleagues are not the best ways to ensure quality education for undergraduates. If anyone should

[^] Complainant thought this date should have been May 17, 1993, not May 7th. She is incorrect. Dr. Risjord testified that he received the letter a few days after his call to complainant on May 5, 1993.

be filing complaints around here it is me. I will do so if these abuses continue. Now, if you'll excuse me, I'll go back to grading papers.

Issue (c): AAS excluded complainant from activities including department committee assignments, graduate student assignments and receptions for visiting scholars.³

15. In AAS, the Graduate Program Committee (GPC) assigns first-year graduate students to an AAS professor for mentoring during the student's first year. This is done using a matching process. The matching process involves reviewing each graduate student's application materials to identify their area of interest, which is matched to an AAS professor's area of interest. At times, a graduate student will request a specific professor and such requests also would be considered.

16. After the graduate student's first year, they are expected to choose their own "principal advisor." The graduate students obtain exposure to professors other than their "match professor" by taking classes from various AAS professors. There also is a social reception each fall where graduate students are invited and faculty attends. The students also gain exposure to professors from AAS receptions held when visitors come to campus.

17. Complainant was assigned 2 graduate students in a 10-year period. The first assignment occurred after Dr. Adell, an Afro-American female, became GPC Chair. Dr. Adell was Chair from 1993-1997. Under Dr. Adell's leadership, complainant continued to receive fewer graduate-student assignments than other AAS staff (Exh. C-66).

18. Complainant received fewer graduate-student assignments than others because of the factors considered in the matching process described previously.

19. All AAS staff were invited to department activities. No one was excluded.⁴

³ Complainant clarified in her 11/20/00 brief (p. 8) that this allegation pertained to her "first three years of service." **This footnote was changed to correct the brief citation and to include the quotation.**

⁴ There is mention in Exh. C-137, p. 4, of a dispute over whether complainant was invited to a fall reception at Dr. Ralston's home. Complainant did not mention this at hearing and she did not ask Dr. Ralston about it when he testified. Under these circumstances, brief mention in an exhibit was insufficient to find that complainant had been excluded from this or any other event.

Issue (d): In 1993-94, AAS conducted an employment search for a senior historian.

20. William Van Deburg and Craig Werner (white males) made certain decisions about AAS' search for a senior historian without complainant's input. Her input should have been sought before the decisions were made because she was part of the decision-making committee.[^]

Issue (e): In spring 1996 after complainant resigned from the AAS newsletter committee, Chair Nellie McKay threatened complainant with disciplinary action from the Dean if she did not either complete the newsletter or turn over any drafts of the newsletter.

21. Complainant was the chair of a new newsletter committee. The newsletter was important to AAS as a fundraising tool. Two other AAS professors, Ronald Radano and Mike Thornton, worked on the newsletter.

22. Complainant sent an e-mail message to Dr Nellie McKay on April 17, 1996 (Exh. R-123). Dr. McKay is black. She has worked for respondent since the fall of 1978, with half-time appointments in AAS and in English. She was the AAS chair from about 1994-1997. The text of the e-mail message is shown below:

Please accept my resignation as chair of the History area [within AAS]. I am resigning because of the refusal of my colleagues to make themselves available to discuss History issues. I will also be unavailable to complete the work on the department fund raising newsletter

23. Dr McKay and complainant met to discuss the e-mail. Complainant told Dr. McKay that the newsletter was almost done and that complainant had returned materials to staff who contributed them. Dr McKay sent a letter to complainant dated April 25, 1996 (Exh. R-141). Relevant portions of the letter are shown below (emphasis shown is the same as in the original document):

[W]hen I asked you about the state of the incompleteness of the Newsletter you immediately claimed the Newsletter as "your" work and suggested that you

[^] See ¶¶104-110, FOF.

would not turn it over to the Department, ostensibly for someone else to complete. If I am inaccurate on this "reading" of your response to me in the office, please inform me otherwise.

I have absolutely no wish to deprive you of the credit for having volunteered to do the Newsletter or for the work you have put into it. Both are highly commendable and should be appreciated by the remainder of the faculty. On the other hand, this is a Department project that cannot be appropriated by any one person. In addition, some of the materials in the Newsletter were given to you by members of the faculty for the sole purpose of their inclusion in the document.

Therefore, I am requesting that you either agree to produce a 25th Anniversary newsletter by no later than June 15, 1997 (you were expected to complete it within this school year), or please turn over your latest draft copy along with all other materials given to you by the faculty relating to this document before May 10, 1997, so someone else may complete it.

24. Complainant did not reply to Dr. McKay's letter so Dr. McKay asked respondent's legal counsel whether she had the authority, as AAS Chair, to request that complainant tender the work she had done on the newsletter as well as items submitted from other professors for inclusion in the newsletter. Legal counsel answered in the affirmative by memo dated May 13, 1996 (Exh. C-102). Dr. McKay then wrote to complainant (on May 16, 1996) providing a copy of legal counsel's opinion (Exh. C-103). Dr. McKay's letter concluded with the following paragraph:

As you will see from the enclosed memorandum, I consulted with the University's legal services. The response confirmed that the materials pertaining to the Newsletter are not legally your property. From my perspective, your action in this matter does significant harm to the future welfare of the Department of Afro-American Studies. I am therefore again requesting that you return all materials connected to the Newsletter (materials from the faculty and your latest draft of the document .) to my office no later than Tuesday May 21, 1996. In the case of your failure to do this, following the advice of counsel, I will refer the matter to Dean Phillip Certain.

The referenced referral of the matter to Dean Certain does not constitute a threat to discipline. Neither Dr. McKay nor Dean Certain had the authority to discipline complainant. Such authority rests with the Chancellor or Provost.

25. Complainant responded to Dr McKay's letter of May 16, 1996. Complainant's response is dated May 19, 1996 (Exh. C-104) and states, in pertinent part as shown below (emphasis shown is the same as in the original document).

In your first letter (dated April 25), you issued me an ultimatum of June 15, 1997 to either produce a newsletter or return all newsletter-related materials. In your second letter, you cite another ultimatum of May 10, 1996

Both of your letters are premised on the notion that I was to be the sole producer of the newsletter. I was not. There was a newsletter *committee*, of which I was a member.

I see no reason why I should be singled out for legal inquiries and handed ultimatums when, as you say, the newsletter was to be a team project.

To save you the trouble of forwarding this matter to Dean Certain, I am sending copies of your letters, (legal counsel's) letter, and this letter to him myself.

26. Complainant was not "singled out" for legal inquiries and ultimatums. Complainant was the chair of the newsletter committee. She previously told Dr McKay that the newsletter was partially completed (see ¶23, FOF⁵). It was reasonable for Dr McKay to attempt to obtain the most recent draft of the newsletter and related documents so that someone else could finish the task.

27 By letter dated May 21, 1996 (Exh. R-145), Dr McKay wrote to Phillip R. Certain, Dean of the College of Letters and Science. The intent of the letter was to provide information about the newsletter situation since complainant had brought it to the Dean's attention. There was no request in the letter for the Dean to become involved in resolving the matter. There was no request that complainant be disciplined.

28.^A Some time after May 21, 1996, complainant returned the requested materials to Dr McKay (Exh C-137, p. 5, ¶3).

⁵ FOF is an acronym for Findings of Fact.

^A The wording of ¶28 was changed for clarification. The Commission specifically rejects complainant's suggestion that she already had returned the materials to Dr McKay and, accordingly, had nothing left to return. (See complainant's 11/20/00 brief, p.2).

Issue (f): In spring 1997, complainant became aware of a "Chair file" that had been maintained on her by the HD including materials about outside employment offer, her request to see the file and some teaching evaluations

29. On April 10, 1996, complainant received an offer of employment from another university (Exh. C-134, p. 13). She informed Dr. Donnelly (HD) of the outside offer. She requested that HD present a counter offer. She also requested that HD hire her full time.⁶ HD took the requests one at a time. The counter offer was addressed first. The request for 100% placement in HD was deferred. The deferral was based on the facts that HD already was down 4 positions and was in the process of developing a 5-year plan. HD wanted to review complainant's request for a full-time HD appointment in the context of the 5-year plan.

30.[^] There were budget considerations related to the counter offer, which required consultation with AAS. HD needed to consult with AAS to determine if AAS would participate in a counter offer because AAS would bear half the expense of a counter offer at least until HD resolved complainant's request for a full-time HD appointment. Consultation also was necessary regarding complainant's request for a full-time appointment in HD. Specifically, either AAS would need to give up the money used to fund complainant's half-time AAS appointment, or HD would need to look elsewhere for funds to support complainant in a 100% position. AAS was unwilling to participate in a counter offer and was unwilling to give up its half-time position.

31. At times relevant to this issue, Dr. Donnelly (white male) was HD Chair. In April 1996, Dr. McKay (African-American female) was AAS Chair. Some time in 1997, Richard Ralston (African American male) became AAS Chair.

⁶ The issues for hearing did not include the request for a counter offer or the request for a 100% placement in HD.

[^] Complainant cited Exh. C-108, p. 3, for the proposition that AAS would not lose its half-time position if she went to HD full time. At hearing, complainant said she offered Exh. C-108 for the counter-offer issue but this was not a defined hearing issue and, accordingly, the exhibit was excluded from the record. Even if the exhibit were considered for the newly-asserted argument, it does not appear to support complainant's assertion that AAS would have been secure in its half-time position if complainant went to HD full time. Page two of the exhibit specifically notes that the second portion of the HD process was to vote on "transfer of .5 FTE from" AAS, which establishes that the possibility continued to exist that AAS could lose the half-time position.

32. Dr. Donnelly created a file regarding complainant's request for a counter offer and for a full-time HD position ("Chair File"). He created the file for his own use.[^] It was not a department file. It was not part of complainant's official personnel file (Exh. R-218, pp. 7-8). The documents contained in the file are as noted in complainant's inventory of the file (Exh. C-122).

33. Dr. Donnelly did not keep a similar file for other HD professors who had outside offers of employment. He viewed complainant's situation as unique due to the additional issues such as computer equipment requested by complainant and the need to coordinate information with AAS. He wanted to have the information easily available to him and the Chair File served this purpose.

34. The Chair File expanded when Dr. Donnelly attempted to find out why complainant wanted to leave AAS. At Dr. Donnelly's request, Dr. McKay provided a copy of complainant's e-mail (dated May 13, 1996) to AAS staff explaining why she wanted a 100% appointment in HD (Exh. C-124).

35. The Chair File expanded due to Dr. Donnelly's exploration of why AAS did not wish to participate in a counter offer. He spoke with Drs. McKay, Van Deburg and Werner about this topic. Dr. Ralston provided an unsolicited document (Exh. C-96) which was a copy of Dr. Tyson's letter to Dr. McKay dated March 23, 1996, regarding Dr. Tyson's perception of complainant's animosity towards him at Dr. Wilson's house. Dr. Donnelly spoke to Drs. McKay and Tyson about the events recited in Exh. C-96, but he did not speak to complainant. Dr. McKay provided Dr. Donnelly with a copy of her letter of April 25, 1996, (Exh. R-141 and Exh. C-123) relating to the newsletter issue.

36. The Chair File also expanded to include information pertaining to complainant's request to review the file.

37. HD's Faculty Committee considered complainant's request for a counter offer. Dr. Donnelly did not show the committee documents from the Chair File. He told the committee that he had received information pertaining to controversies and conflicts between complainant and AAS staff. The committee did not want to know about the conflicts and did

[^] This sentence was changed for clarification.

not feel the potential existence of AAS conflicts should play a role in their deliberations. Dr Donnelly did not share the documents in the Chair File with other HD staff until after HD made its counter-offer to complainant.

Issue (g): On 4/22/97, complainant requested access to her HD "Chair file" but did not gain access to the file until May 1, 1997.

38. On April 22, 1997, complainant asked Dr Donnelly if she could see the Chair File. He replied that he first wanted to seek legal advice. Respondent's legal department advised him that the Chair File would be considered a public record to which complainant would be entitled to access. He then allowed complainant access to the file within 9 days after her initial request to see the file. Complainant felt she was entitled to access the file within 5-7 days after her request.

Issue (h): Included as part of the Chair File was a letter from Timothy Tyson dated 3/23/96 to AAS Chair Nellie McKay accusing complainant of "near harassment" and which was never provided to complainant until she saw the Chair file in May 1997.

39. It was Dr. Ralston who provided Dr. Donnelly with a copy of the Tyson letter (see ¶35, FOF). The letter (Exh. C-96) was written by Timothy Tyson, a white male hired by AAS after complainant. Dr. Tyson wrote the letter to Dr. McKay. Dr. McKay gave Dr. Ralston a copy.⁷ The first time complainant was aware of the letter and the allegations raised therein is when she obtained access to the Chair file.

40.[^] Dr. Tyson was the historian hired as a result of the 1993-94 search, which forms the basis for hearing issue 1(d).

⁷ The record does not reveal the dates upon which Dr. McKay gave Dr. Ralston a copy of the Tyson letter. The record also does not reveal the date Dr. Ralston gave a copy to Dr. Donnelly.

[^] Complainant indicated that Dr. Tyson was hired as an assistant professor "i.e., he was an untenured, junior professor." Exh. C-50, p. 31, indicates that he was hired as an untenured assistant professor. The record, however, contains no definition of a senior or junior historian. In any event, his status at the time of hire is not relevant to the point being made and so the word "senior" has been deleted in ¶40.

41. AAS had a staff meeting at the home of Franklin D. Wilson on March 17, 1996. The meeting was held in a neutral location to discuss significant internal conflicts in AAS.

42. One topic discussed at Dr Wilson's house was the 1993-94 search for a senior historian. Dr Tyson understood complainant to say that she felt he should not have been hired and this perceived comment was the focus of his letter to Dr McKay dated six days after the meeting. His letter stated concern that with his perception of complainant's feelings toward his hire that she might not be neutral in voting over his tenure decision. Dr McKay took the letter from Dr Tyson, read it quickly and said: "You do not have to do this. Don't do this. This is not necessary." Dr McKay took Dr Tyson's concerns about his tenure review seriously and placed the letter in his personnel file. She did not share the letter with complainant or other staff (including Dr Tyson's mentor), with the exception of Dr Ralston.⁸ Dr McKay took no other action regarding the allegations raised in the letter

Issue (i): Timothy Tyson's letter dated 3/23/96 to AAS Chair Nellie McKay made false and defamatory accusations against the complainant.

43. Dr Tyson believed he heard complainant say at Dr Wilson's house that she thought he should not have been hired. Complainant recalls criticizing the hiring process to which someone mistakenly replied that she was saying Dr Tyson should not have been hired. Complainant recalls correcting the person immediately saying that her comments were not aimed at Dr Tyson directly.

Issue (j): The AAS contributions to the Chair File were designed to negatively influence the HD's counteroffer in May 1996.

44. AAS gave Dr. Donnelly information to explain why AAS was not interested in participating in a counter offer, not to negatively influence HD's counter offer

⁸ The record does not indicate when Dr McKay gave Dr Ralston a copy of the Tyson letter. It is equally possible that she gave it to him when she received it, or when he replaced her as AAS Chair, or as part of AAS' preparation of a response to the UW complaint, or at some time in-between.

Issue (k): In May 1997, HD Chair, Donnelly, refused to remove the McKay and Tyson letters from Complainant's HD "Chair File."

45. In May 1997, complainant asked Dr Donnelly to remove Dr Tyson's letter from the Chair File. Dr Donnelly said he wished to consult with respondent's attorneys before giving her an answer. After consultation with the attorney he gave complainant two options. The first was to remove the letter if complainant would agree to write a document saying, in essence, that it was not inappropriate for the Tyson letter to be in the Chair File in the first place. The second option was for complainant to write a rebuttal to the Tyson letter that would be kept in the Chair File along with the Tyson letter. Complainant did not wish to pursue either option.

Issue (l): From 1991-98, complainant's merit increases were lower than comparable male colleagues in the HD and AAS.

46. Merit awards are determined by each professor's accomplishments during the prior calendar year. A merit award granted in March 1994, for example, would be based on a professor's accomplishments during the 1993 calendar year.

47. Professors in HD and AAS complete a form to report their achievements during a given calendar year. The forms, Annual Activity Reports (AARs), solicit information in specific reporting areas such as publications and teaching. Merit decisions are based on achievements as reported in the AARs, as well as on teaching ability as measured by student evaluations.

48. HD had written guidelines for assessing the information in AARs for arriving at a quantification of merit. AAS had no guidelines. It was possible that the two departments would assess complainant's merit differently and, if this occurred, the departments would work out a compromise. Each department would contribute half of complainant's total merit award.

49. The merit award process, such as who made the decisions, differed between HD and AAS.

History Department (HD)

50. Complainant compares her salary to HD Drs. Cohen, Koshar and Zeitlin; (hereafter, comparable males), who are white. Dr. Cohen was hired as an associate professor in 1984 (before complainant was hired). Drs. Koshar and Zeitlin were hired one year after complainant.

51. The chart below shows the merit awards of complainant and the comparable males (Exh. C-50, pp. 47 & 49).

Name	91-92	92-93	93-94	94-95	95-96	96-97	97-98
Plumr	0.40%	2.51%	1.90%	4.45%	0.90%	1.67%	4.45%
Cohen	1.89%	1.67%	1.40%	5.92%	0.80%	1.45%	3.63%
Koshar		3.76%	1.50%	6.29%	1.44%	1.95%	4.45%
Zeitlin		3.91%	2.00%	5.19%	1.44%	2.20%	2.45%

52. The HD Budget Committee makes merit award decisions. The committee is comprised of the HD Chair and six HD faculty elected by their peers. The members of the budget committee are as noted in (Exh. C55, p.76). In all years the committee was comprised mostly of white males.

53. Dr. Donnelly (white male) chaired the Budget Committee when he was HD Chair (from September 1995 through August 1998). Dr. Donnelly encouraged the committee to adopt 3 categories of merit – high, medium and low.⁹ The committee sometimes chose to use a hybrid, such as medium-high or medium-low. The committee discussed each faculty member's achievements as reported in the AAR and teaching evaluations. The committee attempted, and usually reached consensus on whether the person's accomplishments should be classified as high, medium or low. Under this system if the available money divided equally by the number of staff would have resulted in a 3% increase across the board, then a 1% increase would be awarded to professors placed in the low category, 3% to those in the medium

⁹ The use of high, medium, and low categories of merit was recommended in the 1993 CLS guidelines (Exh. C-64).

category and 5% to those in the high category. The committee would then “fine tune” to ensure that the total amount awarded did not exceed the HD merit allotment.

54. HD has guidelines (Exh. R-171) to use in making merit award decisions. The guidelines provide a list of considerations under each category reported in the AARs, but specifically states that “we do not have any mechanical formula for weighting the various items.” The 5 categories are Research, Teaching, University Service, Professional Service and Community Service.” The table below shows the “items” for each category.

Category	Items for Consideration
Research	<ol style="list-style-type: none">1. Productivity2. Quality3. Professional recognition (or “visibility”)
Teaching	<ol style="list-style-type: none">1. Efforts at improvements or innovation (e.g., creating new course, taking an existing courses for 1st time)2. Enrollment3. Student evaluations4. Contact with students5. Emphasis on student writing6. Overtime consultation with students7. General recognition of teaching excellence (as by prizes or awards)
UW Service	<ol style="list-style-type: none">1. Service to Department2. Service to UW (outside of departmental level)
Professional Service	<ol style="list-style-type: none">1. Service to the historical profession (outside UW)2. Service to related disciplines (outside UW)
Community Svc	<ol style="list-style-type: none">1. Professionally-related service to the community

55. The Budget Committee under Dr. Donnelly’s leadership (September 1995 through August 1998), did not weigh all categories reported in the AARs equally. Research, mainly as evidenced by publications, was the most important criterion. Published books were given the highest weight. The next highest weight went for 3 or more published articles, book chapters and/or essays published (after referee by a distinguished journal) and if of normal length (15-30 pages). Teaching and service categories were given weight if they were “outstanding.” Publications in encyclopedias, including a full chapter, were not given much weight. A monograph (a short work on a focused topic) would be regarded as equivalent to

2-3 journal articles, if of normal length (50-75 pages). Highest merit went to faculty whose AARs showed that a book had been *published* during the reporting period.¹⁰

56.^A The merit awards for 91-92 were based on professors' activities for calendar year 1990. The AARs for 1990 are not in the record. Respondent gave complainant a low merit raise in this budget year because her starting salary was considered generous as compared to others in HD, such as Dr. Cohen who was hired about 7 years before complainant yet earned \$3,700 less than complainant's starting salary.¹¹ Another reason cited by HD was that complainant had not arrived on campus during calendar year 1990.

57.^B The merit awards in budget year 92-93, were based on AARs completed for calendar year 1991, as compared in the table below.^{12 13} The student evaluations¹⁴ (Stud Eval)

¹⁰ At times, books were *accepted for publication*, but not yet published during the same reporting year.

^A This paragraph was changed to correct Dr. Cohen's date of hire as reflected in Exh. R-178, p. 2.

¹¹ Complainant notes in her initial brief (p. 10), that her starting salary appeared to be an issue among her colleagues but "[r]espondent did not indicate that these colleagues were equally angered at the 'monster' salaries of white males Jonathan Zeitlin (\$52,000) and Rudy Koshar (\$55,000) hired the following year." Complainant only asked Dr. Archdeacon about Dr. Koshar's starting salary. He responded that he did not know if there were complaints about Koshar's starting salary because he was not chair of the hiring committee for Dr. Koshar. It was complainant's burden of proof to show that attitudes differed for the mentioned white males. The sole question asked at hearing and the response given was insufficient to establish her burden.

^B No changes were made to ¶57, but arguments raised by complainant are addressed in this footnote. First, complainant contends that a newspaper article is not a "distinguished journal." The record contains no definition of a distinguished journal or of certain other terms considered for merit under the HD guidelines. This is why presumptions were made as noted in footnote 14 below. Second, complainant contests that Dr. Koshar taught 4 classes during the 1991 calendar year. Four courses are numbered and listed on his AAR (Exh. R-187) as follows: #1) History 474, #2) History 866, #3) History 999: Diedre Weaver (Winter '92) and #4) History 999: Susan Dinan (Winter '92). Third, complainant contends that Dr. Koshar declined one of the grants awarded to him. Such information is not in the record. Fourth, as to her own achievements, complainant incorrectly contends that Exh. R-115 shows she received a grant and participated in a conference.

¹² Certain abbreviated references are used the merit-award charts. The abbreviation "COM" is used in the table to include service on any committee, faculty senate or council. The abbreviation "UW COM" includes all COM activities outside the employing department(s). The abbreviation "pp." stands for the number of pages. For example, the abbreviation "2 pp." means the document was 2 pages long. The notation "pp?" means the length of the publication was not noted in the AAR. The abbreviation "Art" is used for article. Publications in encyclopedias are denoted by the abbreviation "Ency." The abbreviation "ATD" includes service to student theses or dissertations.

¹³ Certain assumptions were made in attempting to compile the AAR information in chart form. An assumption was made that all publications were in a "distinguished journal." Service to the State

for this year are not in the record. Complainant is compared in the HD chart here (and in the following paragraphs) only to the comparable males who received a higher merit award than complainant. Complainant had two articles of normal length published, as did Dr. Koshar. Dr. Koshar's higher merit award as compared to complainant was justified based on his greater achievements in the following areas: teaching, awards/honors, UW service and professional service. Dr. Zeitlin's publication record and his UW service was better in this year than either complainant or Dr. Koshar. Additionally, as compared to complainant, he had greater achievements in teaching and awards/honors. The merit awards for this year were appropriate.

Category	Plummer 2.51% (R-115)	Koshar 3.76% (R-187)	Zeitlin 3.91% (R-196)	HD
Publications	<ul style="list-style-type: none"> • 2 Art, 15 & 16 pp. • 2 Reviews, 3 & 4 pp. 	<ul style="list-style-type: none"> • 3 Art. 9, 17 & 30 pp. • 2 Reviews, pp. 3 & 2 	<ul style="list-style-type: none"> • Co-editor, 2 collections • Co-author, submissions in 3 edited collections, 32, 29 & 71 pp. • Author, submission in 1 edited collection, pp? • Art, 22 pp. • Co-Author, 3 Art, 56, 49, & 5 pp. • 2 Reviews, 2 & 3 pp. • Several publications were for print outside USA 	CY ¹⁵ 1991

Historical Society was considered as community service. It was assumed that all reported community service was professionally related. All COM activities were deemed equal in nature. Professional activity abroad and publications in foreign journals were noted as relevant to professional "visibility", an item under research in the HD guidelines. **The record contains no evidence that these assumptions are incorrect or inappropriate.**

¹⁴ Scores range from 1-5, with 5 being the best (Exh. C-134, p. 8). Scores are represented by arithmetic mean. More than one score may exist in reporting periods, representing Stud Eval scores for each course taught. Fewer scores could exist than for courses taught because undergraduate courses submit Stud Eval whereas graduate courses do not.

¹⁵ The abbreviation "CY" stands for calendar year. These entries are made to guide the reader.

Category	Plummer	Koshar	Zeitlin	HD CY 1991
Accepted/ Pub.	<ul style="list-style-type: none"> • Book • 5 Ency Art 	3 Art 4 Rev (1 for publication outside USA)	<ul style="list-style-type: none"> • Co-author, 2 Art • Review 	
Pending Publica- tion Ef- forts	<ul style="list-style-type: none"> • Book • 2 Art 	None	<ul style="list-style-type: none"> • None 	
Teaching	<ul style="list-style-type: none"> • None (on leave all year) 	<ul style="list-style-type: none"> • 4 courses, including 2 new ones • 12 students, ATD process • 3 students, Letters of recommendation 	<ul style="list-style-type: none"> • 4 courses 	
Awards/ Honors	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • Grant • Recruitment fellow • Salary Award 	<ul style="list-style-type: none"> • Vilas grant • Grant 	
UW Service	<ul style="list-style-type: none"> • None 	<ul style="list-style-type: none"> • 3 COM • Reading group 	<ul style="list-style-type: none"> • 8 COM 	
Profes- sional Service	<ul style="list-style-type: none"> • Presented 2 papers • Associate Editor 	<ul style="list-style-type: none"> • 4 papers presented • Referee, 2 manuscripts • Organizer, conference • Commentator, 2 conferences • Advisor • 2 consultants, including one for conference outside USA 	<ul style="list-style-type: none"> • Member, editorial board • Member, advisory board • Invited lecturer 	
Communi- ty Service	None	None	<ul style="list-style-type: none"> • Seminar presentation, London 	
Other	4 grants submitted	2 grants submitted	None	

58.[^] The merit awards in budget year 93-94, were based on AARs completed for calendar year 1992. Stud Eval data for complainant (Exh. C-134, p. 8, covering all years) indicates no scores exist for 1992 because she taught graduate student courses. Dr Zeitlin's Stud Eval data is in Exh. C-21A. Complainant's published book warranted a high merit award; as did Dr. Zeitlin's five published articles of normal length, some of which were published outside the USA. Through fine-tuning, complainant's high award of 2.0% was decreased to 1.9%, where Dr. Zeitlin's award remained unchanged. Dr. Zeitlin's international reputation was evident in his publications and professional service. His professional service achievements were greater than complainant's. The merit awards for this year were appropriate.

Category	Plummer (1.9%) (R-116)	Zeitlin 2.0% (R-197)	HD CY 1992
Publications	<ul style="list-style-type: none"> • Book, 303 pp. • 2 reviews, 2 & 3 pp. 	<ul style="list-style-type: none"> • Co-author 4 Art: 24, 46, 65, & pp? • 2 Art: 16 & 16 pp. • 2 Reviews, 2 & 3 pp. • Above publications include some printed outside USA 	
Accepted for Publication	<ul style="list-style-type: none"> • 5 Ency Art. 	<ul style="list-style-type: none"> • Art 	
Pending Publication Efforts	<ul style="list-style-type: none"> • Book 	<ul style="list-style-type: none"> • 3 Art 	
Teaching	<ul style="list-style-type: none"> • 4 courses 	<ul style="list-style-type: none"> • 5 courses • 7 students, ATD process 	
Stud Eval	<ul style="list-style-type: none"> • (graduate) 	<ul style="list-style-type: none"> • 4.29 	

[^] No changes were made to this paragraph, but arguments raised by complainant are addressed in this footnote. First, complainant incorrectly stated that Exh. C-134 is not in the record. The exhibit was offered by complainant and was admitted without objection from respondent. Second, complainant contends that Dr. Zeitlin's publication of an article in more than one publication should be counted only once. Such contention is unsupported by the record. Third, complainant asserts that the chart incorrectly lists her as teaching graduate classes. This paragraph covers activities in calendar year 1992 which is comprised of the spring (2nd) semester in the 1991-92 academic year (roughly from January through May 1992) and the fall (1st) semester in the 1992-93 academic year (roughly from June through December 1992). The record (Exh. C-134, p. 8) for these semesters shows that complainant taught "graduate" courses. Fourth, Exh. R-116 does not support complainant's contention that during calendar year 1992, she was invited to give an "endowed lecture."

Category	Plummer	Zeitlin	HD CY 1992
Awards/Honors	<ul style="list-style-type: none"> • Summer research stipend 	<ul style="list-style-type: none"> • Vilas grant • Grant 	
UW Service	<ul style="list-style-type: none"> • 6 COM • Advisor, minority graduate students 	<ul style="list-style-type: none"> • 5 COM • Center director • Prelims • Research Associate 	
Professional Service	<ul style="list-style-type: none"> • Editor 	<ul style="list-style-type: none"> • International editor • 2 Advisory boards, including one in Australia • COM • Referee, including one entity outside USA 	
Com. Service	None	None	
Other	Submitted 4 grant proposals	None	

59. The merit awards in budget year 94-95, were based on AARs completed for calendar year 1993. The Stud Eval data for Drs. Cohen, Koshar and Zeitlin for this and subsequent years is in Exh. C21A.¹⁶ The AAR activities are compared in the table below. Dr Koshar's higher merit award as compared to all individuals listed below was justified based on 2 articles published of normal length, his involvement with a higher number of students in the ATD process and his international reputation. As compared to complainant, Drs. Cohen and Zeitlin had better publication records, greater teaching services and greater professional services. Complainant had greater awards/honors and greater community service than either Dr. Cohen or Dr. Zeitlin did. Dr. Zeitlin's publication achievements and professional services were on an international level. In summary, complainant, Dr. Cohen and Dr. Zeitlin had different areas of greater achievements. HD's assessment of these different areas of achievement was reasonable.

¹⁶ The record contains no 1993 Stud Eval data for Dr. Zeitlin. It may be that scores shown on the top of p. 5, Exh. C-21A pertain to 1993, but the "heading" was cut off leaving the reporting period in doubt.

Category	Plum'r 4.45% (R-117)	Cohen 5.92% (R-181)	Koshar 6.29% (R-189)	Zeitlin 5.19% (R-198)	HD CY 1993
Publications	<ul style="list-style-type: none"> • 2 reviews, 2 & 2 pp. 	<ul style="list-style-type: none"> • Art, 24 pp. • 1 Ency Art, 17 pp. 	<ul style="list-style-type: none"> • 7 Art, 47, 6, 23, 10, 2, 6 & 4 pp. 	<ul style="list-style-type: none"> • Co-Author Art, 24 pp. • 2 reviews, 2 & 3 pp. • Above include some printed outside USA 	
Accepted for publication	<ul style="list-style-type: none"> • Art • 6 Ency Art 	None	None	<ul style="list-style-type: none"> • 2 Art. 	
Pending Publication Efforts	<ul style="list-style-type: none"> • Book 	<ul style="list-style-type: none"> • Book • Entry • Essay • Review 	<ul style="list-style-type: none"> • 3 Art, 31, 38 & 51 pp. • Book • 4 papers 	<ul style="list-style-type: none"> • Book • Volume • 8 Art • Co-author, Art • Above publications include some printed outside USA 	
Teaching	<ul style="list-style-type: none"> • 1 course • 1 student, ATD process 	<ul style="list-style-type: none"> • 2 courses • 4 students, ATD process • 1 student, individual study 	<ul style="list-style-type: none"> • 3 courses, • 15 students, ATD process • 1 student, ATD process, France 	<ul style="list-style-type: none"> • 3 courses, including 2 new ones • 6 students, independent reading • 8 students, ATD process 	
Stud Eval	<ul style="list-style-type: none"> • 4.245 	<ul style="list-style-type: none"> • 4.1 	<ul style="list-style-type: none"> • 4.29 & 4.39 	<ul style="list-style-type: none"> • (not in record) 	
Awards/Honors	<ul style="list-style-type: none"> • Faculty development • Scholar-in Residence • Grant • Vilas Grant 	None	<ul style="list-style-type: none"> • Fellowship • Summer fellowship • Vilas Grant 	<ul style="list-style-type: none"> • Fellowship nomination • Vilas Grant 	
UW Service	<ul style="list-style-type: none"> • 5 COM • 1 UW COM • Mentor, Chancellor's distinguished scholars' program 	<ul style="list-style-type: none"> • 5 UW COM • 1 COM • Organizer, inter-dept. study group • Speaker SOAR 	<ul style="list-style-type: none"> • 6 COM 	<ul style="list-style-type: none"> • 3 COM • Organizer/Convenor, lecture series • Co-convenor, reading group • Research Assoc. 	

Category	Plummer	Cohen	Koshar	Zeitlin	HD CY 1993
Profes- sional Service	<ul style="list-style-type: none"> Presented 2 papers Reader 	<ul style="list-style-type: none"> Reader Reviewer, 2 entities Organizer, Study Group 	<ul style="list-style-type: none"> Member, European COM, COM Presented paper Commentator, confc. Reviewer 	<ul style="list-style-type: none"> Presented 5 papers International editor Member, 2 International Advisory Boards Referee, 5 entities, including 1 outside USA 	
Commu- nity Service	<ul style="list-style-type: none"> 11 activities 	<ul style="list-style-type: none"> 4 activities 	None	None	
Other	Submitted 6 grant proposals	None	None	None	

60.^A The merit awards in budget year 95-96, were based on AARs completed for calendar year 1994. The AAR activities are compared in the table below. The record lacks Stud Eval data for Drs. Cohen, Koshar and Zeitlin for this and subsequent years. Dr. Zeitlin had greater achievements than the others did in the following areas: publication with evidence of international reputation, teaching, UW Service and professional service with evidence of international reputation. It was appropriate that Dr. Zeitlin received a higher merit award than complainant in this year. Complainant's achievements as compared to Dr. Koshar were greater in the following areas: awards/honors, UW service and community service. Dr. Koshar's achievements were greater than complainant's in the following areas: publications, teaching and professional service. HD's greater emphasis on the areas of publication and teaching makes Dr. Koshar's higher award as compared to complainant appropriate.

^A Complainant contends she created a new course as did Dr. Koshar. A review of her AAR for 1994, (R-118) shows that she indicated as a "new course" AAS 628: History of the Civil Rights Movement in the U.S. She did not indicate on her AAR whether she designed this course or whether it was an existing course taught by her for the first time. Either way, she should be given credit for this per HD guidelines noted in ¶54, FOF. Also, this paragraph was amended to reflect this change but such change was insufficient to change the conclusion that Dr. Koshar's teaching contributions were greater than complainant's in terms of the number of students he supervised in the ATD process.

Category	Plummer 0.9% (R-118)	Koshar 1.44% (R-190)	Zeitlin 1.44% (R-199)
Publications	<ul style="list-style-type: none"> • 5 Arts; 3, 2, 2, 2 & 3 pp. • Review, 1 pp. 	<ul style="list-style-type: none"> • 4 Art, 2, 19, 24, & 2 pp. • Review, 2 pp. 	<ul style="list-style-type: none"> • 2 Art, 16 & 12 pp. • Review, pp? • Above publications include some printed outside USA
Accepted for publication	<ul style="list-style-type: none"> • Book • 2 Art 	<ul style="list-style-type: none"> • 4 Art • 4 reviews 	<ul style="list-style-type: none"> • Co-editor, Art • Co-author, Art • 3 Art • Above publications include some printed outside USA
Pending publication Efforts	<ul style="list-style-type: none"> • Art 	<ul style="list-style-type: none"> • Book • 3 Art • Review • 2 lectures 	<ul style="list-style-type: none"> • Book • Co-author, book • Co-author, Art • 2 Art
Teaching	<ul style="list-style-type: none"> • 2 courses, one of which was either newly designed or preexisting but not taught by her before. • 2 students, ATD process 	<ul style="list-style-type: none"> • 1-¼ courses • 9 students, ATD process • 5 students, letters of recommendation • Designed new course 	<ul style="list-style-type: none"> • 3 courses • 13 students, ATD process • Preliminary exams
Student Eval	<ul style="list-style-type: none"> • 3.935 	<ul style="list-style-type: none"> • not in record 	<ul style="list-style-type: none"> • not in record
Awards/Honors	<ul style="list-style-type: none"> • faculty development • Fellowship • Grant • Vilas Grant 	<ul style="list-style-type: none"> • Fellowship • Vilas Associateship 	<ul style="list-style-type: none"> • 2 Fellowships • Research award • Senior Fellow, Research Program
UW Service	<ul style="list-style-type: none"> • 5 COM • 1 UW COM • HD minority student advisor • Mentor, Chancellor's distinguished scholars program 	<ul style="list-style-type: none"> • 2 COM • 4 UW COM 	<ul style="list-style-type: none"> • 10 COM • 2 UW COM • Director, Center for International & Comparative Labor Studies • Convenor, research circle • Research associate

HD
 CY
 1994

	Plummer	Koshar	Zeitlin	HD CY 1994
Professional Service	<ul style="list-style-type: none"> Presented paper Read manuscript 	<ul style="list-style-type: none"> Presented 3 papers Reviewed Art & book manuscript 	<ul style="list-style-type: none"> Member, roundtable discussion Faculty seminar, MIT Presented 5 papers Workshop presenter at different university Kenynote speaker at international conference International editor Advisory board member of 2 entities Referee, 5 publishing entities including 1 outside USA 	
Community Service	5 activities	None	None	

61. The merit awards in budget year 96-97, were based on AARs completed for calendar year 1995. The AAR activities are compared in the table below. The slightly higher merit award for Koshar as compared to complainant was justified due to his 2 published articles of normal length. Dr. Zeitlin had fewer achievements in the areas of teaching and UW service than either complainant or Dr. Koshar. Dr. Zeitlin's greater achievements as compared to Dr. Koshar and complainant were in the areas of awards/honors and his international reputation. That these achievements were given greater weight in the merit exercise than the achievements of Dr. Koshar (including his publication achievements) or of complainant (including her UW and community service) may be questionable.[^]

Category	Plummer 1.67% (R-119)	Koshar 1.95% (R-191)	Zeitlin 2.20% (R-200)	HD CY 1995
Publications	<ul style="list-style-type: none"> Review, 4 pp. 	<ul style="list-style-type: none"> 3 Art, 51, 31 & 2 pp., incld 1 printed outside USA 	<ul style="list-style-type: none"> 3 Art, 10, 33 & 2 pp. 	

[^] The last sentence of ¶61 of the PDO has been deleted because it over-emphasizes the effect of the decision in question on the other (white male) faculty. The emphasis should be on the negative effect the decision had on the complainant.

		• 3 reviews, 3, 1 & 3 pp.		
	Plummer	Koshar	Zeitlin	HD CY 1995
Ac- cepted for publi- cation	<ul style="list-style-type: none"> • Book • 2 chapters • Art reprint • Symposium commentary • Several Ency Art 	<ul style="list-style-type: none"> • Book • 4 Art • 2 reviews 	<ul style="list-style-type: none"> • Co-editor, "collec- tive volume" • 2 Art • 2 co-authored Art • Reprint, co-authored Art • Review • Reprint, Art 	
Pending pub. Efforts	<ul style="list-style-type: none"> • 2 Art 	<ul style="list-style-type: none"> • Book 	<ul style="list-style-type: none"> • Book • Art • Co-author, Art 	
Teach- ing	<ul style="list-style-type: none"> • 4 classes • 3 students, di- rected study • 7 students ATD process 	<ul style="list-style-type: none"> • 4 courses • 21 students, ATD process 	<ul style="list-style-type: none"> • (On leave so no courses taught) • 12 students, ATD process 	
Stud Eval	<ul style="list-style-type: none"> • 3.6637 	<ul style="list-style-type: none"> • not in record 	<ul style="list-style-type: none"> • not in record 	
Awards Honors	<ul style="list-style-type: none"> • Vilas Grant 	<ul style="list-style-type: none"> • Fellowship • Summer salary support 	<ul style="list-style-type: none"> • Fellowship • Research award • Grant • Senior Fellow 	
UW Service	<ul style="list-style-type: none"> • 7 COM • 1 UW COM 	<ul style="list-style-type: none"> • 2 COM • 2 UW COM • Dir., Euro studies 	<ul style="list-style-type: none"> • 1 COM • 1 UW COM 	
Professi onal Service	<ul style="list-style-type: none"> • Presented 2 pa- pers • Participant, lec- ture program • Reviewer • Member, pub. advisory board 	<ul style="list-style-type: none"> • Organizer, confc. • Commentator, 2 conferences • Presented 4 papers, including 2 outside USA • 1 lecture 	<ul style="list-style-type: none"> • Discussant, 2 confc. • Organizer/presented paper • International editor • Member, 2 advisory boards, including 1 outside USA • Referee 	
Com- munity Service	<ul style="list-style-type: none"> • 2 activities 	None	None	
Other	4 research grant proposals submitted	None	None	

62. The merit awards in budget year 97-98, were based on AARs completed for calendar year 1996. The AAR activities are compared in the table below. Complainant had a book published in this year and was entitled to the highest category of merit award. Dr Koshar also received the highest category of merit award even though he had not published a book. Dr Koshar had 3 published articles of normal length, some of which were published outside the United States. The international nature of Dr Koshar's work also was evident in the category of professional service. Complainant had greater achievements than Dr Koshar did in the following areas: awards/honors, UW service and community service. It was reasonable for respondent to assess their different strengths as warranting the same merit raise.

Category	Plummer 4.45% (R-120)	Koshar 4.45% (R-192)	HD CY 1996
Publications	<ul style="list-style-type: none"> • Book, pp? • 2 Art, 12 & 2 pp. 	<ul style="list-style-type: none"> • 4 Art, 22, 25, 6 & 26 pp. • Review, 4 pp. • Some of the above for print outside USA 	
Accepted for Publication	<ul style="list-style-type: none"> • Chapter • 2 Ency/Dictionary Art • Art 	<ul style="list-style-type: none"> • Book • 2 Art • 1 review • Some of the above for print outside USA 	
Pending Publica.	<ul style="list-style-type: none"> • 3 Ency Art • 2 Art 	<ul style="list-style-type: none"> • Book 	
Teaching	<ul style="list-style-type: none"> • 4 courses • 2 students, directed study • 5 students, ATD process • Faculty workshop 	<ul style="list-style-type: none"> • 3 courses • 11 students, independent study • 23 students, ATD process 	
Stud Eval	<ul style="list-style-type: none"> • 4.045 	<ul style="list-style-type: none"> • not in record 	
Awards/Honors	<ul style="list-style-type: none"> • 3 grants • Vilas grant • Hilldale award • Visiting scholar 	<ul style="list-style-type: none"> • 2 fellowships • Investigator salary • Visiting professor 	
UW Service	<ul style="list-style-type: none"> • 4 COM • 1 UW COM • Faculty workshop 	<ul style="list-style-type: none"> • Director, European Studies Program, CLS • 1 UW COM 	
Professional	<ul style="list-style-type: none"> • Presented 2 papers • 2 COM 	<ul style="list-style-type: none"> • Presented paper • Co-organizer of conference 	

Service	<ul style="list-style-type: none"> • Participant, lectureship • Read manuscripts • 1 student, ATD process 	<ul style="list-style-type: none"> • "Invited Mentor," Germany • Read manuscript • 2 students, ATD process 	HD CY 1996
Category	Plummer	Koshar	
Community Service	<ul style="list-style-type: none"> • 4 activities 	None	

Afro-American Studies (AAS)

63.[^] Complainant compares her salary to AAS senior professors Van Deburg and Ralston (hereafter, comparable males). Dr. Van Deburg is white and Dr. Ralston is African American. The record, however, fails to indicate what portion of the total change in salary for the comparable males was due to merit awards.

[Paragraphs 64 through 71 of the Proposed Decision and Order have been deleted due to the record deficiency noted in paragraph 63 above.]

Issue (m): In about spring 1997, Nellie McKay excluded complainant from the supplemental salary funds available to AAS.

72. Each year respondent receives "market data" of UW-Madison professors (by department versus other institutions). There was a gap in market value for AAS, and the supplemental funds were to address salary compression issues and to reward professors who had worked "very hard" for AAS. Salary compression occurs with professors who have been with the department a long time and whose salaries have not reflected market adjustments as shown by the later higher starting salaries of professors.

[^] Changes were made to this paragraph. First, Dr. Ralston's race was corrected. Also, respondent noted in objections filed to the proposed decision (received 11/20/00, pp. 1-2) that the examiner's reliance on merit figures for Drs. Ralston and Van Deburg as shown in Exh. C-50, p. 40, is inappropriate because complainant testified that she calculated those figures based on the total salary figures contained in Exh. 50, p. 34. The examiner reviewed complainant's pertinent testimony (hearing tape #7, counter at about 1950). Respondent is correct that complainant's calculations were based on total salary changes, which both parties acknowledged may or may not be attributable solely to merit. Respondent also is correct that complainant's calculation of the percent change in total salary was erroneous in some instances.

73.^A Dr. McKay first learned of the 97-98 supplement funds in late spring of 1996, when she was AAS Chair. The AAS Budget Committee made recommendations to Dr. McKay on distribution of the money and she had the final decision. The committee members were Drs. Werner and Wilson.

74. Complainant was the only AAS faculty who was not given a wage increase from the supplemental fund. One reason Dr. McKay did not give complainant any of the money was because by the time the awards were made, complainant already had withdrawn from AAS service and limited her contribution to AAS solely to teaching (§22, FOF, quoted text).

75.^B Dr. Van Deburg was hired in 1973 and Dr. Werner in 1983. Dr. McKay did not consider Dr. Van Deburg's salary as compressed but he received supplemental funds because he had worked for AAS for more than 20 years and was one of the staff who was most dedicated to AAS. Dr. McKay considered that Dr. Werner's salary was compressed to an extent. He received supplemental money to address the salary compression and for the following additional reasons: a) he had worked for AAS for many years, b) he was one of the most productive staff, and c) he worked with students more than anyone else.

76.^C The final reason complainant was not given a share of the supplemental salary fund is because the members of the executive committee (Drs. Werner and Wilson) and Dr. McKay did not like complainant (see §§104-110, FOF).

77. The FPC addressed complainant's exclusion from the supplemental salary fund in its report. A monetary reward was recommended, for the reasons stated in the FPC report, as noted below in relevant part (Exh. R-218, pp. 6-7):

We recommend that Prof. Plummer receive a salary adjustment of \$3768, retroactive to September 1997. AAS received funds from the Dean to alleviate a

^A This paragraph was amended to correct the name of the pertinent committee. The year was corrected as well (Exh. R218, p. 13).

^B This paragraph was amended to correct the hiring dates of Drs. Werner and Van Deburg and related discussion.

^C This paragraph was amended to correct an error. Specifically, the reference to §§112-117, FOF should be to §§104-110, FOF. The same change was made later in the decision without further footnotes.

long standing problem of salary compression in the department and to bring faculty salaries for 1997-98 up to market value, in so far as the funds would allow. At the time that this special salary exercise occurred, it seemed logical to exclude Prof. Plummer because of the possibility of her imminent transfer to [HD] and her withdrawal from AAS activities. However, it seems appropriate to revisit the issue at this time. Although we do not condone some of her actions in connection with events that have occurred over the course of her tenure in AAS, she is a member of this department and should participate in the College's effort to make the department's salary structure more comparable to the market place.

The dollar value that the Committee recommends is based on the average dollar increase awarded to faculty in this special exercise. [Description of formula omitted here.] This standardized approach allows Prof. Plummer to benefit from the salary exercise without the FPC imposing its judgment on her profession activities or her market value. The increase that we recommend would leave Prof. Plummer's salary below Profs. Van Deburg and Ralston, but above Prof. Thornton in AAS, the position she has held since 1991. While the increase will change her standing relative to some of her peers in [HD], the department, like AAS, will benefit from the increase in its base. It is not the Committee's intention to alter Prof. Plummer's salary standing relative to her [HD] colleagues, but it is a consequence of our belief that she should receive the benefits of being a member of AAS, as indeed she is now. Other faculty in AAS who have joint appointments might also have upset the salary rankings in other departments. [T]he adjustment is essentially mechanical, but based upon a principle of fairness that would prevent her exclusion from a department-wide benefit.

Since Prof. Plummer officially is a member of AAS, and for as long as she remains so, we recommend she resume full participation in [AAS]. She should assume normal and typical roles and responsibilities, including service, or expect to suffer the consequences in yearly merit exercise. [AAS] in its turn must be willing to accept her full participation in governance structures.

Issue (n) On October 31, 1997, respondent denied complainant the opportunity to compete for an internal grant.

78. In or about September 1997, complainant applied for a WARF Mid-Career Award. The WARF award is given for outstanding records of scholarship. It includes a substantial monetary stipend. Only scholars tenured for more than 4 years and no more than 20 years were eligible to apply.

79. The decision on who would get the award was made by an entity other than HD or AAS.

History Department (HD)

80. Three HD faculty members applied for the WARF award – complainant, Tom Spear and Andre Wink. Drs. Spear and Wink are white males. Ultimately, HD nominated Dr Spear who was “running out of time” for his eligibility for the award (in terms of the upper 20-year limit). This decision was made knowing that Dr Spear would be a weaker candidate for the award than candidates who had been tenured for fewer years. ^A

81. Dr Donnelly was HD Chair at this time. He made the decision of who to nominate for the WARF award, with advice from a council. Council members included Charles Cohen, John Cooper, Suzanne Desan, Larry Dickey, Robert Kingdon, Maureen Maz-zoui, Stan Payne and John Sharpless (Exh. C-91, p. 2).

82. The materials submitted with a candidate’s application for the WARF award include an application, a curriculum vitae (CV) and publications. Complainant’s three books were returned to her in unopened shrink-wrap. The committee agreed that all three candidates were qualified to be nominated. The committee did not read the publications submitted by any of the candidates.

Afro-American Studies (AAS)

83. Dr. Ralston, an African American male, was AAS Chair at this time. By memo dated October 6, 1997, he established an internal deadline of Friday, October 17th for submission of applications for the WARF award. The winner of the award receives a substantial monetary stipend.

^A The last sentence of ¶80 in the PDO has been deleted because it over-emphasizes the effect of the decision in question on the other (white male) faculty. The emphasis should be on the negative effect the decision had on the complainant.

84. Complainant dated her application October 17, 1997 (Exh. R-166) and placed it in Dr Ralston's mailbox on Friday, October 17th. She was the only AAS professor who applied for the grant.

85. A dispute arose over whether complainant filed her application timely because it was not date-stamped for receipt by AAS until Monday, October 20, 2000.

86. Dr Ralston has two mailboxes, an academic mailbox for use by students and an office mail box. His office mailbox was nearer to the receptionist and other office staff than his academic mailbox. The office staff did not notice the application which complainant put in Dr Ralston's academic mailbox on October 17th, until Monday, October 20th. Dr Ralston does not check his mail routinely. He does not claim that he would have seen complainant's application if it had been submitted on time.

87. When Dr. Ralston learned that complainant disputed that she tendered her application late, he decided to submit her application to the AAS Advisory Council as if it had been timely received. This council was comprised of all former AAS Chairs: Dr McKay (African-American female), William Van Deburg (white male), Craig Werner (white male), Franklin Wilson (a male whose race includes black, white and American Indian) and Friedi Tesfagiorgis (black female). Drs. McKay, Van Deburg and Werner did not like complainant for reasons unrelated to her sex or race (see ¶¶104-110, FOF).[^] The advisory council recommended not nominating complainant stating that the time was too short to process the application.

88. There was sufficient time for AAS to have forwarded complainant's nomination for the WARF award.

89. The record does not reveal whether complainant would have received the award if AAS had nominated her.

[^] This sentence was changed for clarification.

Issue (o) On or about 4/17/98, the Faculty Personnel Committee (FPC) issued its report and failed to provide complainant a fair and complete hearing procedure, and

Issue (p) On about May 29, 1998, Dean Phillip Certain accepted the recommendations of the FPC for the College of Letters and Science (CLS) and expressed his intention to execute the report's recommendation

90. On November 25, 1997, complainant filed a discrimination complaint with Phillip Certain, CLS Dean, hereafter referred to as the "UW Complaint"¹⁷ (Exh. C-134). The Dean asked the Faculty Personnel Committee (FPC) to investigate and develop recommendations to resolve the UW Complaint.

91. The FPC members were Drs. Judith Croxdale from the Botany Department, Sarge Bush from the English Department, John Magnuson from the Center for Limnology, Alex Nagel from the Math Department and Janine Mount from the Pharmacy Department. Dr. Croxdale was the FPC Chair. All FPC members are white.

92. In the UW Complaint, complainant named Dr. Nellie McKay as someone who treated her unfairly. Dr. McKay had half-time appointments in AAS and in the English Department. One of the FPC members, Dr. Bush, was a colleague of Dr. McKay's in the English Department. Dr. Bush was not required to excuse himself from consideration of the UW Complaint based on his being a colleague of Dr. McKay.

93. The FPC never had dealt with a complaint as complex as complainant's UW Complaint. The FPC recognized that the issues raised in the UW complaint were serious.

94. The FPC provided complainant, AAS and HD with more than one opportunity to submit information. Copies of formal responses were shared with all principals with an opportunity to respond. The FPC reviewed the documents and information submitted by complainant, AAS and HD over the course of two months.

95. Dean Certain did not participate in FPC deliberations, nor did he try to influence either the investigation or its outcome in any other way.

96. The FPC issued a report (Exh. R-218) dated April 1998. Dr. Croxdale authored the report and sent it to Dean Certain. Dean Certain provided complainant, AAS

¹⁷ "UW Complaint" is used here to distinguish the complaint filed with the UW from the complaint filed with the Personnel Commission.

and HD an opportunity to review the report and submit final comments. He reviewed the report and final comments and decided to adopt the FPC report and its recommendations (Exh. C-142), including the monetary award noted in ¶77, FOF.

97 Dean Certain and members of the FPC were aware that complainant had filed a complaint with the Commission because she included a copy of the same with her UW Complaint.

Equal Pay Claim

98. Complainant compares her salary in HD to Drs. Cohen, Koshar and Zeitlin (white males). Dr Cohen was hired in 1984 (Exh. R-178), complainant in 1990, and Drs. Koshar and Zeitlin in 1991. The chart below (Exh. C-50, pp. 2-34) shows the total salary with increases expressed in dollars.^A Dr Koshar received a 2.84% increase in 95-96 when he was promoted to full professor status. Dr Zeitlin received a 3.02% increase in 95-96 when he was promoted to full professor status.^B

Name	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98
Plummer	\$50,000	\$50,200 \$200 0.40% ¹⁸	\$51,462 \$1,262 2.51%	\$55,276 \$3,814 7.41%	\$59,432 \$4,156 7.52%	\$59,967 \$535 0.90%	\$63,000 \$3,033 5.06%	\$69,572 \$6,572 10.043%
Cohen	\$46,300	\$47,175 \$875 1.89%	\$52,766 \$5,591 11.85%	\$53,505 \$739 1.40%	\$56,675 \$3,170 5.92%	\$57,128 \$453 0.80%	\$57,956 \$828 1.45%	\$63,059 \$5,103 8.80%
Koshar		\$55,000	\$57,067 \$2,067 3.76%	\$57,923 \$856 1.50%	\$61,568 \$3,645 6.29%	\$64,202 \$2,635 4.28%	\$65,454 \$1,252 1.95%	\$68,367 \$2,913 4.45%
Zeitlin		\$52,000	\$54,032 \$2,032 3.91%	\$55,113 \$1,081 2.00%	\$57,974 \$2,861 5.19%	\$60,560 \$2,586 4.46%	\$61,882 \$1,322 2.18%	\$63,408 \$1,526 2.47%

^A Changes to correct errors were made in the table in this and the following paragraph as noted in bold type.

^B The increases for Dr. Koshar's and Dr. Zeitlin's promotions were added to this paragraph. See C-50, pp. 47-50.

¹⁸ The percentage increases were calculated (using complainant as an example) by determining the dollar amount increase (\$200) and then expressing the increase as a percentage of the prior year's salary (\$200/50,000 = 0.40%).

98a. Dr. Koshar's and Dr. Zeitlin's salary raises in 1995-96 was based solely on merit and promotion to full professor. Exh. C-50, pp. 49-50.

99. Complainant compares her salary in AAS to Drs. Ralston and Van Deburg. Dr. Van Deburg was hired in 1973, Dr. Ralston in 1975 and complainant in 1990. The chart below (Exh. C-50, pp. 2-34) shows the total salary with increases expressed in dollars.

Name	90-91	91-92	92-93	93-94	94-95	95-96	96-97	97-98
Plumr	\$50,000	\$50,200	\$51,462	\$55,276	\$59,432	\$59,967	\$63,000	\$69,572
		\$200	\$1,262	\$3,814	\$4,156	\$535	\$3,033	\$6,572
		0.40%	2.51%	7.41%	7.52%	01.90%	5.06%	10.43%
Ralston	\$58,800	\$59,400	\$61,294	\$62,183	\$64,609	\$65,010	\$66,153	\$73,870
		\$600	\$1,894	\$889	\$2,426	\$401	\$1,143	\$7,717
		1.02%	3.19%	1.45%	3.90%	0.62%	1.76%	11.67%
VanDb	\$53,052	\$53,508	\$58,723	\$60,860	\$67,870	\$68,649	\$70,087	\$78,717
		\$456	\$5,215	\$2,137	\$7,010	\$779	\$1,438	\$8,630
		0.86%	9.76%	3.64%	11.52%	1.15%	2.09%	12.31%

Issue (g) In June-July 1998, the CLS and AAS failed to adequately explain the basis for the 1997-98 salary increases.

100. On June 10, 1998, complainant requested from Dean Certain an explanation of the salary adjustment recommended by the adopted FPC report.[^] Dean Certain replied by e-mail the following day (Exh. C-143), as noted below in relevant part:

The explanation for your salary adjustment can be found in the report of the [FPC] on page 6, last paragraph.

The adjustment is a direct response to the [AAS] market adjustment. The committee took the dollar value for the entire department's market upgrade and divided by the number of [AAS] faculty, omitting Hill (retired), McKay (whose salary increase is set by the dean) and yourself (left out of the original distribution). This gave the average dollar value awarded to departmental faculty, and this value is recommended for your adjustment.

According to its written policy, which was given to you, the committee does not substitute its own judgment of professional activities for that of the department. Because you received the average value, your increase will be greater

[^] See ¶96, FOF.

than some faculty and less than other faculty. With this adjustment, your relative position remains the same as it was when you were hired in 1991

Please let me know if this explanation does not answer your questions.

101 Complainant requested additional information by e-mail on June 12, 1998 (Exh. R-220), as noted below. Her questions relate to the "average dollar value" mentioned in Dean Certain's prior memo (see above paragraph), which the FPC used in its salary calculations ("average dollar increase," Exh. R-218, p. 6, last paragraph).

My calculations based on a standard salary rate of 4.5% (slightly higher than the state's allocation), show a statistical average of \$5,508.57 for the part of the raise that was market adjustment. This is excluding McKay and Hill.

This suggests that the original standard raise distribution was not flat to begin with. So that I may better understand how these salaries were determined, I would appreciate it if you would send me a list of AAS salaries for 1997-98 that contains only the non-adjusted raise. i.e., minus the market adjustment.

102. Dean Certain responded by e-mail on June 15, 1998 (Exh. C-144), as shown below:

As far as I know, the information you requested in your email is not available. The Department returned to me only combined merit plus market increase. Technically all increases were merit increases.

The merit allocation to [CLS] for 1997-98 was 4.0%. The funds for the market adjustment were obtained by reserving 0.50% at the College level. Departments were allocated 3.50%. The reserved funds were used to address a variety of salary issues, including market, in specific departments such as [AAS].

Overall, the merit allocation to the Department was \$57,000, which could be considered \$15,549 "merit" (calculated as 3.50% of the department's salary base, excluding Professors McKay and Hill), and \$41,451 "market."

The explanation of your salary adjustment can be found in the report of the [FPC] on page 6, last paragraph. The Committee did not have a break-out of merit vs. market because I did not ask the Department to report the increases to me in that way. As I understand their calculation, they assumed that all of your 1997-98 increase was in "merit," and the base adjustment was calculated as

your equal share of the market adjustment: $\$41,451/11 = \$ 3,768$, retroactive to the beginning of the 1997-98 academic year

Please let me know if you still have questions.

103.^A Complainant sent Dr Ralston a letter dated July 8, 1998 (Exh. C-156),¹⁹ as noted below (chart omitted):

Thank you for your letter of June 30 regarding the 1997 merit exercise. In it, you explain that no effort was made to separate merit raises from the market adjustment. Insofar as I received a certain percentage, there would have been specific criteria used to arrive at that figure. Your description of the criteria in the last two paragraphs of your letter is vague. I would appreciate it if you would clarify what the budget committee thought were the most important considerations. Specifically, which professional, instructional, and service activities were most valued? What were the "pertinent" and "relevant" factors that you refer to in the third paragraph? How did the budget committee define salary compression and long-term equity?

Additionally, you refer to the special fund allocated by the Dean as a "special merit assessment." It has also been referred to as a market adjustment. Which is it?

Finally, you suggest that the [HD] had to agree to my receiving some part of this special allocation. My information (from the Dean) differs. Can you shed some light on this?

Collegiality Issues in AAS

104. Complainant was not well liked in AAS, although her scholarly activities were respected. The seminal event occurred in relation to complainant's concerns about the 1993-94 search for a senior historian (hearing issue "d"). Committee members included complainant, Dr Van Deburg, Dr Werner and Dr Hill. Dr Van Deburg also consulted Dr Ralston as an Area II faculty member and as a person whose input he valued.

105. Complainant learned in September 1993 that certain members of the committee made some decisions without seeking her input. They should have sought her input. She was

^A This paragraph was changed to correct an error.

¹⁹ Dr. Ralston's June 30th letter is not in the record. Nor is complainant's initial inquiry.

dissatisfied with attempts to obtain information from Drs. Van Deburg and Ralston. Instead of discussing the matter with Dr. Werner, AAS Chair, she sent a written document to all AAS staff (Exh. C-74) stating as shown below (bold type added for emphasis):

1) Concerns about the historian search process

On September 13, I asked the Chair of the Historian Search Committee when he was going to call a meeting of the committee. He asked me why we needed a meeting. An advertisement had already been made up, he said, by himself and Craig Werner, and had already been sent out. The ad called for a 20th century historian with a civil rights specialty. He said Marge had a copy of the ad and was handling the mailing, but that she wouldn't be in that day. (Marge was indeed in that day, and told me later she had not been given a copy of the ad to mail.) I asked the chairman of the search committee how he and Craig could have placed an ad without even consulting the other members of the search committee, especially as the search committee had never convened and we had never discussed what kind of historian we wanted in terms of period, topic, etc., and how that person would fit into the programmatic objectives of the Department. Seeing that I was not going to be satisfied with stonewalling, **prevarication** and jokey responses, we went down the hall to see Richard Ralston, who is also on the committee.

We all agreed that we needed to schedule a meeting to discuss the position in a serious and committed way. As to the ad, both assured me that nothing could be done about its having been placed, as it was a *fait accompli*. (As mentioned above, I later found out this was **untrue**. I then sent the search committee a memo suggesting they delay publishing the ad until we had a chance to meet.) Ralston and the Chair both also implied that they had someone in mind that they would like to hire although they never mentioned who that person was. As a member of the search committee myself, I failed to understand why, if they did have a preference, it should be a secret from me.

The senior search, which may very well net a chair, provides an excellent opportunity for the Department to develop beyond its present confines. I find it incredible that it is being approached in such a casual, off-hand manner. I also find it incredible that scholars who are so attuned to Afro-Americans could find it appropriate for such vital decisions as the wording of the position to be made privately by two white male professors without even consulting other members of the committee, much less the other faculty. **I find this profoundly undemocratic and perhaps racist.** If there is no room for black faculty input in a Department of Afro-American Studies, where at the UW-Madison is there room for such input.

2) My relation to the Department

While most of my relations with people in the Department have been quite cordial, the disdainful and **dishonest** way that my legitimate concerns were responded to raises serious question in my eyes about my role. I have a 50 percent FTE here. Whether the Department accepted that out of enthusiasm or expediency I do not know (although I have heard rumors). The fact is, I am here, I ain't leavin', deal with it! I came here from an institution where minority faculty members had little real voice in campus affairs, either in or outside their departments. The ones who did have a little power jockeyed for position against the others. I did not come to the UW-Madison to repeat that experience. I think I bring real strengths to this Department. I need not describe them here: anyone interested can look at my resume. In addition, our students need to see as many examples of successful black women professors as they can (and I am successful, although it has not been, is not, and never will be easy.)

106. Dr. Werner was upset when he received the above memo. He called complainant on the following Saturday morning and suggested that she should have spoken with him before going public. He had been AAS Chair for less than a week. The discussion became heated. He twice told complainant that what she was saying was "bullshit." He told her she should not accuse people of racism or sexism without offering to discuss the issue in appropriate circumstances first. Complainant felt this was an illegitimate request and accused him of haranguing her. The telephone call lasted 15 minutes and ended when Dr. Werner hung up. He testified that the phone call was the last private conversation he had or ever will have with complainant.

107. Dr. Van Deburg responded with a memo to faculty dated September 17, 1993 (Exh. R-130), as noted below, in part.

I really hate responding to hurtful accusations via the memo format. It seems so much like those pained and angry responses to unfavorable book reviews which appear in the Journal of American History – and mean so little to anyone other than the author and reviewer. Nevertheless, Gayle Plummer's latest (in an unfortunate series) of blindside, accusatory epistles is so profoundly disturbing that an immediate response seems necessary

[T]he brief, allegedly conspiratorial meeting between the "two white male professors" occurred over the summer as our new chair composed the required

Position Vacancy Listing and Recruitment Efforts Plan documents for internal L & S use. Professors Hill and Ralston were abroad/out of town at that time and I did not feel that the low-level decision-making required that afternoon warranted the tracking down of the remaining committee member for approval. Perhaps, I was wrong to assume this. There was no ill intent.

[T]he PVL copy composed that day reads as follows: "Assistant Professor, Associate Professor, Professor, Ph.D. in History or Related Field. Applicants should have broad-based training in Afro-American History, preferably with an emphasis on either the Reconstruction, Late 19th-Early 20th Century, or Civil Rights Movement Periods." Clearly, this just about covers the waterfront. If this describes the one type of African-American historian allegedly sought by the supposed conspirators let me look at her/his vita. They can teach all of our courses!

[T]here was confusion over the mailing of the ad copy to off-campus publications. I incorrectly assumed that it had been done as a follow-up to the Recruitment Efforts Plan during the Summer. In hindsight, I should have checked immediately upon returning from France to ascertain the situation. The fact that, even as committee chair, I have no authority to expend departmental S & E funds on advertising lulled me into thinking that such matters would be handled elsewhere.

Finally, a somewhat petty matter, but one which relates to my personal integrity. When I told Dr Plummer that Marge wasn't in on the morning of September 13, I was telling the truth as I knew it. Neither Marge nor Professor Plummer attended the faculty meeting that a.m. But, Marge was in that p.m. and – without prompting from external voices – I ascertained the current state of affairs and moved to straighten them out. A committee meeting will be held on September 22 – the first available date.

Because Dr Plummer is relatively new to our faculty, she is unaware that my guiding "administrative" philosophy is one of consensus-seeking. Moreover, decisions in hiring are made by the departmental executive committee – not by a single individual or sub-committee. She also may be unaware that if it was not for the determined stand of professors Marrett and Van Deburg during the joint [HD/AAS] search which resulted in her hiring it is very likely that yet another white male professor would be occupying her office in the History wing. Yet, perhaps it is just this sort of isolation within that department which is at the root of her discontent and which has resulted in the unleashing of so much over-heated invective, innuendo, and self-congratulation at the expense of others.

Although I don't feel that my conduct has been either "profoundly undemocratic" or "perhaps racist," I am asking Professor Werner to appoint professor Ralston as chair of the recruitment committee so that we can proceed without doubt or discontent. I hope to remain an active and committed member to that body.

The explanations provided in the above memo regarding the position announcement and Marge's availability are true.

108. Complainant's memo was unnecessarily accusatory. She had a valid point about not being consulted when certain decisions were made. Her method of resolving the matter by suggesting that those she disagreed with were dishonest and racist was unprofessional and inflammatory. The targets of her allegations reasonably were upset. The serious nature of the allegations made the event difficult for her targets to simply dismiss or forget.

109. Dr McKay felt complainant's accusations in the memo discussed above were "extremely off-putting" and that the memo was not the best way to deal with colleagues. She described AAS as being "harmonious for more than 20 years." Complainant's style of communication as expressed in the above memo was unusual for AAS.

110.^A The negative reaction AAS staff had to complainant's memo was unrelated to her sex or race.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant, in turn, may 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).

^A This paragraph was added to clearly indicate that sex and race were not involved with the collegiality issue. Rather, it was complainant's approach to problem solving. Her approach was qualitatively different from a person who loses his/her temper in a private setting such as Dr. Werner's telephone call described in ¶106, FOF.

Complainant alleges in Case No. 97-0170-PC-ER, that certain actions were taken against her because of her race and sex. The elements of a prima facie case here include: 1) the complainant is a member of a protected group, 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 race or sex discrimination. There is no dispute that complainant established the first element of the prima facie case based on her sex and race.

Complainant alleges in Case No. 98-0153-PC-ER, that certain actions were taken against her because of her participation in an activity protected under the FEA. The elements of a prima facie case here include: 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action and 3) there is a causal connection between the first two elements. A "causal connection" is established by evidence that a retaliatory motive played a part in the adverse employment action. There is no dispute that complainant established the first element of the prima facie case due to the complaints she filed with the Personnel Commission.

A prima facie case of discrimination or retaliation must include a showing that a cognizable adverse action occurred. Respondent moved to dismiss certain allegations contending that they do not constitute an adverse action (7/25/00 brief, pp. 4-9). Respondent's motion pertains to allegations a, b, c, d, f, g, h, i, j, k and m (in case No. 97-0170-PC-ER) and q (in case No. 98-0153-PC-ER).

The Commission discussed the concept of a cognizable adverse action in *Dewane v. UW-Madison*, 99-00118-PC-ER, 12/3/99. A portion of that discussion is recited below:

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 retaliation claim, §111.322(3), Stats., makes it an act of employment discrimination "[t]o discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter." 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 employ-

ment or to discriminate against any individual in terms, conditions or privileges of employment.

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.

The Commission, in *Dewane*, reviewed guidance found in federal court decisions. Some of the cited cases were *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir. 1996) [a poor performance evaluation standing alone is not a cognizable adverse action]; *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) [a lateral transfer from one bank branch to another is not a cognizable adverse action] and *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) [lateral transfer resulting in title change and reporting to former subordinate may have caused a "bruised ego" but did not constitute adverse employment action].

Each allegation is analyzed in order below. Respondent's motion is discussed in each pertinent section.

A. Allegation "a"

Complainant alleged that race and sex discrimination occurred in regard to respondent's failure to provide her with adequate workspace (§§4-8, FOF). This allegation was raised in respondent's motion.

Complainant justifiably was upset with the condition of her office and the lack of promised equipment. However, there was no concrete, tangible effect on her employment status. There is no evidence that the office condition or the lack of certain equipment caused her to miss deadlines or in any other way affected her ability to do the job. Respondent's motion is granted here.

B. Allegation "b"

Complainant alleged that race and sex discrimination occurred in the spring of 1993, when Norman Risjord failed to grant her due process with respect to a student complaint against her (see §§9-14, FOF). This allegation was raised in respondent's motion.

The telephone call and resulting exchange of memos did not lead to disciplinary action and were not shown to have had any concrete, tangible effect on complainant's employment status. Respondent's motion is granted here.

Complainant also contends that she was denied due process. This allegation is without merit. Dr. Risjord attempted to involve complainant in the process by telephoning her. When it was evident that she was so angry, he ensured she received copies of his memos. Contrary to her assertions, she was kept informed of all activity related to this allegation.

Complainant also argues that she was deprived of her constitutional liberty interest in her reputation (initial post-hearing brief, pp. 15-17). The Commission lacks jurisdiction to consider this claim.

C. Allegation "c"

Complainant alleged that race and sex discrimination occurred in regard to AAS excluding her from departmental activities including committee assignments, graduate-student assignments, and receptions for visiting scholars and new students (see ¶¶15-19, FOF). This allegation was raised in respondent's motion.

Complainant's participation as a mentor for graduate students and as a member of department committees is a factor considered for merit increases. Complainant's participation in departmental functions also is a factor considered for merit increases. Respondent's motion as to this allegation is denied.

The Commission now turns to consideration of this allegation on its merits. Complainant failed to establish the second element of the prima facie case with regard to AAS activities because the record does not support her contention that she was excluded. She also failed to establish the second element of the prima facie case with regard to membership on AAS committees because the record lacks information about which committees she felt eligible to be on and yet her membership was denied. She established the second element of the prima facie case with regard to the assignment of graduate students as the record indicates only 2 graduate students were assigned to her in ten years. The third element of the prima facie case regarding

graduate student assignments was established by the fact that some white males received more assignments than complainant did.

The burden shifts to respondent to articulate a legitimate, non-discriminatory reason for assigning fewer graduate students to complainant than to some white males. Respondent met this burden by explaining that assignments were made based upon a match between the graduate student's area of interest and the AAS professors' areas of interest (see ¶15, FOF).

Complainant attempts to show that respondent's reason was pretextual by pointing to the fact that no graduate students were assigned to her until Dr Adell, an Afro-American female, became GPC Chair (see ¶17, FOF). This argument is unpersuasive because even under Dr. Adell's leadership, the assignments were few which supports respondent's explanation that complainant's area of interest did not "match" the new graduate students' areas of interest.

D. Allegation "d"

Complainant alleges that sex and race discrimination occurred in 1993-94, when AAS conducted an employment search for a senior historian (see ¶20, FOF). This allegation was raised in respondent's motion.

The complainant was not a candidate for the vacant position, nor has she shown that the search had a tangible effect on her employment in any other way. Respondent's motion is granted here.

E. Allegation "e"

Complainant alleges that sex and race discrimination occurred when Dr McKay "threatened" complainant with disciplinary action from the Dean if she did not either complete the newsletter or turn over any drafts of the newsletter (see ¶¶21-28, FOF). This claim fails because complainant failed to establish that she was threatened with discipline, the alleged adverse action.

F. Allegation "f"

Complainant alleges that sex and race discrimination occurred in the spring of 1997, when she became aware of the Chair File maintained by Dr Donnelly (see ¶¶29-37, FOF). This allegation was raised in respondent's motion.

The materials in the Chair File played no part in HD's counter offer. Complainant was not disciplined for any matters noted in the file. The existence of the file had no tangible effect on complainant's employment status and, standing alone, does not constitute a cognizable adverse action. Respondent's motion is granted here.

G. Allegation "g"

Complainant contends that sex and race discrimination occurred on April 22, 1997, when she requested access to the Chair File, but did not gain access until May 1, 1997 (see ¶38, FOF). This allegation was raised in respondent's motion.

Complainant does not define what negative consequences resulted from the delay, nor are any evident from the record. The delay in complainant's access to the Chair File had no tangible effect on her employment status. Respondent's motion is granted here.

H. Allegation "h"

Complainant alleges that sex and race discrimination occurred because the Chair File included a letter from Timothy Tyson accusing her of near harassment and which was never provided to her until she saw the file in May 1997 (see ¶¶39-42, FOF). This allegation was raised in respondent's motion.

Complainant has not shown that the matters raised in this allegation had a tangible effect on her employment status. The delay in complainant's receipt of the letter caused no tangible effect on her employment status. Neither Dr Tyson's letter nor its content was shared with the HD committee responsible for presenting complainant with a counter offer. Further, AAS did not seek to discipline complainant for the allegations. Respondent's motion is granted here.

I. Allegation “i”

Complainant alleges here that sex and race discrimination occurred because Dr. Tyson “made false and defamatory accusations” against her (see ¶43, FOF). This allegation was raised in respondent’s motion.

The existence of Dr Tyson’s letter, whether the allegations he raises are true or false, had no tangible impact on complainant’s employment. The allegations played no role in HD’s counter offer and no discipline was contemplated. Respondent’s motion is granted here.

J. Allegation “j”

Complainant alleges that sex and race discrimination occurred because AAS contributions to the Chair File were “designed to negatively influence HD’s counteroffer” in May 1996 (see ¶44, FOF). This allegation was raised in respondent’s motion.

Regardless of the motives behind Drs. Ralston and McKay sharing documents with Dr Donnelly, such acts had no tangible effect on complainant’s employment. The materials in the file were not shared with the committee responsible for recommending a counter offer Respondent’s motion is granted here.

K. Allegation “k”

Complainant alleges that sex and race discrimination occurred in May 1997, when Dr Donnelly refused to remove Dr Tyson’s letter from the Chair File (see ¶45, FOF). This allegation was raised in respondent’s motion.

Complainant has not indicated how the refusal impacted on her employment, nor is any evident from the record. Respondent’s motion is granted here.

L.[^] Allegation “l”

Complainant contends here that race and sex discrimination occurred because her merit increases from 1991-1998 were lower than comparable males in HD and in AAS (see ¶¶46-63,

[^] Section “L” of the Discussion was amended to correct Dr. Ralston’s race. The discussion also changed to include a yearly analysis and to recognize that the merit raise information for the comparable males in AAS is not in the record.

FOF). Respondent raised no timeliness objection as to any of the merit increases and, accordingly, this affirmative defense is deemed waived.

The Commission first notes that prior to hearing the complainant was under the mistaken impression that her raises in any given year were based upon her activities in the same year. She specifically noted in her UW Complainant (Exh. C-134, p. 8) that she asked Dr Donnelly why she received "only a 2.5 percent raise in a year (1992) when I had published a book." The book published in 1992 was taken into account in the 93-94 budget year (see ¶58, FOF). The FPC report specifically identified that activities in a calendar year were considered for merit awards in the following budget year (Exh. R-218, p. 11). It is difficult to understand complainant's continuing confusion at the time of hearing and in her post-hearing arguments (e.g., final brief, p. 7).

Complainant failed to establish a prima facie case of sex or race discrimination with regard to salaries of the comparable males in AAS (Drs. Ralston and Van Deburg). It was her burden to present sufficient evidence to establish that the merit raises received by these comparable males were higher than her merit raises. The record does not indicate what the merit raises were for the comparable males in AAS. Since this was complainant's burden of proof the lack of evidence defeats this portion of her claim.

The amount of merit awarded to the comparable males in HD (Drs. Cohen, Koshar and Zeitlin) is part of the record. Complainant established a prima facie case of sex and race discrimination with regard to all years where she received a lower merit award than a comparable male (see ¶51, FOF). Dr Cohen received a higher merit award than complainant in 1991-92 and 1994-95. Dr Koshar received a higher merit award than complainant in 1992-93, 1994-95, 1995-96 and 1996-97). Dr Zeitlin received a higher merit award than complainant in 1992-93, 1993-94, 1994-95, 1995-96, and 1996-97

The burden shifts to respondent to present a legitimate, non-discriminatory reason for the merit raises awarded. Respondent met this burden for the merit raise in budget year 91-92 by stating that the raise was low because complainant's initial salary was generous, she had not yet arrived on campus, and HD has a policy which keeps second-year raises low. Respondent met this burden for the remaining merit raises cited in the prior paragraph, by stating that

complainant's achievements were not as great as those of comparable males. The burden then shifts to complainant to attempt to show that respondent's stated reason is pretext.

Complainant contends (p. 10 of her initial post-hearing brief) that HD's attitude towards salaries for minority professors is demonstrated by the unsavory sentiments of a HD professor, Theodore S. Hamerow as reported in Exh. C-35.²⁰ The link complainant attempts to make here is related to race discrimination. The record, however, does not support her contention. Dr. Hamerow was not a member of the committee that decided merit raises in any of the years at issue in this case. Furthermore, members of the committee who testified at hearing credibly denied that the sentiments reflected in Exh. C-35 played any part in the merit award decisions.

Complainant specifically addressed the 0.4% merit raise in 91-92 (initial post-hearing brief, p. 10 and final post-hearing brief, pp. 7-8). She finds HD's purported practice of keeping second-year salary increases low suspect because the second-year merit raises in fiscal year 92-93 for Dr. Koshar was 3.76% and for Dr. Zeitlin was 3.91% (see ¶51, FOF). The FPC investigated this allegation and concluded as noted below (Exh. R-218, p. 11):

In her discussion with Prof. Donnelly, Prof. Plummer asked why her first raise was so low. Prof. Donnelly explained that it is standard practice in History for new hires to receive a small raise in the second year. She argues that Profs. Koshar and Zeitlin received larger percentages in their second year than she did. She neglects to consider that the pay plan percentages were very much different in the years in question; the pay plan percentage was 1.27% in 91-92, her second year, and 6.75% in 92-93, Profs. Koshar and Zeitlin's second year. However it is true that she received only 30% of the pay plan average [in her second year] while Profs. Koshar and Zeitlin received over 50% of the pay plan average [in their second year]. It is legitimate for Prof. Plummer to discuss the reasons for her low raise in 1991 with Prof. Donnelly, but the Committee does not understand why she waited until 1997 to ask. The Committee determined that the raise Prof. Plummer received in 1991-92 was generous on the part of His-

²⁰ An example of the sentiments expressed in Exh. C-35, is the following excerpt:

Last week, Mr. Hamerow's group agreed to issue a statement that sharply criticizes an ambitious university plan to hire more minority professors. Mr. Hamerow says he welcomes the backlash he thinks will follow.

"We have to be prepared to be dubbed racists, fascists, sexists, and reactionaries," he says. "It's a very sensitive issue here."

tory because she was not a member of the faculty in 1990, the year used to determine merit raises for 1991-92.

Complainant did not refute the information noted above regarding the pay plan percentages available in her second year as compared to the pay plan percentages available in Drs. Koshar and Zeitlin's second year. That she received only 30% of the available pay plan percentage and they received 50%, is not suspect because she was not on campus in 1990 (the basis for her first merit award of 0.4%) and, accordingly, did not contribute in the areas of teaching or UW service. In contrast, Drs. Zeitlin and Koshar were on campus in the 1991 calendar year (Dr. Zeitlin was on campus the entire year and Dr. Koshar was on campus half of the year.)

Complainant's further argument on this point indicates that she continues to view merit raises in the context of her achievements in the incorrect calendar year. She states in her final post-hearing brief (p. 7), as noted below in relevant part:

Insofar as the custom of holding down second-year raises is concerned, the University did not hold down the second-year raises of Koshar and Zeitlin. Respondent claims that Koshar and Zeitlin benefited from a substantially increased pot in 1992-93. If that is the reason they benefited, then Plummer, who published a book that year, should have benefited as much, or more. She did not. Where is the University's rebuttal of this charge of discrimination?

Complainant failed to establish pretext with respect to her merit raises in HD. This is true for all merit raises at issue in this case. As detailed in the FOF, the only questionable award of merit occurred in budget year 96-97 (¶61, FOF) but the record does not support a conclusion that complainant's race or sex was a factor. HD did not base its merit decisions upon complainant's race or sex.

M.^A Allegation "m"

Complainant contends that race and sex discrimination occurred in or about the spring of 1997, when Nellie McKay excluded her from the supplemental salary funds (see ¶¶72-78, FOF). Respondent contends this is not an adverse action because complainant ultimately received the funds pursuant to the FPC recommendation adopted by Dean Certain. The exclusion from pay is a cognizable adverse action. The fact that complainant may have later received the money goes to the issue of remedy and not to the viability of the claim. Accordingly, respondent's motion is denied as to this allegation.

The Commission now turns to considering this allegation on the merits. Complainant established a prima facie case of race and sex discrimination with regard to this allegation. Evidence establishing the third element of the prima facie case, however, is weak due to the fact that the decision-maker was of the same sex and race as complainant.

The burden shifts to respondent to articulate a legitimate reason for not giving complainant part of the supplemental salary fund. Respondent met this burden by stating that complainant did not receive an award because she had withdrawn from AAS service and she had not been in AAS long enough for salary compression to have occurred.

The burden then shifts to complainant to attempt to show that the proffered reasons were pretextual. Her arguments on this issue were addressed in her initial post-hearing brief (pp. 6-9) and in her final post-hearing brief (p. 8).

Dr. McKay testified that complainant had not been at AAS long enough for salary compression to have occurred. She further testified that Dr. Van Deburg's salary was not compressed. She noted that Dr. Werner's salary was compressed to an extent. Drs. Werner and Van Deburg received supplemental funds for the reasons noted in ¶75, FOF, which included their service to AAS. Complainant failed to establish that Dr. McKay's viewpoints were based upon a stereotype that white males contribute more than other staff.

^A Changes were made to this section of the decision to reflect the full Commission's rationale. Portions of the discussion were changed to reflect the amendments made in this decision. For example, ¶67, FOF, was amended to correct the hiring dates for Drs. Werner and Van Deburg.

Complainant also challenged Dr McKay's statement that complainant did not receive part of the supplemental funds due to her withdrawal from all AAS activities except teaching. Complainant noted that two male professors also resigned from the newsletter committee yet they received supplemental funds. Complainant characterized this argument as a disparate impact theory saying that even if withdrawal from AAS is a facially neutral policy for exclusion, it had a disparate impact (initial post-hearing brief pp. 9-10). This claim fails. The Commission first notes that complainant's argument is insufficient as a claim of disparate impact. See *Balele v. DOT*, 99-0103-PC-ER, 11/15/00 (treatment of complainant alone as compared to others is insufficient to sustain a disparate impact claim). The males she compares herself to may have withdrawn from further service on the newsletter committee but they were not similarly situated because there is no evidence that they withdrew from all AAS service except teaching, as complainant did.

N. Allegation "n"

Complainant contends that race and sex discrimination occurred on October 31, 1997, when HD and AAS denied her the opportunity to compete for an internal grant (see ¶¶78-89, FOF). The actions of HD are discussed first, followed by a discussion of AAS.

Complainant established a prima facie case of race and sex discrimination in regard to HD. HD did not nominate complainant for the WARF mid-career award despite her qualifications. An inference of discrimination is present because HD nominated a male for the award.[^]

The burden shifts to HD to articulate a legitimate reason for nominating Dr Spear rather than complainant. HD met this burden saying Dr. Spear was nominated because this could have been his last (or close to last) opportunity to apply for the award.

Respondent asserted in its post-hearing brief (p. 21) that "there is ample testimony in the record that Professor Spear was actually more deserving of the nomination based upon the criteria for the award." On the same page is a statement that Dr. Spear had a "superior ac-

[^] Two sentences were deleted from the PDO text. The Commission did not agree that the inference of discrimination sufficient to establish the third element of the prima facie case was weakened due to the race and sex of individuals (other than complainant) affected by the decision.

demic record.” These assertions are rejected as unsupported by the record. All three candidates were considered qualified for nomination. Dr Donnelly summarized the reasons why Dr Spear was nominated. He indicated that although complainant and Dr Spear both had 3 published books, Dr Spear’s third publication occurred several years before complainant’s third publication. He noted that Dr Spear obtained his degree eight years before complainant did. Lastly, he said that the most important reason was that Spear was running out of time for eligibility for the award.

The burden shifts to complainant to attempt to establish pretext. She points to the fact that HD did not read the shrink-wrapped publications she submitted with her application. This is insufficient to establish pretext because none of the candidates’ publications were read. Complainant also contends (final post-hearing brief, p. 9) that Dr Donnelly testified that “Spear had been pre-selected without competition.” This characterization of Dr Donnelly’s testimony is rejected as inaccurate.

Complainant also attempted to demonstrate that the HD’s decision was based on mixed motives (final post-hearing brief, pp. 9-10). The evidence she cited to support this contention was that she did not hear Dr Donnelly explain that Dr Spear was chosen due to his eligibility situation until after she filed the discrimination complaints with the Commission. This observation, the meat of which was not explored at hearing, is insufficient to establish that sex discrimination occurred.

The Commission now turns to consideration of AAS’ decision not to forward complainant’s name for the award. It is arguable whether complainant established the requisite inference of race discrimination because Dr Ralston made the decision and is of the same race as complainant. However, complainant was qualified for nomination, was the sole applicant and yet was not nominated which is sufficient to raise an inference of discrimination.

The burden shifts to respondent to articulate a legitimate reason for not nominating complainant. Respondent met this burden by saying that complainant’s application was submitted untimely and there was inadequate time to process the application.

AAS’ assertion that there was insufficient time to process complainant’s application is rejected. Dr Ralston’s memo to staff soliciting applications was dated October 6th, with a

submission deadline of October 17th. His memo contained no warning that the time for reviewing submissions was short. His memo did not request advance notice of a faculty member's intent to file an application. The strong inference is that the timetable established in the memo was deemed sufficient when the memo was written. The record does not indicate that anything changed thereafter which affected the time period for AAS to review the applications. Respondent's proffered reason is suspect.

Dr. Ralston's perception that complainant's application was untimely submitted is rejected. Complainant credibly testified that she placed her application in his mailbox on October 17th. No one noticed the timely submitted application but this was due to Dr. Ralston not checking his mail and support staff failing to notice complainant's application on the day it was submitted.

It was apparent to the hearing examiner that if the application had been filed by anyone other than complainant, AAS most likely would have processed it. Complainant was not well liked (see ¶¶104-110, FOF). AAS can be faulted for letting personal feelings interfere with judging complainant on her scholarly activity. However, the evidence is insufficient to find that the decision was motivated even in part on complainant's race or sex.

Complainant attempted to argue that sex discrimination was shown because AAS was tolerant of the angry outbursts of Dr. Werner, a white male (see ¶106, FOF) whereas they were not tolerant of complainant's communication style. Dr. Werner admitted that he was known for his temper until he became a father. Complainant's argument is unpersuasive. The nature of complainant's communication style went beyond being known for a temper. As shown by her memo concerning the search for a senior historian (see ¶105, FOF), she inappropriately used a memo to all AAS staff to levy serious allegations against individuals with whom she disagreed.

O. Allegation "o"

Complainant contends she was retaliated against due to filing her complaints with the Commission (hereafter, FEA Retaliation) on or about April 14, 1998, when the FPC issued a report without conducting "a fair and complete hearing procedure" (¶¶90-97, FOF). This

claim fails because it is unsupported by the record. The FPC members were asked to investigate which they did to the best of their ability. They conducted an extensive investigation and provided interested parties, including complainant, multiple opportunities to provide information. The process was fair and complete.

Complainant alleged in one argument (final post-hearing brief, pp. 12-13) that the Dean and the FPC had a “tacit agreement” that the FPC report would not “fully address” what she considered to be two of the most serious questions – the allegations raised in the Tyson letter and the Chair File. There is no support in the record for the alleged “tacit agreement.” Further, it is clear that the FPC investigated both matters.

P. Allegation “p”

Complainant contends here that FEA Retaliation occurred on or about May 29, 1998, when Dean Certain accepted the recommendations of the FPC (see ¶¶90-97, FOF). Complainant’s argument (final post-hearing brief, p. 13) is that the Dean should not have accepted the FPC method of calculating her monetary award because AAS used a different method of making the supplemental awards. The FPC’s calculations were not intended to recreate the award she would have received if she had been included in AAS’ distribution of supplemental salary funds. The FPC did not want to impose its judgment on complainant’s professional activities or her market value, which would have been necessary if the AAS method of distribution had been followed. Instead, the calculations were based on a standardized approach using the average dollar increase awarded to faculty. The Dean’s adoption of this approach was not shown to be based in any part on FEA Retaliation.

Q. Allegation “q”

Complainant alleges that FEA Retaliation occurred in June-July 1998, when the CLS and AAS “failed to adequately explain” the basis for the 1997-98 salary increases (see ¶¶100-103, FOF). Complainant failed to establish this allegation, thereby failing to establish the second element of the prima facie case. The exchange between complainant and Dean Certain flowed freely without his withholding information. As to correspondence between complainant and Dr Ralston, only one of the letters is in the record. It is only possible to view his

letter in isolation, which is insufficient to show whether he withheld information or that an adverse action occurred in any other way.

R.^A Equal Pay Claim

Complainant contends respondent violated §111.36(1)(a), Stats., the text of which is shown below in relevant part:

- (1) Employment discrimination because of sex includes
 - (a) Discriminating against any individual in promotion, compensation paid for equal or substantially similar work

It is appropriate in resolving equal pay claims under the FEA to look for guidance under the federal Equal Pay Act (EPA), 29 USC §206, et. seq., *Hiegel v. LIRC*, 121 Wis.2d 205, 215, 359 N.W.2d 405 (Wis. Ct. App. 1984) (“The equal-pay-for-substantially-equal-work concept is clearly embedded in both the WFEA and the Federal Equal Pay Act. DILHR and LIRC have . . . looked for guidance to cases decided under the Equal Pay Act.”)

The EPA uses a two-part analysis. First, the complainant must establish a prima facie case by demonstrating that an employer pays one sex a higher salary than the other sex for performing work that is equal in skill, effort, and responsibility, and which is performed under similar working conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Special definitions exist for each element of the statutory phrases “equal skill, effort and responsibility” and “similar working conditions,” that must be met as part of the prima facie case.

After complainant establishes a prima facie case, the burden shifts to the employer to show that the pay differential is justified according to one of EPA’s four affirmative defenses. *Corning Glass Works*, 417 U.S. at 196-97. The 4 statutory defenses under the EPA are that the differential in pay was based on: 1) a seniority system, or 2) a merit system, or 3) a system which measures earnings by quantity or quality of production, or 4) a differential based

^A Changes were made to section “R” of the discussion section due to amendments made in the findings of fact (for example, changes made to ¶¶98-99, FOF). Additional changes were made to reflect the Commission’s decision rationale.

on any factor other than sex. The fourth factor means that an employer can justify a pay differential by establishing some other gender-neutral factor *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir 1989; *Covington v. Southern Ill. Univ.*, 816 F. 2d 317, 322 (7th Cir 1987), *cert. denied*, 484 U.S. 848 (1987). Also see, Jeffrey K. Brown, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense*, 13 Hofstra Labor Law Journal at 181 (1995). The fact that a violation occurs without any discriminatory intent on the employer's part, such as when the pay disparity results from a clerical error or the misclassification of a position, is not an exculpatory defense. Likewise, an employer's "good faith" is not a complete defense to an alleged equal pay violation; 45A Am Jur 2d, *Job Discrimination*, §737 (1993).

Complainant established a prima facie case with regard to Drs. Cohen, Koshar, Ralston, Van Deburg and Zeitlin during the years they received a higher salary^A than complainant (¶¶98-99, FOF). There is no dispute that these individuals performed jobs which required equal skill, effort and responsibility, and which were performed under similar working conditions. The burden shifts to respondent to show that the total salary differentials for each year in question were justified based on a factor other than sex.

Dr. Cohen received a higher salary (\$52,766) than complainant did (\$51,462) in one year, 1992-93. In 92-93, he received a raise of \$5,591 (¶98, FOF), of which merit was only

^A The Commission changed the analysis from the PDO to correct an erroneous view of how a prima facie equal pay case is established. The PDO looked at annual percentage salary increases awarded to the relevant faculty. However, the law focuses on rate of pay. See §111.36(1)(a), Stats. "Compensation paid for equal or substantially equal work;" 29 USC 206(d)(1): "paying wages to employees at a rate less than the rate at which he pays employees of the opposite sex;" Richard Seymour & Barbara Brown, EQUAL EMPLOYMENT LAW UPDATE, pp. 3-32 (Fall 1997): "the plaintiff's pay rate was less than that of employees of the opposite sex;" *Dey v. Colt Construction*, 65 FEP Cases 523, 535, 28 F. 3d 1446 (7th Cir. 1994): "different wages are paid to employees of the opposite sex." In an academic setting of the nature involved here, the only feasible calculation of a wage rate is on the academic year basis. Thus, complainant has established a prima facie equal pay case with respect to each comparator who was paid more than she was in a particular academic year, regardless of whether her increase or percentage increase that year was more or less than the comparator's increase. The amount or percentage of salary increase can give rise to a claim of disparate treatment analogous to a Title VII claim (see discussion sections L and M, regarding WFEA disparate treatment claims discussed above) but in an equal pay claim the appropriate focus is on the bottom line of how much each comparator was paid in a given year. The remainder of the equal pay claim discussion has been edited consistent with this changed approach.

a portion (¶51, FOF). The only explanation in the record for his wage increase in 1992-93 is a reference in Exh. C-50, pp. 47-48 to "Special Merit." Respondent alleges that he received additional compensation in the form of a "quality reinvestment award" for his services as HD Associate Chair (respondent's 11/20/00 brief, p. 5). However, the record does not indicate that he received any monetary remuneration for the post. Accordingly, complainant has established an equal pay claim with regard to Dr. Cohen's salary in 1992-93.

Dr. Koshar's starting salary (91-92) was \$4,800 greater than complainant's salary in the same year (¶98, FOF). Respondent contends it was necessary to offer Dr. Koshar the higher salary to lure him to respondent's employment. One court said that there must be more in the record than respondent's statement that a starting wage was necessary to meet an individual's market rate,[^] *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 43 FEP Cases 1525, 1532 (11th Cir. 1985). It is evident from Dr. Koshar's AARs (for example see ¶62, FOF) that he had an international reputation from which it is reasonably inferred that his market rate would have been higher than individuals with a national or more restrictive reputation at the time of hire. Further evidence in the record supporting respondent's market-rate contention is the fact that Dr. Koshar's starting rate not only was higher than complainant's wage at the time, but also was higher than Drs. Cohen's and Zeitlin's wages during the same year. The difference between Dr. Koshar's starting wage and complainant's wage during the same year (\$4,800) was due to his market rate and was attributable to a factor other than sex for his first year. Dr. Koshar's salary in subsequent years would be adjusted for purpose of comparison with complainant by deducting the \$4,800 difference from his salary. After the subsequent years are adjusted to reflect this amount, his adjusted salary exceeded complainant's salary in 1992-93 but such difference was attributable solely to merit.

[^] While the "market rate" concept should not be applied to gender groups it is a legitimate factor when applied with regard to a particular employee. See, e.g., *Horner v. Mary Institute*, 613 F.2d 706, 21 FEP Cases 1069, 1074 (8th Cir., 1980): "Although an employee's perception that women would generally work for less than men is not a justification for paying women less an employer may consider the market place value of the skills of a particular individual when determining his or her salary."

Complainant would not prevail even if the comparison were based on Dr Koshar's full salary, rather than the adjusted salary. His salary increase in 95-96 was attributable to merit and a promotional increase. His salary increases in 1992-93, 93-94, 94-95 and 96-97 were attributable solely to merit (¶¶51, 98 and 98a, FOF). Merit and promotional wage increases constitute factors other than sex. Accordingly, complainant failed to establish any equal pay claim with regard to Dr Koshar's salary.

Dr. Zeitlin's starting salary (91-92) was \$1,800 greater than complainant's salary in the same year. Respondent contends it was necessary to offer Dr Zeitlin the higher salary to lure him to respondent's employment. It is evident from his AARs (for example, see ¶57, FOF) that he had an international reputation from which it is reasonable to infer that his market rate would have been higher than individuals with a national or more restrictive reputation. The difference between Dr Zeitlin's starting wage and complainant's wage during the same year (\$1,800) was due to his market rate and was attributable to a factor other than sex for his first year. Dr Zeitlin's salary in subsequent years would be adjusted for purpose of comparison with complainant by deducting the \$1,800 difference from his salary. After the subsequent years are adjusted to reflect this amount, his adjusted salary exceeded complainant's salary in 1992-93 but such difference was due solely to merit.

Complainant would not prevail even if the comparison were based on Dr Zeitlin's full salary, rather than the adjusted salary. The raises he received from 1992-93 through 1997-98 were attributable solely to merit and, in 1995-96, to his promotion (¶¶51, 98 & 98a, FOF^A). Accordingly, complainant failed to establish an equal pay claim for any year in regard to Dr Zeitlin.

Turning to the AAS Department, the difference between complainant's starting salary in 1990-91 and the salary in the same year for **Dr. Ralston** (\$8,800) was due to longevity.^B Complainant concedes that longevity is a legitimate factor but questions whether the entire pay differential is due to longevity (final post-hearing brief, p. 11). The Commission agrees that

^A Dr. Zeitlin's salary increase for 96-97 is noted as 2.20% in ¶51, FOF and as 2.18% in ¶98, FOF. It is clear from Exh. 50, pp. 49-50, however, that his '96-97 raise was due solely to merit.

^B The Commission's decision should not be read as suggesting that longevity is measured solely by the difference in salary at the time of hire.

longevity, as a pay factor, constitutes a reason other than sex unless it is not applied equally to both sexes.^A There is no indication in the record that it was not applied neutrally. The question then is how to determine what portion of the pay differential is due to longevity.

The Commission believes it is reasonable to look at complainant's starting wage as compared to Dr. Ralston's wage in the same year and to conclude that the difference is attributable to longevity. The difference of \$8,800 would be considered as the amount attributable to his longevity (15 years). Dr. Ralston's salary in subsequent years would be adjusted for purpose of comparison with complainant by deducting the \$8,800 difference from his salary. After the subsequent years are adjusted to reflect this amount, his adjusted salary exceeded complainant's salary in 1991-92 (\$400 difference) and 1992-93 (\$1,032 difference).

Unlike the circumstances for HD, the record does not indicate what portion of Dr. Ralston's pay increases was attributable to merit. Respondent had the burden of proof in an equal pay claim to provide reasons for the pay differences in these years. The record does not provide an explanation for these differences. All we know is that in 1991-92 he received a \$600 increment versus complainant's \$200 increase, and in 1992-93 he received an \$1,894 increase against \$1,262 for complainant.

In arguments submitted after the PDO was issued, respondent made a general contention^B that it should be inferred from the AAS faculty members' AAR's in the record that such differences are attributable to allocations of merit. The Commission declines to do so. The federal case law in this area reflects the principle that the statutory exceptions in the equal pay act "are to be narrowly construed against the employer asserting them [and] must be rationally and systematically applied." *Marshall v. Aetna Insurance Co.*, 487 F. Supp. 717,

^A See, e.g., *Blocker v. ATT*, 666 F. Supp. 209, 214, 45 FEP Cases 330 (M.D. Fla., 1987) (comparators had extensive service with the employer when plaintiff was hired, "she had been through many fewer annual pay increases, and her salary consequently was lower than the senior employees the higher position and pay afforded these employees was based on their seniority or longevity of service."); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 76 FEP Cases 1858, 1864 (7th Cir., 1998) (salary influenced by each employee's length of experience with the employer).

^B Due to the different means of analysis used here as opposed to the PDO, and different results reached, respondent did not have the opportunity to address the particular conclusions expressed here in its objections to the PDO, but made somewhat similar arguments which the Commission is considering in the instant context.

724, 22 FEP Cases 602 (E. D. Va., 1978), *aff'd.*, *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 22 FEP Cases 607 (4th Cir. 1980). The employer has the “burden of proving to the trier of fact that this is not just an *ex post facto* attempt to find differences between male and female faculty and then use those differences to explain unequal pay ” *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037, n. 23, 43 FEP Cases 1525, 1532, n. 23 (11th Cir. 1985).

Furthermore, AAS (unlike HD) had no written guidelines for assessing merit. The respondent in effect seeks to use HD criteria and to infer that the HD criteria could account for the salary differences in AAS. The problem is not just that the AAS Department lacked a formal merit policy but that the recollection of the decision-makers was so fuzzy on how such decisions were made that their testimony was not useful. *See Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322, 1330, 23 FEP Cases 451 (M.D. Ga., 1980) (“The merit system exception if not strictly construed against the employer could ‘easily swallow the rule’

The employer must show that its ‘merit system’ is administered, *if not formally, at least systematically and objectively.*” (Citations omitted.) (Emphasis added.) Furthermore, as noted above in the alpha footnote to ¶63, FOF, both parties indicated at hearing that it was questionable to attribute the total wage in any year solely to merit-type awards. In conclusion on this point, complainant established an equal pay claim with regard to Dr. Ralston for 1991-92 and 1992-93.

The same approach used above for Dr. Ralston will be followed with **Dr. Van Deburg** who, in 1990 when complainant was hired, had 17 years in AAS. At the time complainant was hired, Dr. Van Deburg earned \$3,052 more than complainant’s starting wage. After the subsequent years are adjusted to reflect this amount, his adjusted salary exceeded complainant’s salary in 1991-92 through 97-98. Again, the record does not reflect how these adjustments were calculated, with the possible exception of 1997-98, which will be discussed below. As to the other years (1991-2 through 1996-97), the Commission rejects the suggestion it look at the AAR’s to try to determine whether and to what extent any of the salary adjustments constituted merit awards, for the same reasons as discussed above with regard to Dr. Ralston.

As to 1997-98, the record shows that in that year the AAS Department received a sum of money to parcel out among the faculty to address salary compression and to reward faculty who had worked "very hard" for the AAS Department. See ¶¶71-77, FOF. Dr. Van Deburg received a 12.31% salary increase of \$8,630. Complainant received a 10.43% raise of \$6,572 which left her net salary \$6,093 less than Dr. Van Deburg's adjusted salary.[^]

Respondent must show that there was a basis other than sex for paying Dr. VanDeburg a salary in 1997-98 (after adjustment for the initial longevity factor) \$6,093 more than complainant. The rationale for the salary adjustment complainant received in 1997-98 is summarized in the following quotation from the FPC's discussion of the 1997-98 salary transactions:

At the time that this special salary exercise occurred, it seemed logical to exclude Prof. Plummer because of the possibility of her imminent transfer to [HD] and her withdrawal from AAS activities. However, it seems appropriate to revisit the issue at this time. The dollar value that the Committee recommends is based on the average dollar increase awarded to faculty in this special exercise. The adjustment is essentially mechanical, but based upon a principle of fairness that would prevent her exclusion from a department-wide benefit. (FOF 77)

This rationale constitutes a reason other than sex for the amount determined for complainant's 1997-98 salary adjustment, which was calculated to equal the departmental average, and establishes an affirmative defense for respondent as to complainant's 1997-98 salary vis-à-vis Dr. VanDeburg, whose salary adjustment was above the departmental average.

S. Examiner's Clarification

The topic of whether some of Dr. Plummer's allegations were sufficient to constitute a viable adverse action was discussed at several points during the hearing process. At some point in complainant's case in chief, the hearing examiner shared copies of the Commission's decision in *Dewane v. UW-Madison*, 99-0018-PC-ER, 12/3/99, for the purpose of informing

[^] The Commission concluded under section M above that respondent's handling of this money did not establish liability under a WFEA disparate treatment claim. We are now looking at the explanation for the salary differential for that year in the context of an equal pay claim. Consistent with the discussion about the basic principles involved in such a claim, we must focus on the "bottom line" salary complainant eventually received that year after Dean Certain implemented the FPC recommendations.

the parties that some actions might not be considered viable adverse actions. The stated purpose for sharing this information was to enable the parties to assess for themselves which of the issues to stress at hearing. The topic arose again after complainant's case in chief. Counsel for respondent requested a ruling from the examiner as to which allegations did not rise to the level of an adverse action so that respondent could narrow the issues presented in its case. The examiner reminded respondent that she did not have the authority to do so because such rulings would result in dismissal of allegations, which requires a vote of the full Commission. The topic was discussed again in the context of submitting briefs. The examiner suggested that the parties concentrate their post-hearing briefs on any issue involving wages. She further suggested that the parties might wish to wait to address the allegations that did not involve monetary consequences to see how they were resolved in the proposed decision and order (PDO). She explained that the parties still would have an opportunity to argue whether certain issues were adverse actions because both parties would have an opportunity to file arguments after the PDO was issued.

The above paragraph is the context in which complainant made the following statements in her reply brief:

- (pp. 1-2) that the hearing examiner "clearly stated that she would not entertain what she considered *de minimis* issues", citing *DeWayne v. UW-Madison*, 99-0018-PC-ER, and *Smart v. Ball State University*, 89 F.3d 437, 441, 7th Circuit, 1996).
- (p. 3) that the hearing examiner "instructed Plummer to suppress the issues that correspond to *Smart v. Ball State*, which the examiner held were *de minimis*."
- (p. 6) that the hearing examiner said she would regard allegation "a" as *de minimis*, but Complainant will address it."
- (p. 6) stating "Respondent has expended a lot of ink on material that the Hearing Examiner said would not be considered but which, under the circumstances, must be addressed."

This clarification is made to avoid misunderstandings. The examiner never said she would not discuss any allegation in the proposed decision and order. To the contrary, she indicated

that all issues would be discussed in the PDO and that the parties might wish to save time by reserving argument on some issues until after the PDO was mailed.

T ^A Complainant's Motion to Repeal Protective Order

On November 2, 1999, Chairperson McCallum issued a ruling on complainant's motion to compel discovery. On the same date and as a result of the motion to compel, Chairperson McCallum also issued a protective order, as noted below (slightly reorganized for convenience here):

Any materials provided to complainant or her representative in response to discovery requests

- a. (the names, addressees, current activity reports and current salaries of two unidentified professors in the History Department, aside from complainant and Professor William Brown, who identified themselves as African-Americans to the Payroll department in 1997), and
- b. (AOF nomination files from the History Department from 1991 to the present)

which were the subject of the ruling issued by the hearing examiner on November 2, 1999, may be used by the complainant or complainant's representative only for the purpose of litigating this case or related cases involving identical or similar issues in other forums and involving the same parties, and may not be disclosed by complainant or complainant's representative for any other purpose.

The complainant is directed to inform the Commission of the name and address of any expert or other witness complainant intends to consult prior to divulging any of this material to any such witness, so that the Commission may serve copies of this order on such person prior to disclosure of the material, and any such person is directed not to disclose the materials to the public or outside the confines of this proceeding.

On November 15, 1999, complainant requested that the protective order be withdrawn, insofar as it relates to two professors in the History Department who had been erroneously identified in Payroll Department records as African-Americans. Chairperson McCallum denied the motion by ruling dated December 6, 1999, stating as noted below:

^A The last paragraph of the PDO discussion about the protective order has been deleted because the Commission's conclusion does not depend on the rationale stated in the deleted paragraph.

[T]he reason the protective order was issued in this regard was to protect the confidentiality of the information voluntarily provided by employees for affirmative action and other related purposes. The fact that errors were made in the transmitting or recording of information as it related to the race of two employees does not change or nullify the original rationale for protecting this information and complainant's request is denied.

The original rationale for protecting the information was discussed in Chairperson McCallum's November 2, 1999 ruling and was based on an Opinion of the Attorney General (OAG, volume 73, (1984), pp. 26-37). The Commission see no reason to deviate from Chairperson McCallum's ruling.

U. Extra Brief Filed by Complainant

Both parties filed written objections to the proposed decision and order. They also had an opportunity to file a reply to the opposing party's filed objections. Respondent filed a reply to complainant's objections by the due date of November 29, 2000. Complainant did not file a response to respondent's objections by the due date of November 29, 2000. On December 5, 2000, complainant filed additional arguments. This document was not only filed late as an objection to the proposed decision and order, but also was used by complainant as an opportunity to comment on respondent's reply to her objections – an opportunity which went beyond the allowed briefing process. Respondent moved to strike complainant's last brief.

The Commission grants respondent's motion with one exception. Specifically, respondent noted in its objections to the proposed decision (dated November 29, 2000) that the merit raise amounts for AAS professors Ralston and Van Deburg as recited in the PDO were incorrect and that certain other salary amounts needed to be corrected. The Commission considered only the portions of complainant's brief, which addressed respondent's correction of merit and other salary amounts.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these cases pursuant to §230.45(b), Stats.

2. Complainant had the burden to establish that sex and/or race discrimination occurred with respect to allegations a through n (Case No. 97-0170-PC-ER). She failed to meet this burden.

3. Complainant established a prima facie case in her equal pay claim (Case No. 97-0170-PC-ER) which shifted the burden to respondent to show that a reason other than sex accounted for the pay differences, as detailed above in section R of the Discussion portion of this decision. Complainant prevailed on her equal pay claim with respect to Dr. Cohen in 1992-93, AAS professor Dr. Ralston in 1991-92 and 1992-93 and with respect to Dr. Van Deburg in 1991-92 through 1996-97. As to the remaining claims, respondent showed that the pay differences were due to factors other than sex.

4. Complainant had the burden of proof to establish that respondent retaliated against her for participating in activities protected under the FEA with regard to allegations o and p (Case No. 98-0153-PC-ER). She failed to meet this burden.

5. Complainant had the burden of proof to establish that race discrimination occurred with respect to allegation q (Case No. 98-0153-PC-ER). She failed to meet this burden.

ORDER


The Commission retains jurisdiction over the remedy for the portion of the equal pay claim established by complainant and for later consideration of an award for fees and costs.

Dated: March 6, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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