STATE OF WISCONSIN PERSONNEL COMMISSION

JANICE SIEGER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0085-PC-ER

ORDER

The Commission, after reviewing the Proposed Decision and Order and the record in this matter, and after consulting with the hearing examiner, adopts the Proposed Decision and Order with the following modifications made for purposes of clarification:

I. On page 41, the second full sentence should be modified to read as follows:

The following militate against a conclusion that complainant sustained her burden in this regard, and any medical conclusions drawn therein are based upon information provided by respondent's medical expert (See Finding of Fact 18, above):

II. On page 43, the second full paragraph should be modified to read as follows:

The final question of those addressed by the Commission in its original decision relates to whether respondent's request for information from complainant/Dr. Berg violated §103.10(7)(b), Stats. It should first be noted that this question, although addressed in the original decision, is not specified as one of the issues to which the parties stipulated. It is doubtful therefore whether this question is required to be decided here. Moreover, the only stipulated issue which could arguably include this question within its scope is question #1, i.e., whether respondent

violated §103.10(11), Stats., with respect to its decision not to grant complainant medical leave for the period October 17 through October 23, 1989; and the Commission concludes that the subject request for information did not contribute to this denial of leave. The Commission's original decision concluded, based on complainant's representation that "Dr. Berg refused to talk to Mr. Conway because she felt that the information contained in her note on the prescription form should be adequate.", that respondent's request did not result in any harm to the complainant because it appeared that, no matter what form the request had taken, Dr. Berg was not going to provide any additional information, and because respondent's request could not be said to have contributed to a denial of leave for the period in question. The current record shows that it was complainant's decision, not Dr. Berg's, not to have Dr. Berg talk to Mr. Conway. However, the reasoning originally relied upon by the Commission did not depend on whether it was Dr. Berg or complainant who refused Mr. Conway's request, but on the fact that it was made clear to respondent that, no matter how the request was presented or by whom, the information would not be forthcoming. This characterization of complainant's response to the request is reinforced by Dr. Berg's testimony in which she indicated that complainant reported to her that "they're just being nosy, they don't need to know this." Therefore, as a result of complainant's posture in this regard, respondent elicited neither any medical information that might have gone beyond the limits established by §103.10(7)(b), Stats., nor a verbal certification from the physician instead of a written certification. In addition, respondent's request cannot be said to have contributed to a denial of leave for the period in question since respondent had not taken any final action on complainant's leave request when complainant commenced her unauthorized leave on October 16, 1989, and since it would be inconsistent with complainant's decision not to provide respondent any further information to conclude that if the request had specifically sought a written certification and had been couched in statutory terms with respect to the information

sought, the response would have been forthcoming and the leave would have been approved.

Dated: May 14, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

LRM:lrm

JUDY M. ROGERS, Commissioner

Parties:

Janice Sieger
c/o Atty. Christine Olsen
Byrne, Goyke, Olsen & Tillisch
115 Forest Street
PO Box 1566
Wausau, WI 54402-1566

Joe Leann
Secretary, DHSS
PO Box 7850
Madison, WI 53707-7850

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

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

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

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

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

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

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

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

STATE OF WISCONSIN PERSONNEL COMMISSION

JANICE SIEGER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0085-PC-ER

PROPOSED DECISION AND ORDER

The history of this case is important to an understanding of it at this stage of the proceedings and, as germane here, is summarized as follows:

Prior to the initial hearing, the parties stipulated to the following issues:

> Whether respondent violated §103.10(11), Stats., with respect to any of the following actions:
>
> 1. The decision not to grant the complainant medical leave for the period of October 17, through October 23, 1989.
>
> 2. The decision, of which the complainant was informed on March 26, 1990, to impose a modified work schedule which would have prevented the complainant from attending a class.
>
> 3. The decision, reflected in a memo dated January 26, 1990, to deny school credits sought by the complainant through the tuition reimbursement program.
>
> 4. The October 24, 1989 decision to reduce the complainant's position to 70% time.
>
> 5. The requirement imposed on May 10, 1990, that the complainant produce proof of payment for a course.
>
> 6. The level of proof required of the complainant to substantiate sick leave requests and the level or scrutiny imposed on the requests made by the complainant versus other employees.
>
> 7. The one-day suspension imposed by letter dated November 16, 1989.

8. The unilateral imposition of a revised position description, first shown to the complainant on or about March 29, 1990, for the complainant's position.

9. The requirement that the complainant revise an expense report/voucher initially signed by her on December 6, 1989.

Eight days of hearing were held on these issues in July, August, September and October of 1990. The briefing schedule was completed on June 21, 1991, and the hearing examiner issued a Proposed Decision and Order (PD&O) on August 20, 1991. Neither of the parties filed objections to the PD&O. The Commission modified the PD&O and issued a Final Decision and Order on November 8, 1991. This Final Decision and Order held as follows, in pertinent part:

1. Mr. Conway's request for information from Dr Berg, complainant's health care provider (See Finding of Fact 13 in PD&O) did not constitute a request for certification within the meaning of §103.10(7), Stats.

2. Even if Mr. Conway's request for information from Dr. Berg was concluded to constitute a request for certification, it resulted in no injury to complainant since Dr. Berg gave no information in response to the request and it was apparent from the record that, regardless of the form or substance of the request, Dr. Berg did not intend to give respondent any information.

3. Complainant had a "serious health condition" but the record did not show that it rendered her "unable to perform the duties and responsibilities of her position."

4. Complainant did not sustain her burden of showing that the requested leave was "medically necessary."

5. Complainant failed to give respondent the "advance notice" required by §103.10(6)(b), Stats.

6. Respondent did not retaliate against complainant as alleged in issues #2 through #9.

The complainant filed a petition for judicial review. The Commission's decision was upheld in its entirety by J. Michael Nolan, Circuit Judge, Lincoln County, Wisconsin. The complainant then filed a petition for judicial review with the Wisconsin Court of Appeals, District III. In its decision (Wisconson Personnel Commission, 181 Wis. 2d 845, 512 N.W. 2d 220 (Ct. App. 1994), the Court of Appeals listed the three bases of complainant's appeal as follows:

1. that the Commission had erred by concluding that complainant had not requested medical leave within the meaning of the FMLA;

2. that the Commission had erred by concluding that complainant had not established at the time she requested her medical leave that her serious health condition rendered her unable to perform her work and that the leave was medically necessary;

3. that the Commission had erred by concluding that complainant failed to sustain her burden of proving that respondent had violated the FMLA by denying her leave and by retaliating against her.

This decision went on to hold as follows, in pertinent part:

1. The Court concluded that complainant had made a request for medical leave cognizable under the FMLA and had given respondent adequate "advance notice." In reaching these conclusions, the Court reversed a factual finding of the Commission not on the basis that there was insufficient evidence in the record to support the Commission's finding but on the basis that the Commission's counsel had so "conceded at oral argument" before the Court.

2. The Court characterized the Commission's decision as concluding that an employee, at the time leave is requested, must demonstrate a "serious health condition" which "renders the employee unable to perform his or her employment duties" and that leave is "medically necessary;" and concluded that the employee need not make such a showing at the time leave is requested but instead at the time of hearing;

3. The Court concluded that medical expert testimony was necessary to establish whether complainant's requested leave was medically necessary, and that this testimony had not been made a part of the record due to the failure of complainant's counsel to call Dr. Berg as a witness and due to the failure of the hearing examiner to make a promised ruling on the question of whether medical expert testimony was necessary. The Court stated in this regard that, " . . . we can find no evidence in the record that directly relates to the issue of whether Sieger's leave was medically necessary. Without this evidence, the broader issue of whether DHSS violated FMLA by denying Sieger's requested leave and disciplining her for taking that leave cannot be resolved."

4. The Court reversed a factual finding of the Commission in concluding that the record shows that certain of complainant's co-workers were of the opinion that complainant was "unable" to perform her work duties because of her serious health condition. The Court, in reversing the relevant factual finding, did not

analyze whether substantial evidence existed in the record for the Commission's finding but instead characterized the opinion testimony of these co-workers as "unrebutted." As a result of this new finding, the Court concluded, based on the record before it, that complainant's serious health condition rendered her unable to perform the duties and responsibilities of her job. However, the Court of Appeals also stated in its decision that, "Because the real controversies at Sieger's hearing, whether Sieger's serious health condition rendered her unable to perform her work duties and whether Sieger's leave was medically necessary, were not tried, we reverse the judgment and remand the matter to WPC for a new hearing."

5. The Court's opinion did not review in any substantive manner the Commission's decision of the retaliation issues.

6. The Court's order reversed the judgment of the Commission and remanded the matter "for a new hearing, consistent with this opinion."

On March 23, 1994, the judgment of the Circuit Court ordered that the matter was remanded to the Commission "for a new hearing on all issues." A hearing pursuant to the order of remand was held on July 31, 1995, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on February 26, 1996.

As is apparent from this recitation of the history of this case, questions exist as to the scope of the issues on remand and as to the factual findings on which this decision on remand is to be based.

The basis for the Court of Appeals' decision that a remand was necessary was expressed by the Court as follows: " Because the real controversies at Sieger's hearing, whether Sieger's serious health condition rendered her unable to perform her work duties and whether Sieger's leave was medically necessary, were not tried, we reverse the judgment and remand the matter to WPC for a new hearing." (181 Wis. 2d at 852); and ". . . we can find no evidence in the record that directly relates to the issue of whether Sieger's leave was medically necessary. Without this evidence, the broader issue of whether DHSS violated FMLA by denying Sieger's requested leave and disciplining her for taking that leave cannot be resolved." (181 Wis. 2d at 864). The only issues originally before the Commission which were linked by the Commission or by the Court of Appeals to these questions still to be resolved were issue #1 (whether DHSS violated the FMLA with respect to its decision not to grant the

complainant medical leave for the period of October 17 through October 23, 1989), issue #6 (whether DHSS violated the FMLA with respect to the level of proof required of the complainant to substantiate sick leave requests and the level of scrutiny imposed on the requests made by the complainant versus other employees), and issue #7 (whether DHSS violated the FMLA with respect to the one-day suspension imposed by letter dated November 16, 1989). The other six issues relate to specific acts of alleged retaliation, and the decision of these issues is not dependent upon or affected by the resolution of the questions of medical necessity or inability to perform, i.e., the decision of these issues relates to whether certain actions of DHSS were taken as a result of complainant's request for leave regardless of whether such request or respondent's handling of such request satisfied the requirements of the FMLA. As a consequence, the Commission is of the opinion that, based upon the language of the Court of Appeals decision, the remand would only relate to issues #1, #6, and #7. However, in view of the language of the Circuit Court in the order of remand, the Commission will proceed to address each of the original issues in this case.

Another issue is that relating to the factual findings upon which the Commission is to decide this case on remand. It is well-settled that an administrative agency, in rehearing a case which a court has reversed and remanded, is bound to act on and respect and follow the court's determination of questions of law. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 84 L Ed 656, 60 S. Ct. 437 (1940). It is less clear how an administrative agency, in rehearing a case which a court has reversed and remanded, is to regard factual findings made by the court which conflict with factual findings made by the administrative agency.

The Court of Appeals here, in concluding that complainant had made a request for medical leave cognizable under the FMLA and had given respondent adequate "advance notice" of her leave, reversed factual findings of the Commission not on the basis that there was insufficient evidence in the record to support the Commission's findings but on the basis that the Commission's counsel had so "conceded at oral argument" before the Court:

> Here, WPC found that DHSS knew of Sieger's serious health condition and that her health condition was affecting her ability to perform her duties. WPC conceded at oral argument that both Conway and Grand knew that Sieger was requesting medical

> leave, and that Grand knew that Sieger was requesting medical leave from October 17 to 23. We therefore conclude that Sieger's request for leave was reasonably calculated to advise DHSS that she was requesting medical leave under FMLA because of her serious health condition.

It has been held, in the context of an appeal from a trial court to an appellate court, that a party is estopped from denying a fact conceded at oral argument before the appellate court. National Time Share Sales, Inc. v. Maritime Ltd. Partnership, 297 SC 43, 374 S.E. 2d 678. However, this principle was applied in the cited case to arguments before the court hearing oral argument, not to factual findings upon remand and rehearing.

The Court of Appeals here, in concluding that complainant's serious health condition rendered her "unable to perform her work duties" reversed a factual finding of the Commission by summarizing the Court's interpretation of certain testimony and characterizing it as "uncontroverted:"

> Several coworkers, as well as her supervisor, Grand and Conway, testified that they believed that Sieger was unable to perform her work duties because of her serious health condition. This testimony remains uncontroverted.

The Commission is of the opinion that the preponderance of the credible evidence in the record supports its original factual findings. However, if the decision of the Court of Appeals is to be regarded as the "law of the case" in regard to findings of fact as well as conclusions of law, then the conclusion should be that complainant met her burden of showing that she gave respondent sufficient advance notice of her intent to take leave and that Ms. Grand and Mr. Conway were aware that she was requesting the week's leave for treatment of a medical condition. The Commission regards very seriously its obligation to effect the mandate of the Court of Appeals, and, as a result, will adopt here the Court of Appeals' findings and conclusions on this issue.

As mentioned above, the Court of Appeals also reversed factual findings of the Commission in concluding that complainant's serious health condition rendered her "unable to perform her work duties" by summarizing the Court's interpretation of certain testimony and characterizing it as "uncontroverted" as follows:

> Several coworkers, as well as her supervisor, Grand and Conway, testified that they believed that Sieger was unable to perform her

work duties because of her serious health condition. This testimony remains uncontroverted.

In this regard, the Commission found that, in August of 1989, Dr. Katcher and Mr. Imm were contacted by several of complainant's co-workers who were of the opinion that complainant was exhibiting signs of depression (Finding of Fact 8, page 5 of Decision); and that, as of October of 1989, Ms. Grand was of the opinion that complainant's health condition required treatment and was interfering with her ability to do her job (Finding of Fact 11, page 6 of Decision). The record also reveals as follows in this regard:

- Complainant testified that, during her meeting with Ms. Grand on October 11, 1989, she told Ms. Grand that she was feeling exceedingly stressed, that she was taking medication, that she was seeing Dr. Berg regularly, that she was working with a counselor, and, when questioned about symptoms, indicated that she was feeling tired. (page 60 of transcript)

- Complainant testified that she cried during her conversation with Ms. Grand on the evening of October 13, 1989. (page 75 of transcript)

- Dr. Aronson testified that, during September and October of 1989, complainant at times seemed despondent and, on one occasion, teary-eyed. (page 403 of transcript)

- Dr. Aronson testified that, on October 13, 1989, after complainant had talked to Dr. Berg on the phone, she seemed distressed and was crying.

- Dr. Aronson testified that his "level of concern" about complainant's condition "was much higher in January and February of 1989 (close to and during the time she was hospitalized for depression) than it was in the summer of 1989." (page 421 of transcript)

- Ms. Grand testified that, in observing complainant at work, she concluded that complainant seemed "disjointed from the work situation" and she had observed her staring out the window for long periods of time, having more and more periods of inactivity and of not socializing or communicating with the other staff. (page 465 of transcript)

- Ms. Grand testified that there was a very high stress level generally in the unit at that time. (page 466-7 of transcript)

- Ms. Grand testified that there was a "limitation" on complainant's ability to get her assigned tasks done. (page 470-1 of transcript)

- Ms. Grand testified that she did not question that "health-wise," complainant needed a leave. (page 473 of transcript)

- Ms. Grand testified that some of the staff reported that they heard complainant crying in her office the morning of October 16, 1989. (page 494 of transcript)

- Ms. Bulgrin testified that she saw complainant upset and crying several times during the fall of 1989 and did not feel that complainant was capable of doing her job at those times when she was upset. (page 578 of transcript)

- Mr. Conway testified that he had concerns regarding complainant's performance of her work duties and didn't know whether depression was causing the problems. (page 609 of transcript)

- Mr. Conway testified that he had heard complainant's co-workers use the term depression in referring to complainant's problems but didn't know what the term meant clinically or operationally. (page 624 of transcript)

- Ms. Caldwell testified that, on October 13, 1989, she observed complainant get a call from Dr. Berg and, after the call, complainant "seemed a little upset about something" and "cried a little bit." (page 742 of transcript)

- Ms. Caldwell testified that, after the October 13 call, she observed that complainant was busy typing and that her eyes were red. (page 754 of transcript)

- Dr. Katcher testified that he met with complainant in August of 1989 because certain of her co-workers had reported concerns regarding her "well-being."

- Dr. Katcher testified that he was concerned in August of 1989 after the reports from her co-workers that she "might continue to be suffering from some sort of serious health condition." (page 833 of transcript)

- Mr. Imm testified that, in August of 1989, several of complainant's colleagues asked him to talk to complainant because they were "concerned." (page 966 of transcript)

- Mr. Conway testified that complainant never advised him as to "what in fact the serious health condition was that she was experiencing;" and he never received information about complainant's condition or its effect on her ability to perform her duties and responsibilities. (page 1310 of transcript)

The Commission noted in this regard in its decision as follows:

> In order to qualify for a medical leave, complainant must show that she was "unable to perform her employment duties" during the period of the requested leave. Although the record shows that complainant's chronic depression, in the fall of 1989, was interfering to some extent with her ability to perform the duties and responsibilities of her position, it does not show a clear "incapacity" or "inability" to perform these duties and responsibilities immediately prior to the period of the leave or during the leave. This conclusion is buttressed by the fact that, although complainant claims this incapacity and inability during the period of her leave, she took a college exam during this period; and, although complainant claims that the stress and demands of her job were exacerbating the symptoms of her depression which in turn was rendering her unable to perform the duties and responsibilities of her job during the fall of 1989, she continued to attend classes for two college classes during this period of time. The Commission concludes on this basis that, although complainant had a serious health condition in October of 1989, it did not render her unable to perform the duties and responsibilities of her position within the meaning of §103.10(4), Stats., . . .

The Commission is of the opinion that there is substantial evidence in the original record to support its conclusion that complainant failed to show that she was unable to perform the duties and responsibilities of her position at the time she requested the week's leave. The Commission is also of the opinion that the original record does <u>not</u> show that several of complainant's co-workers, as well as Ms. Grand and Mr. Conway, testified that "they believed that Sieger was unable to perform her work duties because of her serious health condition." This factual finding is in a different posture than the others discussed above in view of the fact that this is one of the issues the Court of Appeals directed be determined on rehearing("Because the real controversies at Sieger's hearing, whether Sieger's serious health condition rendered her unable to perform her work duties . . . ", 181 Wis. 2d at 852), and that new relevant evidence became a part of the record upon remand. As will be discussed below in the Opinion section, the evidence, viewed as a whole, supports a conclusion that the complainant did not sustain her burden to show that her serious health condition rendered her unable to perform the duties and responsibilities of her position during the relevant time period.

The following constitutes the Commission's findings of fact, conclusions of law, and opinion on remand. Language that was not included in the Commission's original decision will be in **bold** type.

Findings of Fact

1. Complainant was employed in nursing positions by respondent from April 9, 1984, to May 11, 1990. Some time in 1985 or 1986, complainant was appointed to a position which had a working title of Genetics Nurse Consultant. Complainant held this position until her resignation on May 11, 1990. This position was located in the Maternal Child Health (MCH) Unit, Section of Family and Community Health, Bureau of Community Health and Prevention (Bureau), Division of Health; and was responsible for providing coordination and consultation statewide to agencies, organizations, and individuals relating to genetic and reproductive health issues; for monitoring all metabolic and genetic disease secondary grants; for monitoring follow-up activities for children identified through the newborn screening program as having certain inborn metabolic abnormalities; and for having input into program decisions affecting the MCH Unit. In October of 1989, the supervisors of the MCH Unit were concerned about upcoming project deadlines and an unusually heavy workload.

2. Prior to August 31, 1989, Garreth Johnson was supervisor of the MCH Unit. Effective August 31, 1989, Mr. Johnson was appointed Acting Chief of the Budget and Management Services Section for the Bureau. On or around March 7, 1990, he received a packet of four documents from Ken DePrey, Director of respondent's Bureau of Personnel and Employment Relations. The first document was a one-page memo dated March 7, 1990, from Mr. DePrey to all DHSS personnel managers stating that attached to the memo was a copy of Chapter 724 of the Wisconsin Personnel Manual which related to "Family/Medical Leave" and providing the names and phone numbers of individuals to whom questions regarding family/medical leave should be directed. The second document was a two-page Department of Employment Relations (DER) bulletin stating that a copy of the provisions of Chapter 724 of the Wisconsin Personnel Manual was attached; that the purpose of Chapter 724 was to provide information for agency administration of the recently enacted Family/Medical Leave Act; that also attached was "a notice which sets forth the rights of state employees under the provisions of family/medical leave law. Copies of this notice must be posted in conspicuous places where notices to employees are customarily posted. Employing agencies who fail to post these notices shall forfeit not more than $100 for each offense."; and providing a summary of the provisions of the Family/Medical Leave Act and implementing

administrative rules. The third document was a one-page document entitled "Notice of State Employees' Rights Under the Wisconsin Family and Medical Leave Act," stating that "Wisconsin law requires all state agencies to display copies of this poster in one or more conspicuous places where notices to employes are customarily posted.", and summarizing the provisions of the Family and Medical Leave Act. The fourth document was a ten-page document setting forth Chapter 724 of the Wisconsin Personnel Manual which summarized and explained the provisions of the Family and Medical Leave Act and its implementing administrative rules in narrative and table formats. Some time between March 7 and March 30, 1990, Mr. Johnson posted the entire set of documents, with the first document on top and the fourth one on the bottom, on a bulletin board in the entrance area of Room 118 of the State Office Building at 1 West Wilson Street in Madison, Wisconsin. This bulletin board would be visible and apparent to those entering Room 118. None of these four documents was posted elsewhere in the Bureau offices or distributed to Bureau staff.

3. Also posted on this bulletin board in Room 118 were a poster and accompanying appendix prepared by the Personnel Commission and generally describing the Commission's authority to review certain personnel transactions, including transactions subject to the Family and Medical Leave Act. These documents were posted in Room 118 prior to March of 1990.

4. In March of 1990, the Madison staff of the Bureau of Community Health and Prevention was housed on Floors 1, 2, 3, and 9 and in the basement of the State Office Building at 1 West Wilson Street. The offices of the Bureau Director and two Section Chiefs, the Bureau FAX machine, and one of the Bureau's two copy machines were located in Room 118. The bulletin board in Room 118 contained, in addition to the documents described above, training notices; Current Opportunities Bulletins listing available positions in state service; minutes of certain Bureau meetings, including the meetings of the Affirmative Action committee; DER Bulletins; a copy of the state's policy on harassment; Governor's proclamations; a notice regarding political activities of state employees; and notices of emergency procedures. The other bulletin board located within the Bureau contained DER bulletins, issue-specific notices, social notices, tornado safety rules, news articles, calendars for yearly plans for Bureau programs, and training notices specific to Bureau issue areas. Complainant's office was located in Room 131 at 1 West Wilson Street.

Complainant had occasion to enter Room 118 approximately three times each week.

5. The Director of the Bureau at all relevant times was Ivan Imm. Prior to August 31, 1989, Thomas Conway was Chief of the Bureau's Budget and Management Services Section. Effective August 31, 1989, Mr. Conway was appointed as Acting Deputy Chief of the Section of Family and Community Health. At all relevant times, Murray Katcher was the Chief of this Section. Dr. Katcher is a licensed physician. As Acting Deputy Chief of this Section, Mr. Conway was the supervisor of the MCH Unit. On or around September 4, 1989, Anita Grand, a Public Health Nurse, was assigned to be the leadworker of the MCH Unit. As lead worker, Ms. Grand was responsible for screening travel requests for training and conference approval, for attending PPD (performance planning and development) sessions, for helping the staff to schedule their time commitments, for prioritizing work and giving assignments, for controlling the flow of work in the MCH Unit, for communicating management directives to the staff, and for conducting MCH Unit staff meetings. Mr. Conway was responsible for approving travel vouchers for reimbursement, Automated Personnel System (APS) time sheets, AD-19 leave request slips, and monthly leave accounting slips. MCH Unit staff understood that they were to report their absences to Ms. Grand and to submit their travel vouchers, APS time sheets, and AD-19 leave request slips to her. Ms. Grand would review and initial them and then submit them to Mr. Conway for approval. Millie Jones, a member of the MCH Unit staff, testified at hearing that she clearly understood that Ms. Grand had no authority to approve such travel vouchers or leave requests. Mr. Conway strictly interpreted applicable procedural and other requirements and frequently consulted with and relied upon others within DHSS to assist him in rendering these interpretations. When Mr. Johnson had been supervisor of the MCH Unit, he had applied a less strict interpretation of travel, time, and leave accounting requirements. During both Mr. Johnson's and Mr. Conway's tenures as supervisor of the MCH Unit, complainant was not sure who her supervisor was. During this time period, Mr. Johnson or Mr. Conway signed complainant's position descriptions, travel vouchers, and leave request forms as her supervisor.

6. In January of 1989, Mary Berg, M.D., became complainant's treating psychiatrist. When Dr. Berg first examined complainant on January 27, 1989, she diagnosed a major depressive

disorder. Dr. Berg prescribed the drug Prozac for complainant on an outpatient basis at that time but, when she learned that complainant's friends could no longer accept responsibility for her 24-hour-a-day care, she admitted complainant to the hospital on February 9, 1989. Complainant continued on Prozac and participated in individual and group therapy during her hospitalization. Complainant was discharged from the hospital on February 19, 1989, and returned to work a few days later. During her hospitalization, complainant was on an approved medical leave from her position with respondent. Complainant's co-workers in the MCH Unit and her supervisors were aware of this hospitalization and that it was due to depression.

7. The diagnostic and progress notes made by Dr. Berg during her meetings with complainant on January 27, January 30, February 7, and February 10, 1989, included detailed information relating to complainant's personal life and symptoms. In the History and Physical report she prepared on February 9 or 10, 1989, Dr. Berg indicated as follows, in pertinent part:

> This patient came to my attention through the emergency room a week ago when I was on call. At that point the patient was very distraught and crying and was not able to function at work. . . . At the time the patient was seen yesterday in my office, it was immediately apparent that she was not functioning. She had not gone to work. She spent most of the time crying and again felt hopeless, wondered if she would ever get well again, and agreed to admission.
>
> * * * * *
>
> . . . The patient, however, has become much more distraught, very depressed, and agitated since that time [Christmas 1988] and has had some fleeting suicidal ideation with feelings of hopelessness and helplessness and has not gone to work for about a couple of weeks now.
>
> On mental status, the patient does remain very depressed. . . she is depressed to the point that she does feel hopeless and wonders if she is every going to get well again. She has questionable suicidal ideation and is completely nonfunctional.

8. After her discharge from the hospital, complainant met with Dr. Berg for regularly scheduled appointments on March 2, May 1, May 24, August 2, August 19, September 19, October 10, October 28, November 20, 1989, and January 16, March 26, May 14, and August 6, 1990. Complainant discontinued treatment with Dr. Berg on August 6, 1990. Dr. Berg's notes from the March 2, 1989, meeting reference complainant's problems sleeping, content of her dreams, plans to see her twin brother, her twin brother's injuries in an accident, and group therapy. Dr. Berg's notes from the May 1, 1989, meeting, reference another person's desire for complainant "to come," and complainant's interest and participation in music activities. Dr. Berg's notes from the May 24, 1989, meeting reference her work situation and her relationship with her family. Dr. Berg's notes from the August 2, 1989, meeting reference complainant's career plans and her intent to use her maiden name in applying for a new job. Dr. Berg's notes from the August 19, 1989, meeting reference a call that Dr. Berg received from certain of complainant's co-workers relaying their concerns about complainant, complainant's displeasure that they would contact Dr. Berg and her instructions to Dr. Berg not to give them any information, and the fact that complainant had applied for another job and had used her maiden name in applying. The entry in Dr. Berg's notes for October 10, 1989, states in its entirety:

> Dis[cussed] plans for Arizona
> D[is]C[ontinue] Prozac

Dr. Berg's notes from the October 28, 1989, meeting reference complainant's job and the program director's attitude, that complainant intended on meeting with the union, and that jobs in Phoenix look good. Dr. Berg's notes from the November 20, 1989, meeting reference complainant continuing her school program and that she had presented a paper at a meeting. Dr. Berg's notes from the January 16, 1990, meeting reference complainant's schooling, participation in swimming and volleyball, career options, and grievances filed relating to her current job which

was very demoralizing. Dr. Berg's notes from the March 26, 1990, meeting reference complainant's job situation. Dr. Berg's notes from the May 14, 1990, meeting reference that complainant had quit her job, and that she appeared much happier. Dr. Berg's notes from the August 6, 1990, meeting reference a discussion of complainant's career plans and note that complainant was doing well.

9. During her meeting with complainant on October 10, 1989, Dr. Berg wrote out a statement on a standard prescription form to the effect that: "I am recommending one week leave of absence for Janice Sieger. Thank you for your cooperation."

10. It is usual and customary medical practice for a psychiatrist, when recommending that a patient take time off from work, to base the recommendation on the existence of certain target symptoms; to establish as the goal of the leave the elimination of such target symptoms, i.e., the prescription that the patient return to work would be based on the elimination of such target symptoms; to document in his or her treatment notes the nature of such target symptoms and the fact that a leave was prescribed; to document in the prescription the recommended starting date of the leave; and, if the recommendation is based on a diagnosis of depression, to prescribe that the leave begin immediately. A target symptom which would justify a prescription that a patient take time off from work is a symptom being experienced by a patient which is interfering with his or her ability to work. If difficulty concentrating is the target symptom identified as the basis for prescribing time off from work, it is usual and customary medical practice for a psychiatrist to administer a test or tests to the patient during an office visit to measure this target symptom, and to document both the identification and measurement of this target symptom in the treatment notes.

11. The symptoms which complainant was experiencing on or around October 10, 1989, were as follows:

a. insomnia which resulted at least in part in complainant "feeling tired"--Dr. Berg prescribed during her

meeting with complainant on October 10, 1989, that complainant discontinue taking Prozac as a means of assessing whether the Prozac was causing the insomnia; the record does not show that this symptom interfered to any significant extent with complainant's ability to work;

b. withdrawal or distancing herself from others--Dr. Berg related this symptom primarily to complainant's displeasure with her co-workers for contacting Dr. Berg with their concerns about complainant; the record does not show that this symptom interfered to any significant extent with complainant's ability to work;

c. crying on a few occasions--the record does not show that this occurred on a significant number of occasions during the relevant time period or that this symptom interfered to any significant extent with complainant's ability to work.

d. difficulty concentrating--although Dr. Berg testified that this may have led to some procrastination by complainant, the record does not show that this symptom interfered to any significant extent with complainant's ability to work.

12. After complainant's discharge from the hospital on February 19, 1989, she had regularly scheduled meetings with Dr. Berg. The primary purpose of these meetings was to permit Dr. Berg to monitor complainant's medications. Dr. Berg first prescribed Prozac for complainant during their first meeting on January 27, 1989. On February 9, 1989, Dr. Berg increased complainant's Prozac dosage from 20 milligrams once a day to 20 milligrams twice a day. At the end of March of 1989, Dr. Berg discontinued Prozac for complainant. On May 1, 1989, Dr. Berg restarted complainant on Prozac once a day and complainant stayed on this dosage until October 10, 1989, when Dr. Berg discontinued Prozac for complainant in order to determine whether the Prozac was causing complainant's insomnia. On October 28, 1989, Dr. Berg restarted complainant on Prozac once a day for three days and then twice a day thereafter. During the

relevant time period, Prozac was the only medication Dr. Berg prescribed for complainant.

13. Dr. Berg testified that, during 1989 but after the discharge from the hospital, complainant, although she experienced certain symptoms of depression, such as low self-esteem, insomnia, inability to concentrate, dysphoria (unhappiness), her experience of these symptoms was not to any severe degree where she could not function.

14. On August 17, 1989, Dr. Berg got a call from certain of complainant's co-worker(s) reporting concerns that she was distancing herself from others at work and may be relapsing. Dr. Berg testified that the person(s) reporting this did not say "anything that [complainant] couldn't function or wasn't doing her job." When Dr. Berg reported this contact to complainant during their next regularly scheduled meeting, complainant was very upset because she felt that, on the surface at least, she had been functioning at the office so those reporting this to Dr. Berg must have been monitoring her psychiatric status instead of her work performance, and because she resented the interference of her co-workers in her personal life. After that, complainant reported to Dr. Berg that this incident had resulted in a reduced ability to concentrate at work and withdrawal from others and that at least part of the reason for the withdrawal was to prevent any further intrusion by co-workers into her personal life. As a result of this report by complainant as well as the impression given to Dr. Berg by complainant that there was a personality conflict between complainant and "her boss," Dr. Berg suggested, prior to October 10, 1989, that complainant look for a different job. On or around this same period of time, complainant's minister also advised her to look for another job. Complainant testified at hearing that she "had no idea" why Dr. Berg and her minister would give her that advice.

15. In August of 1989, Dr. Katcher and Mr. Imm were contacted by several of complainant's co-workers who were of the opinion that she was exhibiting signs of depression. Dr. Katcher and Mr. Imm set up a meeting with complainant to discuss these contacts. Complainant was surprised when she was advised of these contacts and asked for the identities of these co-workers.

Dr. Katcher and Mr. Imm encouraged her to consult with her physician. Dr. Katcher had tried to contact Dr. Berg in February of 1989 to discuss concerns complainant had shared with him relating to complainant's first appointment with Dr. Berg but he had been unable to get through to Dr. Berg at that time and did not try to contact her at any other time. Mr. Imm did not attempt to contact Dr. Berg at any time.

16. Complainant did not have an appointment with Dr. Berg between October 10 and October 28, 1989. Complainant testified that she had an appointment and met with Dr. Berg on October 16, 1989, and on a Saturday "during that week," and that she cancelled a class and a lab that week in order to meet with Dr. Berg. October 21 and October 28, 1989, were Saturdays.

17. It is not uncommon for treating psychiatrists not to be objective evaluators of the treatment decisions they have made. It is not uncommon for treating psychiatrists to become personal advocates for their patients. Although a treating psychiatrist generally has the most information about his or her patient, he or she may not be the best or most objective evaluator of such information.

18. In the opinion of respondent's expert witness, a psychiatrist familiar with depression and whose regular duties include reviewing the work of other psychiatrists, Dr. Berg's prescription for the week's leave, and documentation of the leave and the basis for the leave did not comport with usual and customary medical practice; if Dr. Berg had believed on October 10, 1989, that complainant needed to be off work for a week due to her depression, the need for leave would have been immediate and Dr. Berg's testimony that it would have been fine for complainant to have taken the leave a week or 10 days later didn't make sense; that, as of October 10, 1989, complainant's health condition did not render her unable to perform her employment duties; and that the week's leave was not medically necessary since no target symptoms that needed to be addressed were documented by Dr. Berg, and since class attendance and taking a college exam were inconsistent with the necessity for a medical leave.

19. In a letter dated August 23, 1990, the stated purpose of which was to detail complainant's progress since her discharge from the hospital on February 17, 1989, Dr. Berg stated that, "Since the discharge, this patient has definitely not been suicidal and has made excellent progress. . . . This patient had a major depression which was resolved during her hospitalization."

20. During the summer of 1989, complainant met with Mr. Imm and told him that she would like to enter medical school some time in the future and that she needed to take certain preparatory courses. Mr. Imm encouraged complainant to pursue this goal. Complainant and Mr. Imm did not discuss specific classes in which complainant intended or desired to enroll in the fall of 1989, Mr. Imm did not give complainant approval to enroll in specific classes in the fall of 1989, and Mr. Imm did not give complainant approval to modify her work schedule to enable her to take specific classes during the fall of 1989. To have done so at that time would have been inconsistent with Mr. Imm's usual practice. Complainant applied to enter medical school in the fall of 1990 but was told she had not completed the required prerequisites. Complainant did not ascertain what such required prerequisites were.

21. In mid-September, 1989, Ms. Grand noticed that complainant left the office during work hours at the same time each week. Ms. Grand asked Mr. Conway, Mr. Imm, and Dr. Katcher if any of them had approved complainant's absences during these times and none of them indicated that he had. Ms. Grand and Mr. Conway then met with complainant in September of 1989 to discuss these absences. Complainant first told them that it was none of their business and then reluctantly told them that she was attending classes and that her attendance had been approved by Mr. Imm some time in July of 1989. It was MCH Unit practice to advise the Unit's receptionist of the duration and purpose for an absence from the work site. Complainant did not do this in regard to these absences. Complainant had not filed leave slips in regard to these absences. Mr. Conway counseled complainant that she was required to get prior approval and to take appropriate leave for such absences.

22. Complainant presented the prescription for a week's leave from Dr. Berg to Ms. Grand on the morning of October 11, 1989. In their ensuing discussion, complainant advised Ms. Grand that Dr. Berg was encouraging her to take some time away from work to make some personal decisions, including career and education decisions. Ms. Grand questioned whether one week's time

would be enough to make these important life decisions. Complainant advised Ms. Grand that she did not have enough leave time remaining to take more than one week. Ms. Grand reminded complainant that her position and the MCH Unit in general had several projects in critical stages and this would have to be one of the factors considered before approving or scheduling any leave. Complainant gave Ms. Grand an oral summary of the meetings and deadlines already scheduled in relation to her position. Complainant did not indicate to Ms. Grand when she would like the leave to commence, **but Ms. Grand assumed that complainant wanted to take the leave the following week, i.e., the week of October 16, 1989.** Ms. Grand did not indicate that the leave was approved and did not recommend what type of leave, e.g., sick leave, vacation, personal holiday, would be appropriate if the leave were approved. As of October, 1989, Ms. Grand was of the opinion that complainant's health condition required treatment and was interfering with her ability to do her job. After this discussion, Ms. Grand gave Dr. Berg's writing to Mr. Conway.

23. On Thursday, October 12, 1989, complainant gave to Diane Nelson, the secretary for the Section of Family and Community Health, a schedule indicating that she intended to begin a week's leave on October 17, 1989. It was the practice for MCH Unit staff to submit weekly schedules to Ms. Nelson on Thursday of the previous week **and for Ms. Nelson to prepare a master schedule and distribute it on Friday or Monday.**

24. At Mr. Conway's request, a meeting was held on Friday, October 13, 1989, to discuss complainant's request for leave. Present at this meeting were complainant, Ms. Grand, and Mr. Conway. At the commencement of the meeting, Ms. Conway presented to complainant a memo addressed to her dated October 13, 1989, which stated as follows:

> Anita Grand, RN, Leadworker for MCH Unit shared with me your physician's recommendation for a one week leave.
>
> We want to be as supportive as possible. It is not clear to me how the leave will be helpful to resolve this situation. In order for me to authorize the leave, I need more information; specifically I need to talk with your physician about:
>
> 1). How is this leave going to be helpful?
> 2). What is this leave going to accomplish?

> I suggest you contact your physician and let me know so that I can call her.
>
> All absences during scheduled work periods must be reported on a leave request/report (AD-19).
>
> Based on a leave accounting report for pay period 20, ending 9/23/89, Jan Sieger's leave balances are as follows:
>
> A. Sick Leave: 217 hours, 17 minutes
> B. Vacation: 20 hours, 30 minutes
> C. Saturday/Personal Holiday: 8 hours
>
> You should prepare a leave request/report (AD-19) for the period of leave she requested and give it to Anita Grand. You should attach a copy of the physician's recommendation. Anita, as leadworker, should review, recommend approval or disapproval. Based on that and from my discussion with your physician, I will approve or disapprove.
>
> As an employee represented by United Professionals for Quality Health Care (UP/QHC) the use of leave (vacation, sick, personal, or Saturday /legal) are set by Article VI, Section 4, Paragraph 1. This contract has been extended by both parties and so is still in effect.

In the ensuing discussion, Mr. Conway indicated to complainant that her request appeared to involve an appropriate use of the sick leave privilege but that he needed the information from Dr. Berg requested in the memo in order to make a final decision. Mr. Conway was referring to the sick leave privilege governed by the terms of the applicable collective bargaining agreement. Complainant indicated that she would contact Dr. Berg to let her know of Mr. Conway's request for more information. Mr. Conway had consulted with Mr. Imm before drafting the October 13 memo. Mr. Conway had also consulted with Earl Kielley, manager of the employment relations staff of respondent's Bureau of Personnel and Employment Relations, before drafting such memo. Mr. Kielley's advice was based on his interpretation of the applicable collective bargaining agreement. In Mr. Kielley's opinion, the terms of the applicable collective bargaining agreement were more generous than those of the Family and Medical Leave Act and, therefore, should take precedence.

25. Immediately after this meeting, at 11:46 a.m., complainant placed a telephone call to Dr. Berg's office and left a message with her answering service to indicate that complainant had called Dr. Berg. Complainant did not request that the call be returned or explain the purpose of the call but did leave a

phone number where she could be reached. Dr. Berg returned the call at 4:00 p.m. Complainant telephoned Ms. Grand at home that evening and told her that Dr. Berg refused to talk to Mr. Conway because she felt that the information contained in her note on the prescription form should be adequate. Ms. Grand advised her that complainant should discuss the matter with Mr. Conway on Monday morning. Ms. Grand then telephoned Mr. Conway to advise him of the substance of complainant's call and they agreed to discuss the matter the next week.

26. It was Dr. Berg's understanding upon learning from complainant, on or around October 13, 1989, that respondent had requested to talk to Dr. Berg, that this was not a requirement in order for complainant to be granted the prescribed leave, and that complainant felt that her employer was just being nosy and didn't need to have this information. Dr. Berg would have spoken to complainant's employer and provided the requested information if she had been informed that this was a requirement for granting the prescribed leave and if complainant would have allowed her to talk to respondent. Dr. Berg understood that the release of medical information is within the control of the patient. Complainant testified that, in her October 13, 1989, conversation with Dr. Berg, she told Dr. Berg that, in order for complainant to get the leave, her employer needed to speak with Dr. Berg. When Dr. Berg and complainant met on October 28, 1989, for complainant's regularly scheduled appointment, complainant told Dr. Berg that respondent had denied her request for a week's leave. Dr. Berg asked complainant why the request had been denied but complainant didn't give Dr. Berg any specific reason for the denial.

27. On Monday, October 16, 1989, Ms. Grand initiated a conversation with complainant at 11:45 a.m. to discuss the status of her leave request. Complainant advised Ms. Grand that, since she understood that her sick leave request would not be granted since she hadn't met the condition of her doctor talking to her employer, she would take vacation, personal holiday, and Saturday holiday leave time for the requested leave. Ms. Grand reminded her that Mr. Conway would have to make the decision regarding the leave request. Complainant became very upset and abusive during this meeting. Complainant did not discuss the leave request or

attempt to discuss the leave request with Mr. Conway on October 16. After her meeting with Ms. Grand, complainant filled out leave slips for the afternoon of October 16 and for all of October 17, 18, 19, 20, and 23. Complainant recorded a combination of 11.5 hours of vacation leave, 8 hours of personal holiday leave, 8 hours of Saturday holiday leave, and 16 hours of leave without pay on these leave slips. Complainant left these leave slips on her desk and left for a work-related meeting which had been previously scheduled for 12:30 p.m. at the University of Wisconsin. Complainant called the MCH Unit after this meeting ended at 2:00 p.m. and spoke to Celestine Caldwell, the Unit's receptionist. Complainant instructed Ms. Caldwell to take the leave slips off her desk and to turn them in to Ms. Grand. Ms. Caldwell took the leave slips off complainant's desk and placed them in Ms. Grand's office mail slot. Complainant did not return to work until October 24, 1989, and did not contact Ms. Grand, Mr. Conway, or any supervisor during this absence. When Ms. Grand discovered complainant's leave slips in her office mail slot on the afternoon of October 16, she gave them to Mr. Conway and summarized for him her conversation with complainant earlier that day. Complainant did not attend classes the week of October 16 but did take a school exam during that week. **Complainant had reported to Dr. Berg on or before October 10, 1989, that she was behind in her class work.**

28. In a letter to complainant dated October 18, 1989, Mr. Conway stated as follows, in pertinent part:

> I received the attached leave request/reports (AD-19) from Ms. Anita Grand, R.N., MCH Unit Leadworker.
>
> Because you failed to comply with the requirements identified in my October 13, 1989 memo given to you at 10:15 a.m. on October 13, and your subsequent departure from the workplace on Monday, October 16, without approval, you are in a condition of unauthorized absence.
>
> Subsequent absences without prior approval will also be considered unauthorized.
>
> Upon your return to work, I will schedule a pre-disciplinary meeting to determine the following:
>
> (1) The basis for your unauthorized absence; and
>
> (2) Why you failed to comply with the requirements of the 10/13/89 memo.

> It is important that you understand I did not receive the information necessary to approve your absence before your departure from the workplace.
>
> I have annotated these leave request/reports (AD-19) as "disapproved, unauthorized absence."
>
> Your Automated Personnel System (APS) timesheet (DMS0784) for Pay Period Number 22, for period: 10-08-89 - through 10/21/89, will be annotated "unapproved absence, leave without pay" for those hours of absence from the workplace without approval.

29. Complainant and Mr. Conway did not discuss the subject absence from work until a November 1, 1989, predisciplinary meeting. As a follow-up to such meeting, complainant received a letter dated November 16, 1989, from George F. MacKenzie, Administrator, Division of Health, DHSS, which stated:

> This is official notification of a disciplinary suspension of one (1) day without pay for violation of Department of Health & Social Services Work Rule #1 which prohibits disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions and Work Rule #7, failure to provide accurate and complete information when required by management or improperly disclosing confidential information; and Rule #14, failure to give proper notice when unable to report for or continue duty as scheduled, tardiness, excessive absenteeism or abuse of sick leave privileges. Your day of suspension without pay is Tuesday, November 28, 1989, You are to return to work on Wednesday, November 29, 1989, at 8:00 a.m.
>
> This action is being taken based on the following incident: On October 10, 1989, you presented to your leadworker, Anita Grand, a note from your physician recommending a one-week leave of absence. On October 13, 1989, at a meeting with your leadworker and your supervisor, Tom Conway, Mr. Conway directed you verbally and in writing that he would not approve the leave without sufficient information to answer (1) how the leave was going to be helpful and (2) what it was going to accomplish.
>
> On October 16, 1989, you gave leave request/reports (AD-19) to your leadworker and left the workplace. Mr. Conway annotated your leave request/report "disapproved, unauthorized absence" and returned them to you. You returned to the workplace on October 24, 1989.
>
> Mr. Conway conducted a pre-disciplinary hearing on November 1, 1989, attended by yourself and your union representatives, Ms. Kathy Schroeder and Mr. Joe Schirmer.
>
> Future violations of these work rules or others may lead to further disciplinary action up to and including discharge.

> If you believe this action was not taken for just cause, you may appeal through the grievance procedure according to Article IV of the Collective Bargaining Agreement.

30. Before recommending a one-day suspension without pay, Mr. Conway, after requesting assistance from an employee of respondent's Bureau of Personnel and Employment Relations, had consulted with a fellow supervisor who advised him of a three-day suspension of an employee who had engaged in fraud and had lied to a supervisor. Mr. Conway has not disciplined any other employee for an unauthorized absence. The record does not show that Mr. Conway regarded or should have regarded any other subordinate employee as having had an unauthorized absence.

31. On one occasion, Susan Tillema, a subordinate of Mr. Conway's, had used earned compensatory time as the basis for an absence from work without getting prior approval from Mr. Conway and without filling out an AD-19 form prior to the absence. Mr. Conway had counseled her in regard to this matter but had not recommended discipline. Ms. Tillema had followed a procedure which had been acceptable to Mr. Johnson in regard to this absence.

32. In August of 1989, as the result of a compromise reached by the Legislature and the Governor, respondent's Division of Health was directed to eliminate 10 full-time positions funded by Maternal and Child Health (MCH) block grants. In an August 24, 1989, memo to Patricia Goodrich, Secretary, DHSS, Mr. MacKenzie indicated that he understood that the purpose of these cuts was to reduce the use of MCH monies for administrative activities in favor of direct services activities of local communities; that every effort would be made to relocate affected employees within the Division of Health and to avoid layoffs; that a cut of approximately 5.95 FTEs would come from some combination of activities and positions from the Bureau of Community Health and Prevention, the Center for Health Statistics, and the Bureau of Environmental Health; and that affected Bureaus/Offices were required to submit their recommendations in this regard on or before September 6, 1989. Mr. Imm was directed to prepare a list of 10 FTE positions within the Bureau of Community Health and Prevention which he would recommend for elimination in response to this directive, to list these positions in priority order, to explain the rationale for this prioritization, and to submit the list and accompanying information to Bill Schmidt and John Chapin of the Division of Health on or be-

fore September 6, 1989. As a result, Mr. Imm prepared his recommendations, including a list of positions within the Bureau. This list included 12.35 FTE positions since the Bureau had been directed to cut 2.5 FTE positions as the result of a legislative initiative relating to an injury-related program. Mr. Imm divided his recommended list into two sections. The first section represented 6.70 FTE positions which he understood at that time to represent the maximum number of FTE positions his Bureau would have to cut in response to both cutback directives; and which were the positions for which he had been able to locate alternative funding sources or redeployment alternatives. Mr. Imm had exhausted alternative discretionary funding source possibilities with these positions in the first section of the list. Complainant's position was the first position in the second section of the list. Some time during the week of October 9, 1989, Mr. Imm received a telephone call from Bill Schmidt, Assistant Administrator of the Division of Health, advising him that the cuts proposed by Mr. Imm were not sufficient, that a cut of another .3 FTE position was required, and that Mr. Imm's recommendation in relation to this additional cut had to be made immediately. Mr. Imm recommended to Mr. Schmidt in this same conversation that this cut should be taken out of the next position on the list. This position was that of complainant. Complainant was the only Bureau employee who received a reduction in hours/pay as the result of the cuts. There were many nursing positions within the Division of Health and Mr. Imm presumed that, if complainant would not have accepted the reduction in her position, she would have had displacement rights into one of these positions and would not have been laid off.

33. Mr. Imm and Mr. Conway met with complainant on October 24, 1989, which was her first day at work after Mr. Imm had been advised of the additional .3 FTE position cut by Mr. Schmidt. Mr. Imm and Mr. Conway advised complainant of the proposed 30% cut in her position; of her option to accept the 70% position or to request that other options such as transfer, reassignment, or the preparation of a layoff plan be explored; and requested that she let Mr. Imm know of her decision as soon as possible. Complainant participated fully in the meeting, asking questions regarding the options which had been outlined and a question regarding a vacant nursing position in the Health Care Financing unit of the Division of Health. As of November 27, 1989, complainant had not advised Mr. Imm of her decision in this regard. As a result, Mr. Imm, in a letter to complainant dated November 27, 1989, instructed her to

advise him of her decision "by close of business on Thursday, November 30, 1989." In a memo to Mr. Imm dated November 30, 1989, complainant stated: "This is to acknowledge your letter informing me of the reduction of the Genetic Nurse Consultant position to .70 FTE, effective January, 1990. I expect to continue working in the genetics consultant position in January." To verify that he correctly understood her memo, Mr. Imm stopped by complainant's office upon his receipt of her memo. Complainant indicated to Mr. Imm at that time that she clearly understood the 30% reduction in her position and she accepted it. Due to the anticipated effective date of the reduction in complainant's position of January 1, 1990, the necessary budgetary and personnel paperwork was required to be completed immediately. A new position description for complainant's position was drafted which noted a 30% reduction in time but which did not alter the duties and responsibilities of the position in any significant way. Ms. Grand, Mr. Conway, Dr. Katcher, and Mr. Imm wanted an opportunity to work with the 70% position for a period of time before recommending which duties and responsibilities should be curtailed or eliminated. Complainant was advised to set her own priorities and use her time as effectively as possible.

34. Certain of the duties and responsibilities of appellant's position related to the Newborn Screening program. The funds generated as part of this program constitute the Newborn Screening Surcharge Fund. Mr. Imm did not consider transferring the funding of appellant's position to this Fund because the Fund itself had no position authorization and previous requests for position authorization or increased spending authority under the Fund had not been approved by the DHSS Office of Policy and Budget or the Legislature. Monies from the Fund have been used primarily to purchase infant formula and for grants to entities outside state government. The state had no authority under the Fund to award grants to an agency of state government.

35. Mr. Imm did not consider using funds from the Woman, Infants, and Children (WIC) program to fund complainant's position because the mandatory cap on the WIC administrative costs budget would have been exceeded as a result and because the duties and responsibilities of complainant's position did not satisfy WIC program requirements.

36. Although there was a vacant dentist position in the Bureau at the time of the cutback in positions, Mr. Imm did not consider using the salary savings from this vacancy to fund complainant's position because savings

from this vacancy had not remained in the Bureau's salary line at the end of the previous fiscal year but were used at the Division of Health level for local aids. Mr. Imm did not use the position's prospective funding to fund complainant's position because he intended to fill the position.

37. Mr. Imm did not consider using AIDS funds (funds related to the Acquired Immune Deficiency Syndrome program) to fund complainant's position since the duties and responsibilities of complainant's position did not relate to the AIDS disease.

38. On November 6, 1989, complainant telephoned Ms. Grand in the morning to advise her that she would not be coming in to work that day since she had just learned that her former brother-in-law had been killed and that her sister had been in a car accident in Arizona. Complainant requested that she be allowed to use sick leave for this day's absence in a leave request form (AD-19) that she signed on November 7, 1989. In accordance with her usual practice, Ms. Grand initialed this AD-19 to indicate that she had received it and reviewed it and then she submitted it to Mr. Conway for his approval or disapproval. Mr. Conway contacted respondent's Bureau of Personnel and Employment Relations and consulted with Mr. Kielley who advised Mr. Conway that the reasons presented by complainant for her leave did not satisfy the requirements for use of sick leave under the applicable collective bargaining agreement. In a memo to complainant dated November 9, 1989, Mr. Conway stated as follows:

> Anita Grand, R.N., MCH Unit leadworker, gave me the attached leave request/report (AD-19) for your absence on Monday, November 6, 1989.
>
> I understand you called Ms. Grand and informed her that your sister was involved in a car accident in Arizona and your former brother-in-law died.
>
> I am returning the leave request/report to you unapproved. Unfortunately, neither of these situations is a legitimate use of the sick leave privilege. I will approve your use of eight (8) hours of Personal Holiday (Code 07), if you can verify these incidents.
>
> Your have until 4:30 p.m. Thursday, November 16, 1989, to provide me documentation.
>
> If you do not provide me documentation, I'll consider the absence unauthorized and schedule a predisciplinary meeting.

> From now on, any time you are unable to report for or continue duty as scheduled, you will contact me directly. My phone number is 266-2684.
>
> In my absence you may leave a message for me with Ms. Jeri Schad and a phone number where I can contact you. Ms. Schad's phone number is 267-5114.

Mr. Conway had never before asked a subordinate to provide documentation for use of a personal holiday. Mr. Conway did so here based on his opinion that complainant had taken unauthorized leaves in September of 1989 (See Finding of Fact 9, above) and in October of 1989 (See Findings of Fact 10-18, above). Complainant grieved Mr. Conway's actions in regard to her November 6, 1989, absence pursuant to the terms of the applicable collective bargaining agreement and her grievance was upheld at the second step by John Chapin, Assistant Administrator of the Division of Health. In his decision, Mr. Chapin stated, in pertinent part:

> The denial of sick leave because of a doubt as to the veracity of Ms. Sieger's statements as to a death of a brother-in-law shows an unbelievable lack of sensitivity, as does the strictest of interpretations that a divorce ends the bonds between an individual and his/her in-laws. Mr. Conway is not to be faulted, as he only followed very poor advice on this issue.

39. Mr. Conway monitored complainant's use of leave after October 16, 1989, more closely than that of his other subordinate employees. Mr. Conway modified complainant's time sheets as well as those of other subordinate employees in order to bring them into compliance with applicable requirements. Complainant and other subordinate employees of Mr. Conway's received a copy of each of their time sheets, including those which had been modified by Mr. Conway. Complainant never discussed such modifications with Mr. Conway. The amount of sick leave earned by complainant was reduced during those pay periods in which she took leave without pay and those in which her position was at a 70% level. The record does not show that complainant's sick leave balance was incorrectly computed or recorded by respondent.

40. On or around January 11, 1989, complainant filed a Travel/Training request form with Ms. Grand seeking approval for leave and for tuition reimbursement in relation to 4 courses at the University of Wisconsin-Madison: Population Genetics, Introduction to Medical Physics, Organic Chemistry

Lecture, Organic Chemistry Lab. This form listed the titles of the four courses, that the starting date for such courses was January 22, 1990, that the tuition for the four courses would be $672, and that the courses would consume 10-12 hours per week during scheduled work hours. This form did not provide a description of such courses. In a memo to complainant signed by Mr. Conway on January 17, 1990, he requested that she fill out a separate Travel/Training request form for each course and provide the course schedules and a brief description of such courses. This request was consistent with respondent's standard procedure. Complainant provided some of the requested information to Mr. Conway on January 22, 1990. This information did not indicate the days or times that such courses met during the week. Mr. Conway consulted with Dr. Katcher before concluding that only the Population Genetics course was related to the duties and responsibilities of complainant's position. Dr. Katcher was of the opinion that organic chemistry and medical physics had little, if anything, to do with complainant's job duties and responsibilities and that the chemistry and physics training she received as part of her basic nursing training was sufficient for complainant to perform the duties and responsibilities of her position. Dr. Katcher was also of the opinion that the Populations Genetics course, although not necessary for complainant's performance of the duties and responsibilities of her position, could be helpful and his recommendation to Mr. Conway gave her the benefit of the doubt in this regard. On January 24, 1990, Mr. Conway approved complainant's request relating to the Population Genetics course; Mr. Imm approved this request on January 25, 1990. On January 25, 1990, Mr. Conway denied complainant's request relating to the other three courses. Complainant dropped the two chemistry courses as a result of this denial and received a partial tuition refund as a result. The standard procedure within the Bureau is for approvals and denials of such leave/tuition reimbursement requests to be forwarded to Mr. Johnson and then to Mr. Imm and Mr. McKenzie for their review and signature. This was not done in regard to these requests filed by complainant. It was Mr. Johnson's responsibility to forward such requests to the appropriate Bureau Director and Division Administrator. The applicable collective bargaining agreement provides that leave and tuition reimbursement for courses such as those for which complainant requested leave and tuition reimbursement are appropriate only when a course is job-related.

41. In a memo dated May 10, 1990, complainant stated as follows:

> Subject: Invoice for Tuition Reimbursement, Course #620 Population Genetics, Spring Semester 1990
>
> This memo constitutes claim for reimbursement for the tuition paid for the course Genetics 620.
>
> | | |
> |---|---|
> | Portion of tuition attributable to Genetics 620: Population and Quantitative Genetics | $133.00 |
>
> Attached you will find the face sheet of the final exam, which indicates the course title, semester taken, (Spring 1990), instructor, (Engels), and Grade for the course. This constitutes all available documentation of my successful completion of the course.
>
> Please send payment to my home address as indicated on FAJ 24272 PO. Thank you.

Attached to this memo was a copy of a document with a title of "Genetics 620 Population and Quantitative Genetics Spring 1990 Engels" and with complainant's name and "C" (adjacent to the words "Grade for course") written in; and an invoice indicating that the tuition for the Population Genetics course was $100.00. This information was submitted to the Bureau's Budget and Management Services Section and was routed to Kathy Longseth, an employee of this Bureau, during the week of May 14, 1990. Ms. Longseth reviewed this information and concluded that it was not clear what the actual cost of the course had been and that it lacked proof that complainant had actually paid for the course. This information is required in regard to all requests for tuition reimbursement. Complainant had resigned from her position with respondent by this time and Ms. Longseth was unable to get a home address or phone number for complainant. As a result, since she was aware that complainant had to return to the MCH Unit offices at the end of May to complete some paperwork, Ms. Longseth left a message there with Ms. Caldwell explaining the type of information that was required in order for complainant to receive the requested tuition reimbursement. At the end of May of 1990, complainant submitted an additional document which was a copy of a tuition bill from the University of Wisconsin for the Spring 1990 semester indicating that complainant had paid $1002.00 on January 26, 1990. In Ms. Longseth's opinion, complainant had still failed to explain how the $133 figure was calculated and she so advised Mr. Johnson who wrote a letter to complainant which she received on or around June 29, 1990. As of the date of the hearing, complainant

had not submitted this additional information to Ms. Longseth. Ms. Longseth did not contact Mr. Conway in regard to this request for reimbursement. The $133 reimbursement amount requested by complainant included the amount of her tuition payment not refunded to complainant when she dropped the chemistry courses not approved for leave and tuition reimbursement. This non-refunded amount is not reimbursable under the terms of the applicable collective bargaining agreement.

42. In a memo to complainant dated March 26, 1990, Mr. Conway stated as follows:

> Effective March 11, 1990, your position was changed from full time to seventy percent (70%).
>
> Attached is a copy of your revised position description.
>
> We need to review the position description, discuss any questions which arise, sign, date and distribute it. Unless it conflicts with a prescheduled obligation we will meet in the conference room 230, WSSOB, from 1:00 p.m. - 2:00 p.m. Thursday, March 29, 1990.
>
> We also need to establish your new work schedule. Currently, your hours of service are 8:00 a.m. to 4:45 p.m. Monday through Friday with 45 minutes for lunch.
>
> A seventy percent (70%) full time equivalency must schedule twenty-eight (28) hours per week; fifty-six (56) hours per bi-weekly pay period.
>
> To provide the maximum daily coverage possible for the congenital disorders program, infant screening, I suggest the following:

DAY		MON	TUES	WED	THUR	FRI	TOTAL
Hours	STA	0800	0800	0800	0800	0800	
	END	1145	1145	1145	1145	1200	
	STA	1230	1230	1230	1230		
	END	1445	1445	1445	1445		
Hours		6	6	6	6	4	28

> By copy of this memo I'm asking Anita Grand, Leadworker, MCH Unit to join us.

43. At the time he wrote this memo, Mr. Conway was unaware that complainant was not enrolled in the two courses for which leave and tuition reimbursement had been denied for the spring semester 1990. Mr. Conway in-

tended the schedule outlined in the memo to be used for discussion purposes at the March 29 meeting. Mr. Conway prepared the March 26, 1990, memo to complainant as soon as he received notice that the cutback in her position had been effected. Such cutback had been effected retroactively at the Division level.

44. Mr. Conway and Ms. Grand met with complainant on March 29 as scheduled. Complainant informed them that the proposed schedule would be incompatible with the timing of her receipt of infant testing results and Mr. Conway agreed to modify her schedule as a result. Complainant did not mention at the March 29 meeting that the proposed work schedule conflicted with her class schedule. Mr. Conway communicated the revised schedule to complainant in a memo dated April 6, 1990. After March 29, 1990, Mr. Conway did not observe complainant having any problem completing her duties; did not observe complainant working extra hours or requesting to work extra hours in order to complete her duties; and was not aware that she told anyone else she was having any problem completing her duties.

45. In October and November of 1989, complainant attended two conferences as a representative of respondent. When she returned from these conferences, she completed a travel reimbursement form. Mr. Conway returned the form to her on or around December 20, 1989, advising her that the amount of certain expenses for which she was claiming reimbursement exceeded the maximum allowable. Mr. Conway requested that she modify these amounts to accord with these allowable maximums. This is consistent with Mr. Conway's standard procedure and respondent's standard procedure. Complainant responded in a note to Mr. Conway dated February 7, 1990, that she did not understand Mr. Conway's request. The reimbursement request was subsequently modified as requested and complainant received her reimbursement.

46. As an adjunct to her participation in these conferences, complainant or one of her superiors invited a staff member of the State Lab of Hygiene to participate as well and agreed to reimburse him for his expenses. Complainant signed his travel expense reimbursement form as his supervisor which was the appropriate procedure. Mr. Johnson returned this form to complainant explaining that the hotel receipt submitted by the Lab employee indicated that a third party had actually paid the Lab employee's hotel expenses--this receipt indicated that this third party had paid the entire cost of the room and did not indicate that this third party had shared the room with

the Lab employee; that there was no documentation that the Lab employee had paid the registration fee for which reimbursement was requested; and the travel agent's itinerary which was submitted as proof of payment by the Lab employee for an airline ticket was insufficient evidence of payment. The request for additional documentation in this regard was consistent with standard procedure for Mr. Johnson and for respondent. The problems with this reimbursement request form had been brought to Mr. Johnson's attention by one of his subordinates. Mr. Johnson ultimately discovered that the subject registration fee had already been paid by the Lab of Hygiene and that the air fare actually paid by the Lab employee was lower than the reimbursement amount claimed.

47. Complainant began looking for an alternative full-time position some time in April of 1990. Complainant resigned from her position in the MCH Unit in a letter dated May 2, 1990. This letter indicated complainant was transferring to a nursing position with another agency of state government. Complainant had been offered a staff nursing position at the University of Wisconsin prior to May 2, 1990, but subsequently declined the offer after her resignation had been effected when she learned shift work would be involved as well as a salary reduction. Complainant had not expected to begin working at the University of Wisconsin immediately after the effective date of her resignation. She had timed her resignation to give herself time to study for her final exams.

48. As of the date of hearing, complainant's position had not been filled although approval had been given to fill it with a limited term employee. Dr. Katcher; Dr. Aronson, a physician consultant in the MCH Unit; and Ms. Grand have been performing certain of the duties of this position; some have been performed by entities outside state government; and some have not been performed.

49. During 1989, complainant had sought counselling from Mr. Schmidt, the pastor of the church which she attended. Complainant did not seek counselling from Mr. Schmidt between May 5 and November 6, 1989.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §103.10(12), Stats.

2. The complainant has the burden to show that she filed her complaints on a timely basis.

3. The complainant has sustained this burden.

4. The instant complaint is deemed to have been filed by complainant on a timely basis based on respondent's failure to properly post the notice required by §103.10(14)(a), Stats.

5. The complainant has the burden to show that respondent violated §103.10(11), Stats., with respect to the actions enumerated in the stipulated issue.

6. The complainant has not sustained this burden.

7. Respondent did not violate §103.10(11), Stats., in regard to any of the actions enumerated in the stipulated issue.

Opinion

Timeliness

Section 103.10, Stats., sets forth the Family and Medical Leave Act. Section 103.10(12)(b), Stats., provides as follows, in pertinent part:

> (b) An employe who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violation occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation.

Section 103.10(11)(a) and (b), Stats., define those acts which are prohibited under the Family and Medical Leave Act (FMLA), and §103.10(12)(a), Stats., makes it clear that the reference to "department" in the cited section is a reference to the Commission in a situation such as that under consideration here.

Section 103.10(14)(a), Stats., provides as follows, in pertinent part:

> (a) Each employer shall post, in one or more conspicuous places where notices to employes are customarily posted, a notice in a form approved by the department setting forth employes' rights under this section.

Section Ind. 86.05, Wis. Adm. Code, provides, as follows, in pertinent part:

> If an employer is not in compliance with the notice posting requirements of section 103.10(14)(a), Stats., at the time the violation occurs under section 103.10, Stats., an employee complaining

> of that violation shall be deemed not to "reasonably have known" that a violation occurred within the meaning of section 103.10(12)(b), Stats., until either the first date that the employer comes into compliance with section 103.10(14)(a), Stats., by posting the required notice, or the first date that the employee obtains actual notice of the information contained in the required notice, whichever date occurs earlier. If the employer is not in compliance with the notice of posting requirements of section 103.10(14)(a), Stats., at the time a violation occurs under section 103.10, Stats., the employer has the burden of proving actual knowledge on the part of the employee within the meaning of this section.

Some time between March 7 and March 30, 1990, Mr. Johnson posted the materials described in Finding of Fact 3, above, on the bulletin board in the entrance area of Room 118 of the State Office Building at 1 West Wilson Street in Madison, Wisconsin. Complainant argues that this bulletin board was not a "conspicuous place where notices to employees are customarily posted" within the meaning of §103.10(14)(a), Stats. The Commission does not agree in view of the location of this bulletin board in an area visible and apparent to those entering Room 118, including those who came into Room 118 to use the Bureau's only FAX machine and one of only two copy machines; the fact that this bulletin board was used for posting most employment-related notices of general interest and application to Bureau employees; and the location of the offices of the top administrative staff of the Bureau in Room 118. Complainant also argues that compliance with §103.10(14)(a), Stats., required respondent to post the required notice in more than one place within the Bureau, i.e., also on the bulletin board in Room 131 which was also used for posting employment-related notices. However, this statutory section clearly permits the employer to post the required notice in "one or more" conspicuous places, and does not on its face require the employer to post the required notice in every location in which employment-related notices are posted. In the instant case, the employer exercised its discretion in this regard and decided to post the notice on the bulletin board in Room 118 which the record shows was a location where more employment-related notices of general interest to Bureau employees were posted than in Room 131 and where, due to the location of the top administrative offices, the Bureau's only FAX machine, and one of only two Bureau copy machines, more Bureau employees were likely to view it. The Commission agrees with complainant that it would have been optimal for respondent to have posted the subject notice in each location where Bureau staff were lo-

cated but the Commission does not agree with complainant that respondent's failure to have done so constitutes a violation of §103.10(14)(a), Stats.

Complainant also argues in regard to the subject posting that it was not conspicuous enough to give "de facto knowledge to personnel regarding the FMLA and its provisions." In support of this argument, complainant points out that, despite the posting, most of the Bureau staff who testified at hearing had not noticed the posting and, as a result, were not aware of their rights under the FMLA. The record also shows that most of these Bureau employees had not noticed most of the other postings on the bulletin boards in Rooms 118 and 131 and were not aware of their contents. It would be nonsensical to hold that an employer's posting of a notice was invalidated due to its employees' failure to read it. Clearly, the provision under consideration here focuses on the posting itself, not on what employees do in response to the posting. The Commission does not sustain the complainant's argument in this regard.

The complainant argues further that, even if the subject posting complied with the applicable requirements of the statutes and administrative rules, her allegations would be timely under a continuing violation theory. The Commission disagrees and concludes that each of the allegations specified in the statement of issue constitutes a discrete transaction and, consistent with the Commission's decision in Vander Zanden v. DILHR, Case No. 87-0063-PC-ER (2/28/89), a continuing violation theory would not apply.

The remaining issue in regard to the timeliness issue is whether the manner in which the subject notice was posted satisfied the language and intent of §103.10(14)(a), Stats. The Commission concludes that it did not. It is clear from the record that the fourth page of the posted materials described in Finding of Fact 3, above, was the notice required by §103.10(14)(a), Stats. Only this document was "in a form approved by the department" within the meaning of §103.10(14)(a), Stats. This is clearly set forth in both the DER bulletin which constituted pages 2 and 3 of the subject posting and in the language of the notice itself. This DER bulletin stated, "also attached is a notice which sets forth the rights of states employees under the provisions of family/medical leave law. Copies of this notice must be posted in conspicuous places where notices to employees are customarily posted." The fourth page of the posting, i.e., the notice itself, stated, "Wisconsin law requires all state agencies to display copies of this poster in one or more conspicuous places where notices to employees are customarily posted." For respondent to argue that some other

document, e.g., the Personnel Commission poster, could constitute the required notice ignores these statements. In addition, for respondent to argue that burying the required notice under 3 pages of other documents constituted an adequate posting ignores common sense. Obviously, the intent of the statute was to require an employer to post the required notice where employees would see it. To permit an employer to satisfy this requirement by burying the required notice under other documents ignores this intent. The Commission concludes that respondent's posting did not meet the requirements of §103.10(14)(a), Stats., and, as a result, the tolling provision of §Ind. 86.05, Wis. Adm. Code, would apply. The operative date would then become the date that complainant first obtained actual notice of her rights under the FMLA. The only evidence in the record in this regard is complainant's testimony that she obtained such notice on May 30, 1990. Since complainant filed the subject complaint on May 30, 1990, the tolling provision of §Ind. 86.05, Wis. Adm. Code, operates to render each of the allegations included in the issue for hearing as timely.

Denial of Request for Leave

The Family and Medical Leave Act provides, in pertinent part:

> 103.10(1)(g) "Serious health condition" means a disabling physical or mental illness, injury, impairment or condition involving any of the following:
>
> 1. Inpatient care in a hospital, as defined in s. 50.33(2), nursing homes, as defined in s. 50.01(3), or hospice.
>
> 2. Outpatient care that requires continuing treatment or supervision by a health care provider.
>
> 103.10(4) MEDICAL LEAVE. (a) Subject to pars. (b) and (c), an employe who has a serious health condition which makes the employe unable to perform his or her employment duties may take medical leave for the period during which he or she is unable to perform those duties.
>
> * * * * *
>
> (c) An employee may schedule medical leave as medically necessary.
>
> 103.10(6)(b) If an employe intends . . . to take medical leave because of the planned medical treatment or supervision of the employe, the employe shall do all of the following:
>
> 1. Make a reasonable effort to schedule the medical treatment or supervision so that it does not unduly disrupt the

> employer's operations, subject to the approval of the health care provider of the . . . employe.
>
> 2. Give the employer advance notice of the medical treatment or supervision in a reasonable and practicable manner.
>
> 103.10(7) CERTIFICATION (a) If an employe requests . . . medical leave, the employer may require the employe to provide certification, as described in par. (b), issued by the health care provider. . . of the employe . . ..
>
> (b) No employer may require certification stating more than the following:
>
> 1. That the child, spouse, parent or employe has a serious health condition.
>
> 2. The date the serious health condition commenced and its probable duration.
>
> 3. Within the knowledge of the health care provider . . . the medical facts regarding the serious health condition.
>
> 4. If the employe requests medical leave, an explanation of the extent to which the employe is unable to perform his or her employment duties.
>
> 103.10(11) PROHIBITED ACTS. (a) No person may interfere with, restrain or deny the exercise of any right provided under this section.
>
> (b) No person may discharge or in any other manner discriminate against any individual for opposing a practice prohibited under this section.
>
> (c) Section 111.322(2m) applies to discharge or other discriminatory acts arising in connection with any proceeding under this section.

In its decision, the Court of Appeals stated as follows, at page 12:

> **In sum, to successfully assert that an employer wrongfully denied the employe medical leave, the employe must prove that (1) the employe had a serious health condition (2) that rendered the employe unable to perform the employe's work duties during the requested leave, (3) that the leave was medically necessary and (4) that the employe requested the planned medical leave in a reasonable manner.**

As discussed above, the Commission adopts the Court of Appeals' conclusion that complainant requested the planned medical leave in a reasonable manner. In addition, the Commission concluded in its original decision of this matter that complainant suffered from a serious health condition and continues this conclusion here.

The record, viewed as a whole, does not support a conclusion that complainant's serious health condition rendered her unable to perform her work duties during the period of the requested leave. As discussed above (see pages 14 through 17), the Commission is of the opinion, based on the evidence in the original record, that complainant failed to show at hearing that she was unable to perform the duties of her position at the time of the requested leave. This is buttressed by the evidence in the record on remand. The only witness called by complaint on remand was Dr. Berg who testified, in pertinent part, that, during 1989, after her discharge from the hospital, complainant experienced some symptoms of depression, but "not to the point where she couldn't function;" that the co-workers who contacted her in August of 1989 in regard to complainant's condition "never said anything that she couldn't function or wasn't doing her job;" that complainant reported to her during the relevant time period that she was functioning at the office; that the concern she had about complainant relapsing in August and September of 1989 was the same concern she had at all times; and that complainant was not subject to a major depressive disorder on October 10, 1989. In addition, Dr. Berg's testimony does not relate the symptoms reported by complainant, i.e., insomnia, difficulty concentrating, withdrawal from others, or crying on a few occasions, to an inability on complainant's part to perform her work duties. The record viewed as whole shows that, although complainant showed that she experienced some symptoms of depression which interfered to an extent with the performance of her work duties, she did not show that they rendered her unable to perform the duties and responsibilities of her position during the relevant time period.

As stated by the Court of Appeals, complainant not only has to show that her serious health condition rendered her unable to perform her work duties during the relevant time period, but also that her leave was medically necessary. Complainant appears to be asking the Commission here to accept Dr. Berg's opinion of medical necessity as irrebuttable proof that the prescribed leave

was medically necessary. However, complainant cites no authority for this contention and the Commission declines to adopt it. The following militate against a conclusion that complainant sustained her burden in this regard:

1. In her testimony, Dr. Berg fails to particularize the basis for her conclusion that the prescribed leave was medically necessary. Although Dr. Berg describes symptoms of depression that complainant had experienced since her discharge from the hospital, Dr. Berg does not indicate that the severity of these symptoms had significantly increased on or immediately prior to October 10, 1989, or that her concern about a possible relapse by complainant was different on or immediately prior to October 10, 1989, than it was at any other time after her hospitalization.

2. Dr. Berg testified that she felt that complainant was experiencing symptoms of depression "to a much more major degree" on October 28, 1989, than she had been on October 10, 1989, and yet she didn't prescribe a leave for complainant on October 28. Dr. Berg's explanation of this related to the availability of leave for complainant, i.e., that it was her understanding on October 10 that leave would be available to complainant but that this was not her understanding on October 28. This explanation suggests that Dr. Berg was basing her prescription for leave on something other than medical necessity, i.e., it is incongruous to assert that a leave was medically necessary when the prescription of the leave was based in substantial part on situational factors unrelated to the patient's medical condition. Either a leave is necessary based on a patient's medical condition at the time or it is not, and Dr. Berg's reliance on factors unrelated to complainant's medical condition tends to support a conclusion that the prescribed leave was not medically necessary.

3. At the time that Dr. Berg prescribed the leave, she also discontinued complainant's Prozac treatment. Prozac was the drug prescribed by Dr. Berg during complainant's hospitalization and thereafter to control complainant's symptoms of depression, and Dr. Berg's records indicate that she tended to prescribe a larger dosage for complainant when her symptoms were the most severe.

Logically, Dr. Berg's prescription on October 10, 1989, that complainant discontinue the use of Prozac tends to show that Dr. Berg did not feel that complainant's symptoms or the likelihood that she would relapse were a serious concern at that time.

4. Dr. Berg testified both that she discontinued Prozac for complainant on October 10 and that she prescribed the leave for complainant on October 10 to determine the influence of the drug and of complainant's work situation on complainant's symptoms, i.e., to determine whether complainant's symptoms would abate. However, such an approach seems logically and scientifically unsound and, as a result, not credible. If Dr. Berg had actually felt that it was medically necessary for complainant to be removed from her work situation and placed on leave in order to assess the impact of her work situation on her symptoms, she would not have interposed another variable in the mix, i.e., by implementing two changes, Dr. Berg would not be able to assess which of the two was responsible for an abatement in complainant's symptoms if such an abatement occurred.

5. It would have to be assumed that Dr. Berg, if she had felt that complainant was suffering the symptoms of depression to such an extent that a leave from her job was medically necessary, would have followed usual and customary medical practice and documented in her treatment notes the nature of the target symptoms sought to be addressed by the leave and that a leave had been prescribed. Dr. Berg's notes of her October 10, 1989, meeting with complainant do not include this information.

6. It would have to assumed that Dr. Berg, if she were of the opinion that a leave was medically necessary for complainant in order to address her difficulty concentrating, would have followed usual and customary medical practice and administered a test or tests to measure this symptom and documented both the identification and measurement of this symptom in her notes. Although Dr. Berg has identified difficulty concentrating as one of the symptoms of depression complainant was experiencing at the time, Dr. Berg's notes of her October 10, 1989, meeting with

complainant do not include information relating to the identification or measurement of this symptom.

7. Complainant took a college exam during the period of her leave. Complainant's position here that her medical condition rendered her unable to work and necessitated a leave from her job but did not render her unable to take a college exam is not believable and further strengthens the conclusion that the leave she took was not medically necessary.

The final question relates to whether respondent's request for information from complainant/Dr. Berg violated §103.10(7)(b), Stats. The Commission's original decision concluded, based on complainant's representation that "Dr. Berg refused to talk to Mr. Conway because she felt that the information contained in her note on the prescription form should be adequate.", that respondent's request did not result in any harm to the complainant because it appeared that, no matter what form the request had taken, Dr. Berg was not going to provide any additional information and because respondent's request could not be said to have contributed to a denial of leave for the period in question. The current record shows that it was complainant's decision, not Dr. Berg's, not to have Dr. Berg talk to Mr. Conway. However, the reasoning originally relied upon by the Commission did not depend on whether it was Dr. Berg or complainant who refused Mr. Conway's request but on the fact that it was made clear to respondent that, no matter how the request was presented or by whom, the information would not be forthcoming. This characterization of complainant's response to the request is reinforced by Dr. Berg's testimony in which she indicated that complainant reported to her that "they're just being nosy, they don't need to know this." Therefore, as a result of complainant's posture in this regard, respondent elicited neither any medical information that might have gone beyond the limits established by §103.10(7)(b), Stats., nor a verbal certification from the physician instead of a written certification. Also, respondent's request cannot be said to have contributed to a denial of leave for the period in question. To begin with, respondent had not taken any

final action on complainant's leave request when complainant commenced her unauthorized leave on October 16, 1989. Also, it would be inconsistent with complainant's decision not to provide respondent any further information to conclude that if the request had specifically sought a written certification and had been couched in statutory terms with respect to the information sought, the response would have been forthcoming and the leave would have been approved.

Retaliation

In determining the merits of complainant's allegations of retaliation, it may be useful as an analytical tool to utilize the framework set forth in McDonnel-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny for reviewing allegations of discrimination and/or retaliation in the employment context. Pursuant to this framework, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-retaliatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for retaliation. In the instant case, complainant has demonstrated a prima facie case by showing that she applied for leave under the FMLA; her supervisor was aware of such application; various actions were taken by respondent in regard to complainant's employment (as listed in the statement of issue, above); and, as a result of the fact that such actions occurred over a relatively short period of time immediately subsequent to such application, an inference of retaliation could be drawn.

Issue #2: Complainant contends that respondent retaliated against her in relation to the work schedule proposed by Mr. Conway after the cutback in her position. Respondent has articulated a legitimate, non-retaliatory reason for this action, i.e., that Mr. Conway was proposing, not imposing, such schedule and requesting complainant's reaction to it. The burden then shifts to complainant to show that this reason was a pretext for retaliation. However, although complainant alleges that Mr. Conway drafted the proposed schedule purposely to conflict with her class schedule, the documents complainant submitted to Mr. Conway relating to these classes fail to specify the times at which such classes were scheduled to meet. In addition, complainant failed to

even mention to Mr. Conway at their meeting to discuss the proposed work schedule that it conflicted with her class schedule. Finally, Mr. Conway revised the schedule as recommended by complainant. Complainant has failed to show pretext for retaliation in this regard.

Issue #3: Complainant contends that respondent retaliated against her in relation to its denial of her leave/tuition reimbursement requests for three college courses for the spring of 1990. Respondent has articulated a legitimate, non-retaliatory reason for this action, i.e., its view that such courses were not related to the duties and responsibilities of complainant's position. The burden then shifts to the complainant to show that this reason was a pretext for retaliation. The only testimony offered by complainant to rebut Dr. Katcher's opinion in this regard was that of the chief of clinical chemistry for the State Lab of Hygiene who testified that such courses could be useful to complainant in performing the duties and responsibilities of her position. However, this witness was not as familiar with the duties and responsibilities of complainant's position as Dr. Katcher; was not as familiar with complainant's education and training in chemistry, physics, or any other disciplines as Dr. Katcher; and was not as familiar with the courses under consideration or with the medical or nursing field in general as Dr. Katcher. Complainant has failed to successfully rebut respondent's showing that the courses for which leave/tuition reimbursement was denied for the spring of 1990 were not job-related and, as a result, has failed to show pretext for retaliation in this regard. Complainant also alleges that the failure to get Mr. McKenzie's signature on the request which was approved and Mr. McKenzie's and Mr. Imm's signatures on the requests which were denied is evidence of retaliation. The record shows, however, that such failures were the result of ministerial oversights on the part of Mr. Johnson and the Commission concludes complainant has failed to show pretext for retaliation in this regard.

Issue #4: Complainant also contends that respondent retaliated against her in regard to the cutback of her position to 70%. Respondent has articulated a legitimate, non-retaliatory reason for this action, i.e., the requirement imposed by the Administrator of the Division of Health and his superiors that ten positions funded by the MCH block grant be eliminated; and Mr. Imm's inclusion of complainant's position on the prioritized list of positions within the Bureau which he prepared in response to this requirement. The burden then shifts to the complainant to show that this

reason was a pretext for retaliation. Although Mr. Imm was aware of complainant's request for leave under the FMLA at the time he advised Mr. Schmidt of his recommendation to cut complainant's position, the essence of this decision had been made several months prior to the subject request for leave. Mr. Imm prepared his recommended list of positions to be eliminated in priority order prior to September 6, 1989. Mr. Imm simply followed these recommended priorities when responding to Mr. Schmidt's request for an additional .3 FTE position cut some time during the week of October 9, 1989. The record fails to show that Mr. Schmidt had any knowledge of complainant's request for leave under the FMLA, that Mr. Imm or Mr. Conway had any control over the extent of the cuts, or that Mr. Schmidt did not make the phone call to Mr. Imm and require his recommendation as to the additional cut. In addition, complainant did not successfully rebut respondent's evidence that alternative sources of funding for complainant's position were not available at the time Mr. Imm was asked to recommend the additional .3 FTE position cut. Finally, the record shows that other employment options were discussed with complainant but that she decided to remain in the 70% position despite the likelihood that she could have displaced into another full-time nursing position within the Division of Health. Complainant has failed to show pretext for retaliation in this regard.

Issue #5: Complainant contends that respondent's failure to reimburse her for the Population Genetics course she successfully completed constituted illegal retaliation under the FMLA. Respondent has articulated a legitimate, non-retaliatory reason such this action, i.e., reimbursement requirements mandate that such information be provided. The burden then shifts to complainant to show that this reason was a pretext for retaliation. First of all, the record shows that the individual responsible for processing this tuition reimbursement request and for requesting additional documentation from complainant, Ms. Longseth, was not aware and had no reason to be aware of complainant's request for medical leave under the FMLA. Even if Ms. Longseth had been aware of such FMLA request, the record shows that she requested the same type of documentation routinely requested of those seeking such reimbursement and that the documentation provided by complainant was inadequate and inconsistent. For example, complainant requested reimbursement for $133 and yet the accompanying invoice indicated that the fee for the course was $100 and complainant provided no explanation for the

discrepancy. In addition, the proof of payment which complainant submitted was a receipt from the University of Wisconsin indicating that she had written a check to the UW for $1002. Although complainant claims that she also filed with this a "cancelled check" for this amount, what she filed was a copy of the check she had written but no documentation that this check had ever been processed and payment received. Although the record does show that respondent did delay bringing their concerns and requests for documentation in this regard to complainant's attention until late in the fiscal year, the record also indicates that Ms. Longseth had had difficulty getting in touch with complainant and that complainant has never submitted the required documentation. The complainant has failed to show pretext for retaliation in this regard.

Issue #6: Complainant further contends that respondent retaliated against her in regard to its increased scrutiny of her leave requests after October 10, 1989. Respondent has articulated a legitimate, non-retaliatory reason for this action, i.e., its view that complainant had a history of unauthorized absences from the workplace. The burden then shifts to the complainant to show that this reason was a pretext for retaliation. The record supports complainant's contention that her leave requests were scrutinized more closely and subject to different criteria than those of other MCH Unit staff after this date. However, in view of complainant's unauthorized absences during September of 1989 and October of 1989, Mr. Conway was justified in concluding that she was a leave abuser and questioning her use of leave more closely than that of other MCH Unit employees, none of whom have been shown in the record to have abused leave requirements in any significant way. Complainant has failed to show pretext for retaliation in this regard.

Issue #7: Complainant first alleges that her one-day suspension was imposed in retaliation for having filed a request for medical leave under the FMLA. Respondent has articulated a legitimate, non-retaliatory reason for such suspension, i.e., its view that complainant was absent from the workplace without authorization. The burden then shifts to the complainant to show this reason is a pretext for retaliation. First of all, the Commission has already concluded that respondent did not violate the provisions of the FMLA during its consideration of complainant's request for leave in October of 1989. Complainant has failed to show, therefore, that her absence from work October 17 through October 23 was authorized by respondent or by operation of the

provisions of the FMLA. Respondent imposed the subject suspension for this unauthorized absence. Although complainant asserts that this discipline was excessive, the only comparison offered was one regarding another employee who was suspended for 2 or 3 days for fraud and lying to his supervisor. There are simply not enough facts in the record regarding this other suspension to draw a meaningful comparison with complainant's suspension. Complainant also asserts in this regard that Ms. Tillema was not disciplined despite not receiving prior approval from Mr. Conway to use accumulated compensatory time. The situations are clearly not comparable, especially since Ms. Tillema's actions were consistent with the practice under the MCH Unit's former supervisor, the record does not indicate that she had any reason to believe that the practice had changed, and the time involved is only that of a few hours. On the other hand, complainant's absence was for a week's time, she was very aware that she should request prior approval from Mr. Conway, and she had been counseled in September of 1989 relating to a previous unauthorized absence. Complainant has failed to show pretext for retaliation in this regard.

Issue #8: Complainant contends that respondent's failure to modify her position description in response to the cutback in her position to 70% was retaliatory. Respondent articulated a legitimate, non-retaliatory reason for this action, i.e., that the supervisors of complainant's position wanted a chance to review the impact of the cutback to 70% before changing complainant's position description. The burden then shifts to complainant to show that this reason was a pretext for retaliation. The reason offered by respondent is consistent with Mr. Conway's and Ms. Grand's advice to complainant to set her own priorities. It appears from the record as though complainant did this. In fact, the record shows that complainant was not observed after the cutback having any difficulty setting and carrying out such priorities nor did she advise any of her supervisors that she was having any such difficulties. Complainant argues that Mr. Conway allowed other MCH Unit employees to propose and participate in revisions of their position descriptions. The evidence offered in this regard related to a personnel management survey of certain MCH Unit positions and predated the subject request for medical leave under the FMLA. Complainant has failed to show pretext for retaliation in this regard.

Issue #9: Complainant also contends that Mr. Conway's instructions to complainant to revise a travel expense reimbursement form because she had claimed an amount for reimbursement greater than the maximum allowed was

retaliatory. Respondent has offered a legitimate, non-retaliatory reason for this action, i.e., that this was the procedure consistently followed by Mr. Conway and that reimbursement requirements do not allow reimbursement for an amount in excess of the specified maximums. The burden then shifts to the complainant to show that this reason was a pretext for retaliation. The record shows that this was the practice Mr. Conway followed in relation to any such form filed by any of the MCH Unit staff and that respondent followed in relation to any such form filed by any of their employees. It strains common sense for complainant to argue that, despite such standard practice, she should be allowed to record an amount in excess of the maximum on her reimbursement forms in anticipation that her supervisor will modify it in accordance with current reimbursement maximums. In addition, it strains common sense for complainant to read into such an action an intent to retaliate. Complainant has failed to show pretext for retaliation in this regard.

Complainant also contends that questions respondent asked and documentation respondent requested in relation to the travel expense reimbursement form filed by the Lab of Hygiene employee were retaliatory. Respondent has articulated a legitimate, non-retaliatory reason for such action, i.e., that reimbursement requirements specified that such information be provided. The burden then shifts to complainant to show that this reason was a pretext for retaliation. Once again, such questions and such documentation requests are standard practice for respondent. The record clearly shows that the form submitted by complainant and the Lab employee was deficient in several respects and that, as a result of respondent's inquiry, a double payment and an overpayment were avoided. It again strains common sense for complainant to argue that respondent does not have an obligation to require verification of such expense reimbursement requests or for such a request for verification to be retaliatory. Complainant has failed to show pretext for retaliation in this regard.

The complainant has failed to sustain her burden in regard to the issues presented here, i.e., issues #1-#9, and, as a result, the Commission issues the following

Order

This complaint is dismissed.

Dated: _____, 1996 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

_____
DONALD R. MURPHY, Commissioner

LRM:lrm

_____
JUDY M. ROGERS, Commissioner

Parties:

Janice Sieger
c/o Atty. Christine Olsen
Byrne, Goyke, Olsen & Tillisch
115 Forest Street
PO Box 1566
Wausau, WI 54402-1566

Joe Leann
Secretary, DHSS
PO Box 7850
Madison, WI 53707-7850