STATE OF WISCONSIN PERSONNEL COMMISSION

JANICE SIEGER,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 90-0085-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. Although no objections to the proposed decision and order have been filed, the Commission on its own motion will amend the proposed decision, for the following reasons.

The proposed decision, beginning at p.28, addresses two issues: first, whether "since Mr. Conway's request for information from Dr. Berg involved a request to speak personally with Dr. Berg, such request violated §103.10(7), Stats.," and, second, whether "the information requested in Mr. Conway's October 13, 1989, memo was outside the scope of information which §103.10(7), Stats., permits employers to request filed under the FMLA." In the Commission's opinion, the proposed decision addresses these issues on the basis of a premise that is unsupported by the record — i.e., that Mr. Conway's request for information (set forth in his October 13, 1989, memo, see Finding #13) was a demand for certification subject to §103.10(7), Stats.

Section 103.10(7), Stats., provides in part, as follows:

> 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: . . . . (emphasis added)

In determining whether this subsection applies in the first instance to Mr. Conway's memo, it is necessary to scrutinize what preceded and precipitated it.

According to Finding #10, the note from complainant's psychiatrist (Dr. Berg), which complainant presented to her leadworker, Ms. Grand, stated merely that: "I am recommending one week leave of absence for Janice Sieger. Thank you for your cooperation." According to Finding #11, complainant presented this note to Ms. Grand on October 11, 1989, and "[i]n 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 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." (emphasis added) These findings reflect that not only had Dr. Berg not tied the request for leave to a medical basis, but also that in her discussion with Ms. Grand, complainant specifically stated that Dr. Berg's rationale for recommending the leave was so that complainant could make some personal decisions regarding her career and education. Based on the nebulous circumstances that respondent had before it when Mr. Conway wrote his October 13, 1989, memo, it is a misnomer to label Mr. Conway's memo as a demand for certification in response to the employe's request for medical leave, subject to §103.10(7), Stats. The fact that in her conversation with Ms. Grand, complainant referred to not having enough leave to take more than a week off also suggests complainant was not requesting medical leave, since at the time she had over 200 hours of sick leave balance, Finding #13. Respondent was dealing with a confusing situation involving an employe who respondent believed had a "health condition [which] . . . was interfering with her ability to do her job," Finding #11, but whose psychiatrist had recommended leave, apparently because she believed it would be helpful for complainant to be away from work to make some "personal decisions, including career and education decisions." Id. It appears from the memo and other information of record that as of October 13, 1989, respondent would have considered other bases for the leave besides medical leave. The questions posed for Dr. Berg were general enough that Dr. Berg conceivably could have responded in a manner that would have supported the leave request for reasons that

might not have been predicated on the basis of medical necessity per se, but which might have had some relationship to complainant's overall psychological status.

Furthermore, given the nature of Dr. Berg's response to respondent's request for additional information (as recounted by complainant) — "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," Finding #14 — even if one were to conclude that the request for information was improper under the FMLA, it did not result in any harm to complainant. That is, the only conclusion which can be drawn from this record is that Dr. Berg was not going to provide any information beyond what was in her original note. Therefore, by making the request it did, 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 commencing on October 16, 1989. Also, since Dr. Berg's response was that "she refused to talk to Mr. Conway because she felt that the information contained in her note on the prescription form should be adequate," Finding #14, it would be speculative 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, Dr. Berg's response would have been any different, and that the leave would have been approved.

For these reasons, the Commission will not address the issues discussed in the proposed decision of whether, if an employe requests medical leave, §103.10(7), Stats., limits the employer's response to a request for a written certification, and whether the questions set forth in Mr. Conway's October 13, 1989, memo go beyond the substantive limits on the certification that can be required by an employer in response to an employe's request for medical leave, pursuant to §103.10(7), Stats.

ORDER

The proposed decision and order, a copy of which is attached, is incorporated by reference and adopted as the Commission's final disposition of this matter, with the exception of that portion of the decision beginning with the first paragraph on p.28 and ending at the bottom of p.29, which is deleted for the reasons set forth above, and this complaint is dismissed.

Dated: November 8, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Janice Sieger
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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

Nature of the Case

This is a complaint of discrimination and retaliation filed pursuant to the Family and Medical Leave Act. The parties agreed to waive investigation of this case and proceed directly to a hearing on the merits. This hearing was held on July 3 and 5, August 8 and 9, September 10 and 12, and October 11 and 29, 1990, before Laurie R. McCallum, Chairperson. The briefing schedule was completed on June 21, 1991. The parties agreed to waive the requirement in §103.10(12)(d), Stats., that the Commission issue its decision within 30 days after the hearing.

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 activites 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. Beginning in January of 1989, complainant was under continuing treatment for depression. Her treating physician was psychiatrist Mary Berg, M.D. Complainant was hospitalized in February, 1989, for depression. During this 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 the basis for it.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. At 4:00 p.m. on October 10, 1989, complainant met with Dr. Berg. Dr. Berg advised complainant to continue to take the antidepressant medication Dr. Berg had prescribed for her. Dr. Berg also 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." During this period of time, complainant was feeling tired, was having trouble sleeping, and was finding it difficult to concentrate. Complainant felt that stress

was exacerbating these symptoms of depression. Complainant was considering leaving her job because Dr. Berg and her minister were advising her to do so. Complainant testified at hearing that she "had no idea" why they would give her that advice.

11. Complainant presented this statement 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. 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.

12. 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.

13. 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.

14. 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 to advise 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 Dr. Berg's refusal to talk to him and they agreed to discuss the matter the next week.

15. The release of medical information is within the control of the patient.

16. On Monday, October 16, 1989, Ms. Grand was busy in the office. As a consequence, complainant waited until 11:45 a.m. to speak with her regarding the status of her leave request. Complainant advised Ms. Grand that 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 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. After her conversation with Ms. Caldwell,

complainant cancelled her plans to go to class that afternoon and went to Dr. Berg's office. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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 activites 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 before 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 intiative 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. Mr. Imm did not consider using AIDS funds (funds related to the Acquired Immune Deficiency Symdrome program) to fund complainant's

position since the duties and responsibilities of complainant's position did not relate to the AIDS disease.

27. 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. Kielly 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.

28. 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.

29. 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 couses 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.

30. 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.

31. 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.

32. 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 intended 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

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

The parties agreed that the following issue would govern this case:

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 of 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.

Respondent also raised a jurisdictional objection alleging that the filing of the subject complaint was untimely as to all the allegations except 5, above.

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 located 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 cusomarily 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.

The decision not to grant the complainant medical leave for the period of October 17, through October 23, 1989.

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.

The Commission must first determine whether complainant had a "serious health condition" and was "unable to perform her employment duties" during the period of her leave and that taking leave during this period was "medically necessary" within the meaning of §§103.10(1)(g) and 103.10(4)(a) and (c), Stats. The complainant asks us to accept Dr. Berg's note as Dr. Berg's opinion as a physician that the recommended leave was medically necessary during the period of time from October 17 through 23, 1989. However, Dr. Berg's note does not state that or necessarily imply that. In fact, it does not state or imply any urgency or necessity. In addition, during complainant's October 11, 1989, discussion of Dr. Berg's note with Ms. Grand, complainant did not even relate the recommended leave to her medical condition but to some personal decisions she felt she would like time to make and did not advise Ms. Grand that she needed or wanted to take the leave immediately. 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 courses 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., and it was not "medically necessary" for complainant to take the requested leave during the period of October 17 through October 23 as opposed to some other time.

If the Commission were to accept complainant's position that her serious health condition rendered her unable to perform the duties and responsibilities of her position and that a leave in October of 1989, was medically necessary, a question would still remain whether complainant gave respondent "advance notice of the medical treatment or supervision in a reasonable and praticable manner" within the meaning of §103.10(6)(b), Stats. Prior to actually leaving the work site on October 16, 1989, the only person who was aware of complainant's intent to use the week of October 16 through 23, 1989, as the week of her requested leave was Ms. Nelson. Ms. Nelson was not one of complainant's supervisors nor one of the individuals who would be involved in approving the leave or in assessing whether the requested leave would "disrupt the employer's operations" within the meaning of §103.10(6)(b), Stats. Although Ms. Nelson's standard procedure is to take the staff schedules turned into her on Thursday and prepare a master schedule for the following week, there is no evidence in the record that Ms. Grand, Mr. Conway, or Mr. Imm had had an opportunity to review a master schedule for the week of October 16 prior to complainant leaving the work site. In none of her discussions prior to October 16 with Mr. Conway or Ms. Grant relating to the requested leave did complainant indicate that she intended to begin her requested leave on October 16 nor could this be inferred from Dr. Berg's note recommending leave. Notice within the meaning of §103.10(6)(b), Stats., would include notice not only as to the basis for the leave but as to the timing of the leave as well. Failing to advise an employer of the time period which the requested leave will cover does not satisfy the requirements of §103.10(6)(b), Stats. Even if the record were to show that Ms. Grand and/or Mr. Conway saw the master sched-

ule on Thursday or Friday of the previous week, this would still not allow sufficient time for respondent to carry out the type of review and planning contemplated by §103.10(6)(b), Stats. On this record, it actually appears as though complainant made a conscious effort to avoid discussing the timing of her leave with Ms. Grand and Mr. Conway, i.e., despite several discussions with them relating to her leave request, complainant did not indicate that she wanted to start her leave on October 17 and did not make her leave slips available to Ms. Grand and/or Mr. Conway until she had already left the office with the intent not to return until October 24. The Commission concludes that complainant's request for leave under the FMLA did not satisfy the notice requirements of §103.10(6)(b), Stats.

The next element of the instant controversy involves §103.10(7), Stats., which governs the type of information an employer may require from an employe's health care provider in relation to a request for leave under the FMLA. Complainant argues that the term "certification" in this section "must necessarily involve a writing" and, as a result, since Mr. Conway's request for information from Dr. Berg involved a request to speak personally with Dr. Berg, such request violated §103.10(7), Stats. Complainant bases this argument on the dictionary definitions of the noun "certificate" and the verb "certificate." However, this ignores the dictionary definition of "certification" itself which states [Webster's New Collegiate Dictionary (1977)]:

> 1. the act of certifying: the state of being certified 2: a certified statement.

and the accompanying dictionary definition of "certify" which states:

> **1**: to attest authoritatively: as **a**: confirm **b**: to present in formal communication **c**: to attest as being true or as represented or as meeting a standard **d**: to attest officially to the insanity of **syn** see Approve

Neither of these definitions necessarily contemplates or requires a writing in order to certify something. Complainant's argument ignores as well the fact that, when the Legislature clearly intends to require a writing, they have not been hesitant to do so as is evidenced throughout the statutes. Their failure to do so in regard to this section of the statutes leads the Commission to conclude, in conjunction with the conclusions drawn from the dictionary definitions

cited above, that Mr. Conway's request to speak to Dr. Berg did not violate §103.10(7), Stats., and did not impose an "illegal precondition" as complainant has asserted.

Complainant further asserts that the information requested in Mr. Conway's October 13, 1989, memo was outside the scope of information which §103.10(7), Stats., permits employers to request of health care providers in relation to a request filed under the FMLA. The obvious intent of this section of the statutes is to restrict to a certain extent an employer's access to health-related information regarding an employee, a type of information traditionally treated by our laws and public policies as deserving of special privacy and privilege considerations. This section specifies the maximum allowable intrusiveness of a request for information from an employer to a health care provider under the FMLA. It does not, however, require that this request echo the language of §103.10(7), Stats. In the instant case, Mr. Conway asked two questions: "How is this leave going to be helpful?" and "What is this leave going to accomplish?" To the Commission, these questions seem to be asking essentially the same thing, i.e., they seem to be asking Dr. Berg for her opinion as to what problem this leave was expected to solve and how far this leave would go in solving it. This inquiry appears to the Commission to be subsumed by the scope of inquiry specified in §103.10(7), Stats., i.e., the identification of the problem appears to be subsumed by §103.10(7)(b)1. and 3. (the fact of and the medical basis for the serious health condition) and the prognosis or impact of the leave by §130.10(7)(b)2. and 4. (the duration of the serious health condition and its impact on the employee's job). The Commission concludes that neither the substance nor the form of Mr. Conway's request for information violated §103.10(7), Stats.

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.

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.

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.

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.

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.

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 complainat has failed to show pretext for retaliation in this regard.

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.

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 recipt 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.

Finally, 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.

Order

This complaint is dismissed.

Dated:_____, 1991 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

_____
DONALD R. MURPHY, Commissioner

_____
GERALD F. HODDINOTT, Commissioner

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