STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN G. BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondent.

Case No. 90-0097-PC-ER

DECISION AND ORDER

Nature of the Case

This case arises under the Family and Medical Leave Act (FMLA). A hearing was held on March 7 and 8; May 4, 5, and 6; June 30; July 1 and 22, 1994; before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on October 20, 1995.

Findings of Fact

1. Effective January 29, 1990, complainant was appointed to a Security Officer 3 (SO 3) position at Mendota Mental Health Institute (MMHI). Complainant's supervisor was Julius Grulke, Chief of Security. Complainant was required to serve a six-month probationary period.

2. Complainant was given the customary orientation and training for a probationary SO 3 with previous security experience. Complainant had been employed as an SO 2 and an SO 3 for the University of Wisconsin from November of 1984 until July of 1989.

3. Mr. Grulke and another person conducted the employment interview of complainant for the SO 3 position. During this interview, Mr. Grulke stated that he was very strict about the use of sick leave by his subordinates. Mr. Grulke made this statement at all SO interviews. Complainant volunteered during this interview that he had a child and a pregnant wife. Complainant alleges that Mr. Grulke then stated that being the father of a young son and

having a pregnant wife might interfere with the SO 3 position for which complainant was interviewing. Mr. Grulke did not make this statement.

4. On March 8, 1990, complainant was getting dressed for work when his son had a seizure. Complainant called his wife, who was at her work place, and asked her to call Mr. Grulke to explain that complainant would be late for his shift and to explain why. Complainant's wife did this some time after the beginning of the shift. Complainant reported to work 3.5 hours after the beginning of his scheduled shift. Complainant alleges that Mr. Grulke was upset about the absence; told complainant that he considered it an unnecessary use of sick leave and, if it continued, it could lead to discipline; and stated that child care was not a father's responsibility and, if complainant's wife went into labor while he was at work, complainant would not be permitted to leave. Mr. Grulke did not make these statements.

5. On April 4, 1990, complainant's wife gave birth to their second child, a daughter. Complainant's wife's medical condition required her to be hospitalized until the middle of April. When his wife was released from the hospital, complainant requested four days of sick leave and one day of personal leave to care for her. This leave request was handled by SO Schweiger because Mr. Grulke was on vacation. Complainant alleges that, when he returned from leave, Mr. Grulke was back at work and told complainant that complainant's absence had been an unnecessary use of sick leave, that he would take job action if complainant continued to abuse sick leave, that complainant was lucky that SO Schweiger had been there because he wouldn't have approved the leave, and that complainant was putting a burden on the rest of the department and causing unnecessary overtime. Mr. Grulke did not make these statements. Mr. Grulke was contacted by one of complainant's co-workers who questioned whether complainant could take sick leave to stay home with his wife if his wife was at home and well and the baby was still in the hospital. Mr. Grulke referred this inquiry to the personnel unit at MMHI which checked with respondent's central personnel unit which indicated that such leave was permissible. Complainant alleges that, upon his return from leave, he stated to Mr. Grulke that he hoped his daughter would be released from the hospital on or around June 1 and that he would need to take four week's leave at that time. Complainant did not make such a statement to Mr. Grulke and did not request such leave, orally or in writing, from respondent.

6. MMHI SOs were required to conduct fire drills at MMHI and at Central Wisconsin Center for the Developmentally Disabled (CWC). Conducting a fire drill at CWC required an SO to follow the procedure stated below for each of CWC's 10 buildings:

a. go to the Administration Building, have the switchboard operator dial the fire department, and advise the fire department that they should ignore the fire alarms;

b. go to building where fire drill is to be conducted and set off alarm by pulling handle down in pull box, or by activating smoke alarm by pushing button with broom handle or by spraying a can of smoke on the smoke alarm;

c. observe procedure followed by staff and residents;

d. re-set pull box if pull box has been used;

e. open control panel and push re-set button;

f. fill out fire drill form.

The procedure to be followed and the pull box and control panel mechanisms are essentially the same for each CWC building. An SO who has observed the fire drill procedure once should be able to conduct a fire drill independently after that. Each fire drill takes about 5-10 minutes to complete. It was not unusual for one SO to complete all CWC fire drills on one shift. It was a federal certification requirement that a fire drill be conducted for each CWC building on each shift once each calendar quarter. Mr. Grulke took this requirement very seriously after he was threatened, prior to 1990, with job action for noncompliance.

7. On February 1, 1990, complainant carried out fire drills with SO Welch in Building 4, Building 6, and Building 7/8 of CWC. SO Welch demonstrated fire drill procedures to complainant and answered any questions complainant had during these fire drills.

8. On February 6, 1990, complainant completed fire drills at MMHI with SO Schweiger. MMHI fire drills did not involve the same procedures as CWC fire drills.

9. On February 26, 1990, complainant carried out fire drills with SO Schweiger in Murphy Hall-East and Buildings 1 and 2 of CWC. SO Schweiger demonstrated fire drill procedures to complainant and answered any questions complainant had during these fire drills.

10. On March 23, 1990, complainant carried out fire drills with SO Schweiger in House 1 and House 2 of CWC. SO Schweiger demonstrated fire drill procedures to complainant and answered any questions complainant had during these fire drills.

11. Kay Spaulding was appointed to an SO 3 position at MMHI effective January 2, 1990. Ms. Spaulding was given the customary SO orientation and training. SO Schweiger provided Ms. Spaulding's fire drill training by demonstrating two fire drills to her, answering any of her questions, and observing and providing feedback while she conducted a fire drill. Ms. Spaulding was able to conduct fire drills independently after this training.

12. Prior to March 19, 1990, complainant left 5 or 6 notes for Ms. Spaulding criticizing her work performance as an SO. Ms. Spaulding felt that complainant was singling her out for criticism and that the tone of the notes was that of a superior, not a peer. On March 19, 1990, Ms. Spaulding received the following note from complainant:

> North entrance door to CWC Food Service was ajar again when I checked it. Also found it ajar Saturday 3/17/1990. Be sure to check this door each time you enter or exit it.
>
> Just a reminder--you forgot to fold the flags.
>
> Also, after eating or drinking in the van be sure to dispose of your empty snack bags or cans. It's each officers responsibility to pick up after themselves.

The content and tone of this note was consistent with the previous notes. This note upset Ms. Spaulding and she showed it to Mr. Grulke. Ms. Spaulding felt that complainant's treatment of her was condescending rather than collegial, that complainant did not treat the other SOs this way, and that this treatment was due to the fact that she was a woman. Ms. Spaulding requested of Mr. Grulke that she not be required to work with complainant but Mr. Grulke advised her that she and complainant would have to work this out. Mr. Grulke did discuss the note with complainant and told him not to write such notes to Ms. Spaulding again.

13. On April 30, 1990, complainant and Ms. Spaulding were scheduled to work together on the second shift. They met with Mr. Grulke at the beginning of the shift. Mr. Grulke commented at this time that, since there were two of them scheduled to work the second shift that day, the fire drills for CWC would be assigned. Mr. Grulke ordered complainant to complete all the CWC fire drills on the second shift and assigned Ms. Spaulding to do the other second shift

duties. These other second shift duties included grounds patrol, locking buildings, certain deliveries, and covering the switchboard operator's break. Mr. Grulke also stated that, if all the fire drills were not completed as ordered, job action would result; and that Ms. Spaulding should not do any fire drills unless she had time. Complainant advised Mr. Grulke that he would like to complete the fire safety self-study packet before doing the fire drills and Mr. Grulke did not indicate that complainant should not do so although he told complainant he felt complainant should complete the fire drills first. The self-study packets did not show how to do fire drills at CWC. Complainant and Ms. Spaulding agreed that she would begin the second shift duties while he did the study packet and he would call her to pick him up when he was done. It took complainant almost two hours (2:30-4:20 p.m.) to complete the packet. At the beginning of this shift, complainant and Ms. Spaulding received a memo which indicated that the system connecting the CWC fire alarms to the fire department was shut down. This simply removed a required step from the fire drill procedure and did not prevent or affect in any other way the performance of the fire drills at CWC. Complainant did not ask any questions as to the meaning of this memo or the effect it would have on completion of fire drills.

14. Ms. Spaulding picked complainant up in the security van at 4:20 p.m. Complainant indicated that he did not know how to do fire drills and suggested they should do them together. Ms. Spaulding told complainant that this was not her understanding of Mr. Grulke's order but that she would help him with the first one and demonstrate the fire drill procedure to him at that time. Complainant asked Ms. Spaulding, "Why can't you just go along?" when she told him that she would not do all the fire drills with him since it was contrary to Mr. Grulke's order. Ms. Spaulding and complainant agreed that Mr. Grulke should be contacted in view of their dispute about the shift assignments. They were unable to reach Mr. Grulke so they left a message on SO Newlun's answering machine. SO Newlun was the SO to be contacted if Mr. Grulke was unavailable.

15. Ms. Spaulding and complainant proceeded to CWC Building 1 to conduct the first fire drill. Ms. Spaulding demonstrated each step in the fire drill process to complainant. Some time during the conduct of the fire drill, SO Newlun contacted them by phone. Ms. Spaulding spoke to SO Newlun and advised him that she was very upset about complainant's suggestion that she

violate Mr. Grulke's order. Mr. Newlun felt that the disagreement between complainant and Ms. Spaulding posed a security risk to the institution and suggested that Ms. Spaulding take leave and go home. Ms. Spaulding agreed with Mr. Newlun, finished the fire drill with complainant, and left the work site. This fire drill took 7 minutes to complete. Complainant testified that he would have been able to complete the remaining fire drills at CWC after Ms. Spaulding left but that he did not have enough time left in the shift to do so.

16. The shift report completed by complainant for the second shift on April 30, 1990, indicated as follows:

Spaulding:	start time-1430	end time-1800
Butzlaff:	start time-1430	end time-2230

1430-1620	Self study packages
1430	Library box run was done
1450	Med.boxes and central supply delivered
1625	Delivered food to CTU
1640	Locked MMHI admin.
1655	Monitored patients going to supper at FS
1730	Began fire drills at CWC
1800	Covered CWC switchboard for break. Took down flags. Lights on.
1835	Locked CWC HAB. Locked and security checked Murphy Hall. Locked the Auditorium, Rm. B-47 and Rm. B-46. [all CWC buildings]
1900	Admission from Dane County. Taken to FAU. Cleared 1935.
1940	Locked and security checked Bldgs 1-7. Locked rooms B-23-C and B-15 in Bldg 5; Room B-11 in Bldg 4. [all CWC buildings]
2025	Locked and security checked CWC food service/ canteen. Closed and locked all windows in canteen area.
2042	Locked and security checked Stovall Hall and Lorenz Hall/Canteen. Locked and security checked MMHI food service/conference center. [all CWC buildings]
2115	Covered CWC switchboard for break.
2140	Attempted to jump start Nursing Supervisor's vehicle. Unable to. Cleared 2150.

Made patrols of MMHI and CWC during shift.

18. SOs frequently did not cover the switchboard during the switchboard operator's break if they were busy with other duties. The switchboard operator on duty during the second shift on April 30, 1990, was very flexible and cooperative about this.

19. Since each of the treatment units at MMHI and most of the treatment units at CWC are locked internally, the locking of the outside of the buildings is not considered such a high security priority that it must be completed on a particular shift, and it is not uncommon for it to be left for the following shift. Complainant testified that he understood during the course of his employment as a SO 3 at MMHI that patrol and lock-up were routine SO duties which were to be interrupted for emergencies or when the supervisor instructs an SO to do something else. It takes 30 to 60 minutes to lock all the buildings at CWC. Most of the outside doors of CWC were self-locking as of January of 1990.

20. An admission is a high security priority and takes precedence over most other security responsibilities.

21. Complainant had the time and the opportunity to complete the remaining CWC fire drills after Ms. Spaulding left on April 30, 1990.

22. When Mr. Grulke learned that the CWC fire drills had not been completed by complainant on the second shift on April 30, 1990, he directed that complainant prepare a report of this incident and scheduled a meeting with complainant. The notice to complainant of this meeting was dated May 1, 1990, and stated as follows:

> Things are not going well. I am considering terminating your probation. I want to meet with you at 1430, on Wednesday, May 2nd. If you do not want to meet, please let me know and my final decision concerning your employment status will be made based upon the information I currently have.

23. Prior to the meeting complainant completed a memo summarizing his version of events which occurred during the second shift on April 30.

24. The meeting was held as scheduled on May 2, 1990. Present for the entire meeting were complainant, Mr. Grulke, and Marie Carlin, who was the chief union steward and was attending as complainant's union representative. Ms. Carlin was a very experienced union representative and an aggressive advocate but was not the union representative complainant had requested. Complainant did not have a right to union representation at this meeting but it was respondent's general practice to allow one. Present for part of the meeting was Dennis Dokken, MMHI personal manager. Complainant was given an opportunity during the meeting to offer his version of the events which occurred during the second shift on April 30, 1990. When asked why he had not completed the fire drills, complainant indicated that there had not been

enough time, that SO Spaulding had not finished the orientation, that he didn't feel comfortable doing the drills alone, and that SO Spaulding was too busy at MMHI to help. Ms. Carlin requested that complainant be given an opportunity to improve his performance.

25. Complainant's employment as an SO 3 at MMHI was terminated by respondent based upon Mr. Grulke's recommendation effective May 2, 1990.

26. Based on his background/record as a supervisor, Mr. Grulke was likely to terminate a probationary employee for violating one of his orders.

27. It is consistent with respondent's policy and practice to terminate a probationary SO for failing to carry out a supervisor's order. The procedure followed by respondent in terminating complainant was generally consistent with its usual procedure in terminating probationary employees.

28. Based on his background/record as a supervisor, Mr. Grulke was unlikely to terminate a probationary employee for requesting leave to care for a spouse or child.

29. Complainant did not include on his employment application for the MMHI SO 3 position or in his responses to interview questions the primary reason he had left his employment with the Dane County Sheriff's Department. Complainant also did not tell his wife the primary reason for leaving this job. Complainant was employed as a deputy sheriff with the Dane County Sheriff's Department from July to September of 1989. The employment application form complainant completed and signed for the subject SO 3 position at MMHI stated as follows: "I hereby state that all the information on this application is true and complete to the best of my knowledge and I understand that any false job-related information may disqualify me for htis position." Misrepresentation on an employment application form constitutes grounds for termination by respondent.

30. Complainant's wife, Jacqueline Butzlaff, called Mr. Grulke on May 3, 1990, and asked him why complainant had been terminated. Mr. Grulke told her that he needed to check with personnel before he talked to her and he would get back to her. When Mr. Grulke had not gotten back to her by the next day, Ms. Butzlaff called him on May 4 and again asked him why complainant had been terminated. Mr. Grulke explained to Ms. Butzlaff that he had been advised not to discuss with her the reasons for complainant's termination. Ms. Butzlaff then listed for Mr. Grulke the family health problems she and complainant were facing at the time. Ms. Butzlaff alleges that Mr. Grulke made

a statement to the effect that their family health problems were no longer his problems. Mr. Grulke did not make such a statement.

31. On April 14, 1990, Ms. Spaulding gave respondent notice that she would be resigning effective May 5, 1990. On May 2, 1990, Mr. Turbin was hired to replace Ms. Spaulding. Mr. Turbin resigned May 9, 1990, due to a health problem. Mr. Kelling was hired to replace Mr. Turbin effective June 18, 1990. Stan Lamont was hired to replace complainant effective July 1, 1990.

32. The informational poster required by the Family and Medical Leave Act was posted at MMHI on or around April 1, 1990.

33. Mr. Grulke died on October 28, 1992. On June 21, 1990, Mr. Grulke met with Neil Gebhart, a staff attorney for respondent, to discuss complainant's allegations with respect to this charge of retaliation.

Conclusions of Law

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

2. The complainant has the burden to show that respondent violated the provisions of the Family and Medical Leave Act (FMLA), §103.10, Stats..

3. The complainant has failed to sustain this burden.

Opinion

Complainant contends both that respondent terminated him in retaliation for exercising rights protected by the Family and Medical Leave Act (FMLA), and that respondent "interfered with, restrained, or denied" his exercise of such rights.

Retaliation

The legal issue argued by the parties in regard to this contention relates to the proper "mixed motive" standard to apply, i.e., the one enunciated by the U.S. Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), or the one more recently enunciated by the Wisconsin Court of Appeals in Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W. 2d 234 (Ct. App. 1994). However, the Commission concludes, based on the record before it, that complainant has failed to prove that FMLA retaliation was a motivating factor in respondent's termination of complainant's employment and, as a result, it is not necessary to resolve this issue here.

In attempting to prove his case, complainant alleges that Mr. Grulke made certain statements which demonstrate his anti-FMLA sentiments and his intent to retaliate against complainant for engaging in activities or for invoking rights protected by the FMLA; and that Mr. Grulke's reputation and his handling of situations involving other employees support this allegation. The resolution of these factual issues necessarily involves an analysis of the comparative credibility of complainant and Mr. Grulke and the comparative plausibility of the versions of events propounded by the parties; and an analysis of whether Mr. Grulke's reputation and handling of situations involving other employees supports complainant's or respondent's position here.

The record reveals numerous deficiencies in complainant's credibility, including the following:

1. Complainant attributed his failure to complete additional fire drills on April 30 after SO Spaulding left to his lack of fire drill training. Not only does the record show that complainant had sufficient fire drill training and training comparable to that provided to other SOs, but complainant acknowledged in a report that he wrote about the incident that, after SO Spaulding showed him how to do the fire drill in Building 1, he would have been able to do the rest of the fire drills.

2. Complainant also attributed his failure to complete additional fire drills on April 30 after SO Spaulding left to lack of time. However, the record clearly shows that complainant had time not only to complete the remaining necessary second shift responsibilities but to complete the remaining fire drills as well. The record further shows that, rather than completing all or even a few of the remaining fire drills, complainant used his time to complete low priority second shift tasks which, consistent with standard procedure, could have been left for the next shift.

3. Complainant testified that, during fire drill training by SO Welch, SO Welch required him to stay by the switchboard while SO Welch set up the fire alarm system and required him to stay in the van while SO Welch conducted the fire drills. This testimony was in direct conflict with that of SO Welch who indicated that this would have been inconsistent with his purpose and practice in conducting fire drill training, and with his practice not to use a van to go from building to building but an electric cart to go through a tunnel connecting the buildings. This testimony by complainant is also inconsistent

with the statement he made in his hand-written report of the April 30 incident to the effect that he " . . . had observed a few Fire Drills conducted by Don and Ed." It is undisputed that his reference to "Don" here is to SO Welch. It should also be noted that there was no showing that SO Welch had any reason to retaliate against complainant by misrepresenting the circumstances of his fire drill training.

4. The conclusion in paragraph #3, above, relating to complainant's credibility is buttressed by a parallel situation relating to his fire drill training by SO Schweiger. Once again, complainant testified that he was required by SO Schweiger to stay by the switchboard while SO Schweiger "set up the system." Once again, testimony by SO Schweiger and others who SO Schweiger trained fails to show that this was his practice in training complainant or his practice in training any other SO. Once again, the record fails to show that SO Schweiger had any reason to retaliate against complainant by misrepresenting the circumstances of his fire drill training.

5. Complainant testified on direct examination that his awareness of a memo which indicated that the system connecting the CWC fire alarms to the fire department was down caused him concern about his ability to properly set up the system. Complainant offers this as further explanation for his failure to complete additional fire drills on April 30. Upon cross examination, however, complainant admitted that he had not asked Mr. Grulke during the pre-shift meeting about the implications of the memo on the conduct of fire drills, that this situation had not caused any problem when he and Officer Spaulding had conducted the fire drill in Building 1, and that this should not have caused him concern.

6. Complainant's addition of increasingly more damning allegations to his version of events as time went on lends credence to respondent's contention that complainant's final version of events is not credible.

a. In his lengthy letter to the Commission dated May 29, 1990, which complainant characterized in his testimony as outlining all the reasons for his believing that Mr. Grulke had retaliated against him, complainant failed to mention that Mr. Grulke had made any inappropriate comments relating to family or medical leave during his interview for the subject position. However, after being advised by Commission staff of the time limit for filing a FMLA claim, complainant filed a charge of discrimination on June 15, 1990, in which he stated that "When I was interviewed for Security Officer

3 by Julius Grulke, he expressed deep concern that being a father of a "young" son and having a "pregnant" wife might interfere with the position." It should also be noted here that Mr. Grulke's ultimate hire of complainant is inconsistent with any such feeling of "deep concern" on his part.

b. In his lengthy May 29, 1990, letter, complainant stated that when he came in three and a half hours late for his shift after taking his son to urgent care, "Grulke expressed deep concern that I would need to take time off from work to do this. Grulke stated he didn't like to give out unnecessary overtime." In this letter, complainant also stated that, after his meeting with Mr. Grulke on March 20, 1990, regarding his notes to SO Spaulding and in which Mr. Grulke directed complainant not to write such notes to another SO again and warned complainant not to spread rumors about Mr. Grulke, "from this day on he always treated me as if I had said the rumor he had heard." In his June 15, 1990, charge of discrimination, complainant stated that, "After my son had a seizure and I took 3 1/2 hours to rush my son to Dean Urgent Care to be examined I noticed Grulke started treating me differently from the other officers." In an October 29, 1992, letter to Commission staff, complainant, for the first time, asserted that, when he arrived at work after taking take his son to urgent care, Mr. Grulke "warned me not to abuse sick time again" and stated, "it is not the Father's responsibility to care for children or run them to the doctor . . . that's what the mother is for." In complainant's answers to respondent's first set of interrogatories dated November 22, 1992, complainant stated for the first time in regard to this incident that, "Grulke threatened termination if Mr. Butzlaff continued to use sick leave." In complainant's answers to respondent's second set of interrogatories, complainant stated for the first time in relation to this incident that, "Grulke confronted me saying that if I was on duty when my wife went into labor I would not be permitted to leave work."

c. In his May 29, 1990, letter to the Commission, complainant described the incident which occurred upon his return to work after caring for his wife as follows: "After returning to work. Grulke, again, expressed concern that I needed to take time off from work for this purpose. Grulke didn't like to assign overtime. It really upset him when I informed him I <u>may</u> also need time off to care for my daughter . . . " In a letter to Commission staff dated October 29, 1992, complainant stated in regard to this incident that, "Upon Security Supervisor Julius Grulke's return from his trip he <u>again</u> threatened

to fire me if I abused sick leave again. He also stated he would never have approved the time off. (Family/Medical Leave) He then stated I had better set my priorities straight; that I should place my job before my family especially since I was still on probation. (ANOTHER THREAT) I told him I had to consider my family's needs first. I then informed him of my need for and requested Family/medical Leave be approved for me so I can care for my daughter when she was released from St. Mary's Infant Intensive Care. Security Supervisor Julius Grulke firmly stated he would not approve my request for Family/Medical Leave. He stated I would be putting too much of a "burden" on the rest of the Security Officers for overtime. He refused my note requesting Family/Medical Leave."

7. Complainant did not tell his wife or respondent the primary reason he left the Dane County Sheriff's Department, i.e., the record shows that complainant was asked to submit his resignation when the sheriff's department discovered that he had been arrested for retail theft but that he told his wife and he told respondent that he left the sheriff's department becuase he didn't like working with jail inmates.

8. Complainant testified that he thought that he told Ms. Carlin that Mr. Grulke had threatened to terminate him for abuse of sick leave. However, Ms. Carlin's testimony did not confirm this and her recollection of their conversation about the reason for the termination was that complainant told her this was happening to him because people, including Mr. Grulke, did not like him.

Mr. Grulke's credibility is also necessarily an issue here. This issue is complicated, however, by the fact that Mr. Grulke died before the hearing was held and his testimony was not preserved prior to his death. Complainant argues, however, that Mr. Grulke lied to Ms. Carlin and Neil Gebhart, an attorney for respondent who interviwed Mr. Grulke about the circumstances of complainant's charge of retaliation before his death, about the facts of complainant's termination.

Complainant asserts first in this regard that Ms. Carlin's notes and testimony indicate that Mr. Grulke lied to her by telling her the May 2 meeting "was a performance review and not a termination meeting." However, Ms. Carlin's notes actually indicate that Mr. Grulke indicated early in the meeting that complainant had been insubordinate and that he didn't think complainant

was going to "work out." More important, however, is the fact that the note that Mr. Grulke gave to complainant relating to the scheduling and subject matter of the meeting (See Finding of Fact 22, above) clearly indicated that the purpose of the meeting was to consider termination of complainant's probation. The fact that Ms. Carlin may have been uncertain about the purpose of the meeting because complainant did not share the contents of this note with her cannot be interpreted as an effort by Mr. Grulke to keep her in the dark or to misrepresent to her the purpose of the meeting. In addition, Ms. Carlin's contemporaneous notes of the meeting indicate that, toward the end of the meeting and after Ms. Carlin had made several suggestions and asked several questions, Mr. Grulke stated, "You know I don't have to have a union steward at this meeting. This is a job performance evaluation and stewards don't have to be at performance evaluations. We have made the decision that Officer Butzlaff is unable to perform his duties and is terminated." Ms. Carlin's notes do not indicate, contrary to complainant's assertions here, that Mr. Grulke stated that the meeting was "not a termination meeting." The record does not support a conclusion that Mr. Grulke misrepresented the purpose of the pre-termination meeting to complainant or to Ms. Carlin.

Complainant also asserts that Mr. Grulke lied to Mr. Gebhart in regard to three points when the two met in June of 1990. First, complainant asserts that Mr. Grulke lied when he indicated that complainant had stated in his employment interview that his wife was expecting a "difficult" pregnancy when, in fact, the record indicates that complainant and his wife had no reason to expect this at that time. Although much has been made of this inconsistency by complainant, its significance is minimal. Mr. Grulke would have had little if any reason to misrepresent this point in the context of this case and, as a result, the inconsistency is more likely attributable to error than to intentional misrepresentation.

Complainant next asserts that Mr. Grulke lied by telling Mr. Gebhart that "the only time Officer Butzlaff discussed the issue of his wife's pregnancy was in the interview and that Officer Butzlaff had, in fact, been granted time off to attend to his family needs." Complainant is arguing here that Mr. Grulke's statement to Mr. Gebhart relating to "time off" is inconsistent with the alleged denial of or interference with complainant's request for four weeks' leave to care for his daughter once she was released from the hospital. A review of Mr. Gebhart's notes indicates, however, that Mr. Grulke's statement

that complainant had been granted time off related to complainant's request for leave to care for his wife after she was released from the hospital. A review of these notes further indicates that Mr. Grulke's reference to "checking with downtown" related also to complainant's request for leave to care for his wife, not to complainant's request for time off to care for his daughter once she was released from the hospital. Finally in this regard, Mr. Grulke was not inconsistent in his statements relating to his conversation with complainant about his wife's pregnancy. Mr. Gebhart's notes indicate that Mr. Grulke denied discussing complainant's wife's pregnancy with him at any time other than the interview. The only contrary evidence in the record consists of statements made by complainant. Since SO Schweiger, not Mr. Grulke, handled complainant's request for four days of leave to care for his wife after she was released from the hospital, the record does not support a conclusion that Mr. Grulke's representation in this regard was "patently incredible and an obvious lie" as alleged by complainant.

Complainant also argues that Mr. Grulke lied to Mr. Gebhart in asserting that complainant did not mention his allegedly inadequate fire drill training until after the shift on April 30. Complainant contends that he mentioned this to Mr. Grulke during the pre-shift meeting. However, the testimony of SO Spaulding that she "was surprised" when complainant told her during the course of the shift that he did not know how to do the drills; and of Andra Michels, a witness to the pre-shift meeting, that Mr. Grulke told Officer Spaulding to help complainant with the fire drills "if she had time," are inconsistent with discussion during the pre-shift meeting of complainant's lack of preparation to do fire drills independently or of SO Spaulding performing a fire drill training role for complainant during the second shift.

Complainant also contends that Mr. Grulke's version of events relating to the circumstances surrounding the inquiry to respondent's central personnel office regarding complainant's leave request to care for his wife at home is not plausible or credible. Complainant bases this argument on its contention that "reason dictates that it would be very unusual for a disinterested fellow employee to question this legitimate use of sick leave." Given the dynamics of any work setting and the possibility that a co-worker may be facing a similar situation, it is not necessary or even reasonable to conclude that Mr. Grulke's version of these events is not plausible or credible. Complainant also contends that Mr. Gebhart's notes (Complainant's Exhibit 39)

of his conversation with Mr. Grulke on June 21, 1990 (See Finding of Fact 33, above), reveal an inconsistency in this regard. These notes indicate that " . . . pers. √ 'd w/ dntn + they said yes + time was granted . . . " Complainant contends that, since SO Schweiger had already approved complainant's leave, it could not have then been approved after Mr. Grulke had checked with the central personnel office ("dntn" or "downtown"). However, not only do Mr. Gebhart's notes not clearly indicate that complainant's leave was approved "after" Mr. Grulke checked with "downtown" as complainant contends, but the record does not show that SO Schweiger or Mr. Grulke or anyone else acting as a first-line supervisor has final approval authority for leave requests. Complainant has failed to demonstrate an inconsistency or lack of credibility here.

Decision of a case under the circumstances present here also requires an analysis of which version of events, that espoused by the complainant or that espoused by the respondent, is the more plausible given the evidence in the record. In the context of the issue under consideration here, the relevant question is whether the record supports a conclusion that Mr. Grulke was more likely motivated to terminate complainant for violating an order or for requesting leave to care for his family.

The record clearly establishes that Mr. Grulke was an authoritarian supervisor who expected his orders to be followed by his subordinates and who would likely terminate a probationary employee for violating one of his orders. The record also establishes that Mr. Grulke gave complainant an order to complete all the CWC fire drills on the second shift on April 30, that such an order had been given to other SOs at other times and such SOs had carried it out, that Mr. Grulke had reason to be aware of the fact that complainant had been trained to do fire drills by more senior SOs, and that complainant did not complete or attempt to complete any fire drills on April 30 after SO Spaulding left.

The record also establishes that, based on his treatment of other employees, Mr. Grulke was not likely to look with disfavor on requests for leave to care for a spouse of child or to terminate a subordinate for making such requests. The record does not show that Mr. Grulke ever denied an employee's request for leave to care for a family member or ever harassed an employee for requesting such leave:

1. Although Mr. Grulke or the department he supervised was the subject of numerous union grievances over the years, not one of these grievances involved a complaint that Mr. Grulke had interfered with or denied an employee's legitimate use of sick leave. Ms. Carlin, who as chief union steward had dealt with Mr. Grulke in relation to union grievances over the course of many years and who acknowledged in her testimony that she thought that Mr. Grulke was a bad supervisor, testified that she could not recall any employee ever complaining about Mr. Grulke denying leave for the care of a spouse or child, or harassing an employee for making such a request.

2. Jim Billings testified that, when he was a union officer, employees disliked Mr. Grulke and complained about him at union meetings, but he was not aware of any complaints that Mr. Grulke harassed employees about family or sick leave.

3. Carrie Matthews disliked Mr. Grulke and kept her own "file" on him but this file contained no information that Mr. Grulke had denied use of leave time for family medical problems or harassed an employee requesting such leave.

4. SOs Matthews, Spaulding, and Lamont all testified that Mr. Grulke did not harass them about or discourage, interfere with, or deny their use of sick leave to care for their children.

5. Ms. Carlin testified that Officer Tyrole Glenn used sick leave to care for a child with serious health problems and that she was not aware of Mr. Grulke denying him the use of or harassing him about the use of such leave.

6. Officer Craig Kelling testified that Mr. Grulke allowed him to take three days of sick leave during his probationary period to attend his grandmother's funeral and assured him that he could take as long as he needed.

7. Officer Newlun testified that Mr. Grulke did not harass him or deny his use of leave to take his wife to the doctor.

8. When SO Matthews learned at work that her daughter had suffered a seizure, Mr. Grulke, who had learned of the situation over his radio, came in to work from home upon his own initiative so that SO Matthews could leave work to be with her daughter.

9. Several witnesses who had worked many years with Mr. Grulke testified that he had a "soft spot" for children.

10. A situation offered by complainant as one comparable to that presented here is not parallel and does not lend credence to complainant's contention. In this other situation, SO Groesbeck cared for his handicapped child prior to the start of his shift, and made it known to Mr. Grulke that coming in to work prior to his shift would make child care arrangements difficult. It was MMHI's policy to require forced overtime to meet the needs of this total care 24-hour-a-day institution, and the applicable union contract specified that MMHI management had the right to require forced overtime in reverse seniority order. When Officer Groesbeck was notified by Mr. Grulke to come in early consistent with this policy and contract provision, Officer Groesbeck declined based on his child care situation. Mr. Grulke did not order Officer Groesbeck to report but made other arrangements. When Officer Groesbeck did arrive for the start of his scheduled shift, Mr. Grulke explained the forced overtime requirements to him. It should be noted that this situation did not involve a request by Officer Groesbeck for leave to care for a family member. It is concluded that this situation does not evidence any attitude on Mr. Grulke's part about Mr. Groesbeck's family medical situation, but his intention to run his department by the book and his expectation that his subordinates comply.

11. Complainant also points to Mr. Grulke's alleged statement to complainant's wife (See Finding of Fact 30, above) as evidence of his anti-FMLA sentiments. Ms. Butzlaff's credibility and interest in the matter were both assessed in determining whether Mr. Grulke made such a statement to Ms. Butzlaff. It was concluded that there were inconsistencies in Ms. Butzlaff's testimony. In particular, she testified that she contacted Mr. Grulke for the sole purpose of learning the reason for her husband's termination and not to ask for his job back or to make Mr. Grulke feel guilty. However, if this were her sole purpose, she would not have recited for Mr. Grulke all the health problems her family was experiencing at the itme. Her testimony is also inconsistent with the representation in complainant's pre-hearing brief that "Mrs. Butzlaff's testimony will show that she called Julius Grulke after her husband was fired to plead with him to give her husband his job back." In addition, complainant attempts to portray Ms. Butzlaff as a disinterested person vis a vis this litigation, but it must be assumed that Ms. Butzlaff would have a financial interest in any monetary remedy recovered or in any monetary obligation incurred by complainant here. Finally, it would have been

incongruous for Mr. Grulke to have made such a statement to Ms. Butzlaff in view of the caution he had exercised in checking with the personnel unit after Ms. Butzlaff's first call and in informing her during the second call that he had been advised not to discuss the reasons for complainant's termination with her.

Complainant also makes several pretext-type arguments. He argues that his record of "outstanding performance" as a Security Officer "stands in stark contrast" to his termination and supports a conclusion that his termination was for reasons other than the manner in which he carried out the duties and responsibilities of his position. The record shows, however, that there are two aspects of an employee's "work performance" and that they are evaluated and handled by respondent in two different ways. The first relates to the competence with which an employee carries out the duties and responsibilities of a position and this is the type of work performance which is generally assessed on a performance evaluation and is the type of work performance which was rated as "outstanding" for complainant in regard to certain measures of his performance and generally satisfactory in regard to the remaining measures. The other aspect relates to the manner in which an employee complies with applicable work rules and this is the type of work performance which is generally addressed through disciplinary channels. The reason offered by respondent for complainant's termination, i.e., his violation of the work rule prohibiting insubordination, is based on this second aspect. As a result, the nature of complainant's performance evaluations would be irrelevant. The reason offered by respondent is legitimate and non-retaliatory on its face and is consistent with the focus of Mr. Grulke's statements at the pretermination meeting. In addition, the record shows that it was consistent with respondent's policy and practice for a probationary employee to be terminated for violating a supervisor's order, and that the procedure followed by respondent in terminating complainant was consistent with existing policy and practice. In this same regard, complainant also alleges that certain of respondent's witnesses changed their testimony regarding the justification for complainant's termination. This relates again to the distinction between performance problems relating to competence for which the record shows respondent works with the employees to improve performance, and performance problems relating to work rule violations

which the record shows serve as the basis for possible discipline or termination. The record viewed as a whole does not support a conclusion that any of respondent's witnesses changed their testimony in this regard.

Complainant also argues that Mr. Grulke was motivated to terminate complainant because he wanted to avoid the overtime costs and scheduling complications associated with complainant's use or planned use of leave time to attend to family medical matters. The record shows that it would have been apparent to Mr. Grulke if, as complainant alleges, he had received a request from complainant for four weeks' leave, that he would probably incur greater overtime costs and scheduling hassles by terminating and replacing complainant than by working around his four week leave. Testimony of personnel office employees indicated that it took an average of 3 to 6 months to fill a position, and that it took 8 weeks to fill complainant's position after his termination. Even though Mr. Grulke was aware at the time of the pretermination meeting that a certification list for the Spaulding vacancy had been generated in 2 weeks, he would have had little reason, in view of past experience, to expect that any subsequent certification requests would be generated in such a short time.

Finally, complainant argues that Mr. Grulke was aware that complainant's fire drill training was inadequate or that complainant was unprepared to do fire drills independently; and that Mr. Grulke's assignment of the fire drills to complainant was an effort to set complainant up for failure and a clear demonstration of pretext. However, the record shows that complainant received as much fire drill training or more than other SOs who had been assigned by Mr. Grulke to perform fire drills independently and had done so successfully, and that Mr. Grulke had reason to be aware of the amount and type of training that complainant and these other SOs had received. The record also shows that, at the pre-termination meeting, Mr. Grulke was aware, through information that complainant himself had provided, that, after SO Spaulding had left on April 30, complainant felt that he was able to independently perform the remainder of the fire drills. Finally, although complainant contends that the MMHI fire drill training of SOs in general was inadequate, this sheds little light on the issue here since there has been no showing that complainant's training was inconsistent with that given other SOs or that he was held to a different standard after such training than other SOs. Complainant has failed to demonstrate pretext.

This is not a close case. The clear preponderance of the credible evidence in the record supports a conclusion that Mr. Grulke was not motivated by complainant's requests for leave to care for his wife and children to terminate complainant, but that complainant's termination was based on his failure to carry out one of Mr. Grulke's orders.

Interference

Complainant also appears to be arguing that he has a second independent cause of action under the FMLA. (§103.10(11), Stats.) Pursuant to this theory, Mr. Grulke's allegedly threatening statements to complainant relating to his use of leave to care for his wife and children had a tendency to "interfere with, restrain, or deny" complainant's exercise of his rights under the FMLA. However, as concluded above, Mr. Grulke did not make the threatening statements attributed to him by complainant. [1]

[1] The remainder of this paragraph as it appeared in the Proposed Decision and Order was removed by the Commission due to the fact that it was unnecessary for the decision of this matter.

Order

This complaint is dismissed.

Dated: January 23, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

LRM:lrm

Parties:

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

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

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

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

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

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

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

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