STATE OF WISCONSIN PERSONNEL COMMISSION

**MARY E. NEWBOLD,**
***Complainant,***

**v.**

**OFFICE OF THE STATE PUBLIC DEFENDER,**
***Respondent.***

**Case Nos. 96-0053-PC-ER, 96-0095-PC-ER**

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of age and sex discrimination and retaliation for engaging in protected fair employment activities. A hearing was held on May 27 and 28, July 26, 27 and 28, and September 7 and 8, 1999, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on December 20, 1999. Complainant has urged the Commission not to consider respondent's post-hearing brief since, although it was postmarked by the deadline, it was not received until after the deadline. The Commission's practice, however, is to consider service of a brief effective upon mailing. §PC 1.05(2), Wis. Adm. Code. The hearing examiner issued a Proposed Decision and Order to which the parties had an opportunity to respond. The Commission, after considering the parties' responses and consulting with the hearing examiner, adopted the Proposed Decision and Order with only minor changes for purposes of clarification. These changes appear as footnotes in this decision marked by letters of the alphabet. None of these changes disturbed the credibility findings of the hearing examiner.

## FINDINGS OF FACT

1. On or around January 9, 1995, complainant (dob 11/22/40) was appointed to an Investigator position in respondent's Racine regional office. Complainant was required to serve a six-month probationary period. The decision to hire complainant was effectively made by Sally Barrientes-Lugo, Deputy First Assistant; Richard Jones[A], Senior Assistant Public Defender; and Ronald Langford, the First Assistant in the Racine regional office at the time. Complainant had previously received paralegal training and had served as an unpaid investigator intern in Minnesota. State Public Defender (SPD) Investigators are responsible for assisting defense attorneys in gathering and verifying facts. Determining defense strategy is the sole responsibility of the defense attorney. On January 16, 1995, complainant met with her supervisor, Richard Jones, to review her position description and performance expectations.

2. The First Assistant has overall responsibility for a regional office such as the Racine office. During the relevant time period, the First Assistants in the various SPD regional trial offices were supervised by Michael Tobin, (dob 1951), Director of respondent's Trial Division.

3. During complainant's tenure with the SPD, there was a procedure for obtaining employee identification (ID) cards. This procedure was informally developed and carried out by Bruce Goodnough, one of the staff Investigators; the cards were produced by him at his convenience; and the cards were not a job requirement for SPD staff. In 1995, Mr. Goodnough was assigned to the SPD office in Elkhorn.

4. Some Investigators, including two senior male Investigators, never requested or received ID cards. Jane Harlan (dob 10/8/47) was hired as an Investigator in the Racine SPD office in October of 1994. She received an ID card soon after her hire. Deanna Thompson (dob 5/12/69) was hired as an Investigator in the Racine SPD office in late 1995. She did not receive an ID card until the next spring when she made arrangements to meet Mr. Goodnough at a conference in Madison. Wayne Baumgart

was hired as an Investigator in the Racine SPD office in early 1996. He drove to Mr. Goodnough's office in Elkhorn to get his ID card prepared soon after he was first hired. Complainant did not receive an ID card soon after her hire.

5. New Investigators were issued a letter of introduction by their supervisor to be used until staff at the jails, police departments, probation and parole offices, social service agencies, or other relevant venues became acquainted with them and recognized them as an SPD employee. Complainant was issued such a letter by Mr. Jones on January 9, 1995. Complainant is the only SPD Investigator in the Racine SPD office who experienced difficulty during 1995 gaining access to the jail or other relevant venues. Staff in the Racine County jail and/or in the Racine Police Department reported to Mr. Jones that complainant had been rude to them when they asked her for identification.

6. In July of 1994, classroom training was offered to Racine SPD office staff relating to CLARIS, the computer software used in the office for word processing purposes. Those hired after July of 1994 did not receive this classroom training but an instructional video was made available to them. Complainant viewed sections of this video but not the entire video.

7. Complainant claims that, at a meeting on February 4, 1995, at which she, Mr. Jones, Jennifer Bias[B], and Cindy Meinert were present to discuss a particular case, Mr. Jones grabbed her right knee while they were sitting next to each other. Complainant further claims that she told Mr. Jones a few days later that this conduct had been unwelcome. According to complainant, no comparable incidents occurred in the future.

8. Ms. Bias became the Acting First Assistant in the Racine SPD office the first week of April of 1995.

9. On or around April 9, 1995, Mr. Jones completed a written evaluation of complainant's work performance and met with complainant to discuss it. This

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[A] Mr Jones was under the age of 40 at all times relevant to this matter.
[B] Ms. Bias was under the age of 40 at all times relevant to this matter.

evaluation was very positive. The evaluation form did not require or enable the supervisor to assess such performance-related factors as attitude, relationships with co-workers or members of the public, or willingness to take direction or supervision. The completed written evaluation of complainant's performance did not include the face sheet (Part A) of the form, but it was not unusual for SPD supervisors to omit this form. [c]

10. On or around May 4, 1995, complainant asked secretary Patti Kremkoski to type a subpoena for her. Although Ms. Kremkoski was busy with other tasks she considered a higher priority based on timeliness concerns, complainant became very demanding and Ms. Kremkoski agreed to type the subpoena for complainant. When Ms. Kremkoski completed typing the subpoena, complainant noticed several typographical errors as well as certain substantive modifications Ms. Kremkoski had made. Complainant alleges that, when she asked Ms. Kremkoski to make changes in the subpoena, Ms. Kremkoski said words to the effect, "Don't be so God damn fussy." Ms. Kremkoski agreed to make the changes to the subpoena requested by complainant, and delivered the corrected document to complainant's office. Since complainant had her back to Ms. Kremkoski as she entered the office, Ms. Kremkoski touched complainant on the head or shoulder to get her attention so that she wouldn't startle her. Complainant alleges that Ms. Kremkoski patted her on the head in a patronizing manner. Ms. Kremkoski did not use profanity in addressing complainant. Complainant noticed additional errors in the document and became enraged at Ms. Kremkoski, speaking to her in a loud and angry voice.

11. Complainant reported her allegations relating to the alleged head patting to Ellen Banker, the lead secretary, who discussed it with Ms. Kremkoski. Ms. Banker directed Ms. Kremkoski to type complainant's work exactly as written and exactly as complainant instructed. Ms. Banker also informed Ms. Kremkoski that complainant

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[c] Although complainant's supervisors had used other types of documents to assess other employee's attitude, relationships, or willingness to take direction or supervision, they did not use any of these types of documents at this time to assess these aspects of complainant's performance. Complainant's supervisors did not discuss these aspects of her performance with her at this time

did not appreciate her patting complainant. Ms. Banker mentioned this discussion to complainant and assumed thereafter that the matter had been resolved to complainant's satisfaction. Complainant did not report to Ms. Banker that Ms. Kremkoski had used profanity during the incident. Ms. Kremkoski was 45 years old at the time of the incident.

12. It had been reported to Ms. Bias by various members of the clerical staff that complainant was rude, discourteous, demanding, had unreasonable expectations, and refused to answer questions such as those relating to her handwriting. Complainant was the only Investigator during 1995 about whom the clerical staff complained.

13. Some time after complainant's appointment, Mr. Jones brought to her attention the availability of a training opportunity relating to certain computer assisted drafting (CAD) software which had been recommended by an SPD staff member in another office for use in creating diagrams of crime scenes. The creation of crime scene diagrams was currently being performed for respondent by outside contractors, and having Investigators perform this function would have resulted in a cost savings for the agency. The other Investigators in the Racine SPD office completed the CAD training. Mr. Jones told complainant that this training was optional. Complainant formed the opinion that the training was a thinly veiled marketing presentation by the software vendor and declined the training. Ms. Bias learned that complainant had declined the training, and communicated to Mr. Jones that she would like complainant to participate in the training. Mr. Jones communicated this to complainant who continued to decline the training.

14. There was no training offered to the other Investigators in the Racine SPD office during complainant's tenure there that wasn't offered to complainant.

15. The relevant collective bargaining agreement required that SPD Investigators obtain prior supervisory approval before incurring overtime hours. Although complainant, as a probationary employee, was not subject to this agreement, it was agency policy that this same requirement apply to probationary Investigators, and this fact was made known to complainant upon or soon after her appointment.

Complainant was also instructed that she should discuss her request with one of her supervisors rather than putting her request in writing, and that one of her supervisors would be available in person or by phone at all times. Prior to May 18, 1995, complainant incurred overtime hours without prior approval from her supervisors. Mr. Jones' signature on complainant's time sheets on which these hours were recorded did not signify his prior or subsequent approval for her to work these hours, but instead signified his acknowledgement that the hours had been worked. Her supervisors' presence when she was working these overtime hours did not signify their approval for these overtime hours.

16. Complainant and the other Investigators were issued cellular phones, and it was explained to them that these phones had limited authorized minutes each month, that they would be required to reimburse respondent for minutes in excess of this limit, and that, in order to restrict their use so as not to exceed the monthly limit, the phone should be used primarily for emergency purposes. Complainant was one of a few Investigators who regularly exceeded the monthly limit. Complainant was asked to reimburse respondent for the excess which amounted to two or three dollars a month. Complainant brought her concern about this situation to Mr. Jones' attention. Mr. Jones looked into the matter and attempted to change service providers but did not receive permission to do so. Once this had occurred, complainant continued to express her concern about cellular phone charges to Mr. Jones.

17. During the first few weeks of complainant's employment, one of the three Investigators in the Racine office, Cindy Kollath (dob 12/2/56), took an extended medical leave. To assist complainant with her increased workload and, having been informed by complainant that she did not have good typing skills, one of the secretaries in the office was assigned by complainant's supervisors to type complainant's reports. When Ms. Kollath returned from leave, complainant's supervisors advised her that she would now have to type her own reports. Complainant was very concerned about this and brought her concerns to Mr. Jones. During this discussion, complainant asked if Mr. Jones had any problems if she consulted her union representative in regard to this

issue. Mr. Jones indicated that he did not, and told complainant that he would discuss the issue with Ms. Bias. Mr. Jones did mention the issue to Ms. Bias who indicated that complainant had raised it with her as well and it was Ms. Bias's understanding that complainant intended to get back to Ms. Bias for the purpose of further discussion. All Investigators in the Racine SPD office were expected to type their own reports. Most of the attorneys in the Racine SPD office did their own typing.

18. Because of these outstanding issues relating to complainant's employment, Mr. Jones thought that it would be a good idea to meet with complainant to discuss and attempt to resolve them. Mr. Jones also invited Ms. Bias and Ms. Barrientes-Lugo to attend the meeting. This was consistent with typical office procedure. Ms. Bias indicated that she would be able to attend. Mr. Jones prepared a description of the issues he recommended they discuss at the meeting and he made a copy of this list for Ms. Bias to use. This was a management document and was intended for management use only.

19. The meeting with complainant was held on May 18, 1995. Mr. Jones explained at the beginning of the meeting that it was not a disciplinary meeting but was instead intended to be an informal discussion of certain concerns and issues that had arisen that he wanted to address so that they would not become problems in the future. When complainant noticed that Mr. Jones and Ms. Bias had brought a document to the meeting with them, she interpreted the document as an agenda for the meeting and insisted that she be given a copy. Mr. Jones explained to complainant that the document was a description of the issues they intended to discuss and had been prepared for management use only. Complainant continued to insist that she was entitled to a copy of the document, and when Mr. Jones did not provide one to her, complainant became very uncooperative. During this meeting, complainant was not open to the discussion of any work performance issue. Mr. Jones and Ms. Bias were surprised because they had not personally observed complainant display this attitude before.

20. During this meeting of May 18, 1995, when the issue of typing for complainant was raised, complainant indicated that she had understood that Mr. Jones and Ms. Bias were supposed to get back to her for further discussion and, since they had not, she considered the issue moot. When Mr. Jones tried to discuss the issue further, complainant told him to "move on" to the next discussion item. When Ms. Bias tried to discuss the issue further, complainant pointed her finger at Ms. Bias and said in a loud, rude tone, "I told you to move on." Complainant also stated in this regard that, without the typing help, her reports would be "skinnier," and she would have less time to devote to fact gathering and verification.

21. During this meeting of May 18, 1995, Mr. Jones and Ms. Bias discussed the importance of training with complainant, and complainant indicated that she would be interested in obtaining training in medical terminology, guns, traffic stops, and blood spatters. Mr. Jones explained that most of the people providing training to SPD Investigators did so on a volunteer basis and respondent had to take advantage of the offers whenever they were made available.

22. During this meeting of May 18, 1995, complainant initiated the discussion of the cellular phone issue and indicated that she continued to be concerned about the cellular phone bills she had been receiving. Mr. Jones indicated that he had attempted to change the service provider but had been unsuccessful. In regard to overtime, Mr. Jones reiterated the prior approval requirement. Complainant indicated that she disagreed with the requirement and felt she should be permitted to work whatever hours were necessary to complete her job. Ms. Bias reminded complainant that it was a collective bargaining agreement requirement that they were not authorized to ignore. Mr. Jones and Ms. Bias directed complainant to call any of her three supervisors, even at home or by contacting their beepers, to obtain prior approval for overtime, and reminded complainant that approval required dialogue.

23. During this meeting of May 18, 1995, Mr. Jones and Ms. Bias made several suggestions to complainant relating to receiving and accepting criticism, developing effective and collegial relationships with others, and refraining from rude

behavior, and asked complainant to make suggestions regarding what steps could be taken to help her do her job more effectively. Mr. Jones and Ms. Bias did not raise their voices during this meeting, they each spoke in a calm and serious tone of voice, they did not threaten or discuss discipline or an unfavorable work evaluation, and they gave complainant an opportunity to fully participate in the discussion. Complainant concluded from this meeting that Mr. Jones and Ms. Bias had decided to terminate her, and acknowledges that her attitude changed after this meeting and she avoided communicating with Mr. Jones and Ms. Bias. According to complainant, the harassing aspects of this meeting were the mention by Mr. Jones and Ms. Bias that it was not a disciplinary meeting, the fact she was not provided a copy of Mr. Jones' document describing the issues he wanted to cover, and Mr. Jones' and Ms. Bias's serious tone of voice during the meeting.

24. Mr. Jones summarized what occurred at the May 18, 1995, meeting in a memo. Carla Blum, respondent's Human Resources Officer, would probably have recommended complainant's immediate termination if she had seen this memo.

25. Ms. Kollath was planning to conduct a handwriting exemplar of an SPD client and thought that it would be a good training opportunity for complainant and Jane Harlan (dob 10/8/47), the other new Investigator in the Racine office. Ms. Kollath scheduled the exemplar with the client for May 22, 1995, and, in a memo dated May 15, 1995, advised complainant and Ms. Harlan of the exemplar and suggested they attend. When Mr. Jones heard of the training opportunity, he directed complainant and Ms. Harlan to attend. Complainant was upset that Ms. Kollath had scheduled the exemplar without consulting complainant about her schedule and upset that Mr. Jones had ordered her to attend. Complainant attended the exemplar on May 22, 1995, and, during part of the training exercise, read an article about Oscar Wilde in "Vanity Fair" magazine. Later in the exemplar, complainant related to Ms. Kollath that she saw no point in being there and Ms. Kollath told her she could leave.

26. During this period of time, Mr. Jones became very concerned about the relationship among the Investigators and the efficiency with which the Investigators

were using their time and energy. As a result, he scheduled a meeting for May 25, 1995, to discuss these and other matters, including overtime approval, training, and cellular phone usage, in an informal setting. The meeting was held at a restaurant in Racine and Mr. Jones and the three Investigators rode together to the meeting. During the meeting, Mr. Jones raised the issue of training. Prior to this, complainant had looked out the window and not contributed anything to the discussion. Once training was mentioned, complainant indicated to the group that she needed to make prior determinations as to the value of any training and needed Mr. Jones to get a syllabus and evaluation of the scheduled trainer prior to the training date for her to review; and that she had found the handwriting exemplar training to be useless. Mr. Jones, later in the meeting, expressed interest in having the Investigators work as a team, i.e., to cover each other on a regular basis and to spend more time coordinating their work efforts to reduce the effects of their respective workloads. In response to this, complainant stated to the group that she would rather not work with Ms. Harlan because she didn't have confidence in the information she got from her and, as a result, she had decided not to talk to Ms. Harlan any longer. Complainant also stated that she did not like Ms. Kollath. After she had her say, complainant refused to participate any further in the meeting. At the conclusion of the meeting, complainant refused to ride with the others and took a bus back to the office.

27. Mr. Jones summarized what occurred at the May 25, 1995, Investigator's meeting in a memo of that same date. Ms. Blum would have recommended complainant's immediate termination had she seen this memo and, if the supervisors of the Racine SPD office had not accepted her recommendation, would have taken it to Mr. Tobin.

28. Ms. Kollath made arrangements for Mr. Goodnough to come to the Racine SPD office on May 26, 1995, to make ID cards for her (a replacement card), complainant, and a staff member from the Milwaukee SPD office. Ms. Kollath advised complainant that Mr. Goodnough would be in the office between 1:00 and 1:30 p.m. on May 26. Complainant made an appointment to be in Durand at 1:00 on May 26 for the

purpose of copying certain records, but did not advise anyone in the Racine SPD office that she would not be present for the scheduled appointment with Mr. Goodnough. When Mr. Goodnough arrived in Racine and complainant was not in the office, Mr. Jones called her on her cellular phone and she told him that she was copying materials and would return to the office at 3:15 for Mr. Goodnough to take her picture. Mr. Jones informed complainant that Mr. Goodnough could not wait that long. Complainant then told Mr. Jones that he was "using up her minutes, this was not an emergency, and she'd deal with it later." When complainant got back to the Racine SPD office around 3:00 p.m. and learned that Mr. Goodnough had already left, she was very upset that he hadn't waited for her to return. She contacted Mr. Goodnough by phone a few days later. She let him know she was very upset that he hadn't waited for her or come to the office in Durand where she had the appointment on May 26 and make her ID card there. Mr. Goodnough characterized complainant's tone in this conversation and the subsequent conversations he had with her as "chastising, accusatory, antagonistic, adamant, and abrasive." All of Mr. Goodnough's contacts with other Investigators relating to the preparation of ID cards have been collegial and cooperative.

29. On Monday, June 5, 1995, Ms. Banker was ill and her office was locked when the others in the office arrived at work that day. There were materials in her office which the supervisors needed by noon in order to conduct employment interviews. Since complainant had been observed the previous weekend using Ms. Banker's office, even though asked not to do so by Ms. Barrientes-Lugo, it was assumed that complainant had been responsible for locking the door. Ms. Banker had the only key to her office. Mr. Jones and Ms. Barrientes-Lugo decided that complainant should be responsible for retrieving the key. Complainant was in Kenosha carrying out investigative duties at the time. Mr. Jones contacted complainant by phone and directed her to retrieve the key from Ms. Banker at her home and deliver it to the office. Complainant was very upset about this directive and hung up on Mr. Jones. Mr. Jones called complainant back and gave her Ms. Banker's address and phone

number, and reiterated his directive. Complainant called Ms. Banker at her home, and persuaded Ms. Banker to take the key to the office. Complainant felt that Mr. Jones should have had Ms. Harlan retrieve the key since she was in the office that day.

30. On or around June 5, 1995, complainant received a new case assignment. When she discovered that the case file was not in her box, complainant so advised Mr. Jones. Mr. Jones suggested complainant check with Ms. Harlan or Ms. Kollath to determine whether they knew where the case file was. Complainant was never able to locate the file, and had a duplicate file prepared. Complainant was of the opinion that Mr. Jones was harassing her by having her track down the file.

31. In a memo to Ms. Bias and Ms. Barrientes-Lugo dated June 13, 1995, Mr. Jones summarized the concerns he had relating to complainant's work performance during her probationary period. In this memo, Mr. Jones cited as examples of performance problems complainant's refusal to discuss the typing issue with her supervisors, her feeling that she was not being treated as a professional if she was performing secretarial work, complainant's statements that her reports would be skinnier if she had to type them herself and she would have less time for fact gathering and follow-up which Mr. Jones interpreted as a threat to do less than a thorough job with her assigned cases, complainant's opposition to training as evidenced in particular by her behavior at the handwriting exemplar conducted by Ms. Kollath, complainant's failure to obtain authorization from her supervisors for overtime hours, complainant's uncooperative and insubordinate attitude regarding arrangements for her to obtain a photo ID card, and complainant's attack on Ms. Harlan at the Investigators' meeting and indication that she refused to talk to or work with Ms. Harlan.

32. Mr. Jones, Ms. Bias, and Ms. Barrientes-Lugo met with complainant on June 14, 1995, to discuss these concerns. The result of this meeting was that complainant's probation was extended three additional months and complainant was placed on a Performance Improvement Plan (PIP). It was a typical SPD practice for more than one member of management to be present at this type of meeting.

33. The PIP imposed on complainant on June 14, 1995, stated as follows, in pertinent part:

> . . . This Performance Improvement Plan is implemented to guide your working relationships with clients, support staff, supervisors, courtroom personnel, witnesses, community resources, and the public in general; to ensure that your performance is consistent with professional and ethical standards, to promote adherence to agency policies and procedures; and to ensure that administrative responsibilities are satisfactorily met.
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> 1. You will abide by the rules of decency, courtesy, and common sense in dealing with others, including clients, support staff, supervisors, courtroom personnel, witnesses, community resources, and the public in general.
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> 2. You will consult and communicate with attorneys, regarding their cases, in a courteous and professional manner, and keep the attorney timely informed of the status of the case and all investigative findings, prior to the established completion or due date.
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> 3. You will attend and attentively participate in any and all training offered by this Agency, which is deemed by your supervisor to be necessary to your position as an investigator.
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> 4. You will observe all agency and local office policies and procedures.
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> 5. You will abide by all work orders issued by your supervisors.
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> THIS PERFORMANCE IMPROVEMENT PLAN IS A WORK ORDER. It is effective immediately and will remain in effect through June 14, 1996. Failure to comply with this Performance Improvement Plan may result in discipline, up to and including termination.

34. Performance Improvement Plans are generally[D] a year in duration, and are seldom used for probationary employees since they involve a major time and energy commitment for the affected supervisors.

35. The purpose of extending an employee's probationary period is to permit the employee an additional opportunity to demonstrate that he or she can satisfactorily

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[D] The word "generally" was substituted for the word "always" to more accurately reflect the record.

perform the duties and responsibilities of the position. The alternative to a probation extension is probationary termination at the end of the original probationary period.

36. Ms. Bias, Ms. Barrientes-Lugo, and Ms. Blum recommended to Mr. Jones that complainant be terminated at the end of her six-month probationary period. Mr. Jones felt that complainant had demonstrated some ability as an Investigator and he wanted to give her an additional opportunity to meet all the expectations of her position. Ms. Blum requires that a supervisor recommending a probation extension provide a document detailing performing problems and the plan for addressing them during the period of extension. The PIP prepared by Mr. Jones satisfied this requirement. Extending a probationary period requires the approval of the Department of Employment Relations. Respondent's typical practice is to notify the affected employee once this approval is obtained, and this practice was followed here.

37. It was contrary to Mr. Goodnough's policy to send blank ID cards in the mail but, after he had received several demanding calls from complainant, he made an exception for her. Mr. Goodnough mailed out the card the end of June of 1995, but complainant did not receive it. On July 14, 1995, complainant called Mr. Goodnough's supervisor, Judy Zuege, and told her that he was refusing to provide her with an ID card. Mr. Goodnough brought this call to Mr. Jones' attention through an e-mail of July 25, 1995, in which he indicated in relevant part that:

> . . . While I admit that Ms. Newbold's attitude and abrasiveness leaves me rather cold, I have bent over backwards to see that she has an ID card. It should be noted that the ID cards are the property of the agency, they are controlled and ultimately my responsibility. I have already stretched my own rules as far as sending an incomplete ID card to Ms. Newbold and now am advised that she does not have it. I would greatly appreciate your addressing the matter so Ms. Newbold understands the situation, comes into compliance and ceases unnecessary phone calls to my supervisor.

38. Mr. Jones discussed the ID situation with Ms. Bias after he received Mr. Goodnough's e-mail. In a memo to complainant dated July 26, 1995, Ms. Bias stated as follows, in pertinent part:

> Your attitude seems to be that he [Mr. Goodnough] is at your beck and call. He is not. You decided to ignore the appointment to meet with him, despite instructions from your supervisors at the very moment that Mr. Goodnough was in this office waiting for you. Your behavior and your attitude throughout this entire situation has been appalling and unprofessional. You created a bad situation by not keeping your appointment. However, your bad attitude has exacerbated it. I cannot fathom why you would make demands of anyone given the history of this situation and yet that is your approach in "working out" your missed appointment with Mr. Goodnough.
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> The State Public Defender identification cards are the property of the agency, not you. The method by which they are created and distributed is controlled by the agency, not you. It is interesting to note that you have not addressed any of your concerns about not having a state identification card to your supervisor or any other supervisor in this office, nor have you alerted us to your many unsuccessful efforts with Mr. Goodnough.
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> Until your supervisors resolve the issues of where, when and how a state identification card is to be issued to you and direct you as to the steps necessary to secure it, do not contact Mr. Goodnough or his supervisors.
>
> Contact Richard Jones or me if you wish to discuss this issue and we will make an appointment to meet with you.

39. Complainant contacted Nicholas Chiarkas, the State Public Defender, by letter dated July 26, 1995, about her failure to have an ID. In this letter, complainant attributed her failure to connect with Mr. Goodnough on May 26 to a "series of misunderstandings and miscommunications," and indicated that her subsequent requests to him had been ignored. Complainant had not requested help from Mr. Jones or Ms. Bias in getting an ID card since she was of the opinion that they were acting in concert to deprive her of an ID card and had actually instructed Mr. Goodnough not to provide her one.

40. During the time period relevant here, Mr. Goodnough had no reason to be aware of complainant's age.

41. Prior to June 21, 1995, complainant was assigned to perform investigative duties relating to a sexual assault case in which the SPD client was a juvenile and the

alleged victim was a three-year-old child. The defense attorney assigned to the case was Ricardo Lugo. Complainant spent some of her investigative time on tasks not specifically assigned by Mr. Lugo, e.g., obtaining information regarding the impact of repeated interviews on a child victim and the re-victimizing of a child victim by adults in the criminal justice system. One of the reasons complainant undertook these tasks related to her opinion that Mr. Lugo had re-victimized a child victim in another case as the result of his questioning techniques.

42. As part of the investigation of this sexual assault case, Mr. Lugo instructed complainant to go to the department store restroom where the assault had allegedly occurred and take photos of the crime scene. Complainant's initial reaction was to tell Mr. Lugo to do it himself. After Mr. Lugo repeated his instruction, complainant did go to the store.[E]

43. Mr. Lugo instructed complainant to invite the child and his mother to the Racine SPD office for an interview on June 21, 1995. Complainant followed this instruction. When Mr. Lugo indicated to complainant that he wanted her to participate in the interviewer as an observer, complainant refused. The basis for complainant's refusal was her belief that Mr. Lugo would re-victimize the child through his questioning, and complainant shared this belief with Mr. Lugo. Mr. Lugo reported this to complainant's supervisors and she was replaced by another investigator.

44. In interviews of child witnesses, the typical procedure is for at least one parent to be present and for this parent to have the right to remove the child at any point, and for at least one other SPD staff member, usually an investigator, to be present with the defense attorney during the interview to serve as an observer and to take notes. One of the purposes of having an investigator present during a defense attorney's interview of a child victim is to provide feedback to the defense attorney regarding interviewing techniques.

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[E] The last sentence was modified because it was not clear from the record whether complainant ever had the opportunity to view or photograph the crime scene and it was not necessary to resolve this point in the decision of this matter

45. As the result of complainant's actions in regard to the subject investigation, complainant's supervisors reasonably concluded that she had overstepped her bounds and neglected her duty as an investigator by becoming an advocate for the victim instead of the defendant. In Mr. Tobin's opinion, this incident alone would have justified complainant's termination.

46. Complainant visited and spoke at length with the child victim's mother prior to the hearing before the Commission.[F] In relating the subject of this interview, complainant emphasized the manner in which the eventual interview of the child was conducted and her opinion that the techniques utilized by Mr. Lugo and the investigator were inappropriate.[G]

47. Investigators are expected to follow through on each request for assistance from a defense attorney, unless they feel they are in personal danger. It is the responsibility of the defense attorneys to determine if a situation presents an ethical question or conflict.

48. Complainant was the Investigator assigned to a case on which Ms. Bias was the defense attorney. This case had been handled by Mr. Langford until he left the Racine SPD office. Mr. Langford had placed the name of AM on the list of witnesses he intended to call at trial. After Ms. Bias was assigned the case, she explained to complainant, on May 16, 1995, that it was not in the defense's interest to have AM testify and she did not want his name on the witness list and did not want him subpoenaed. Despite this explanation, complainant arranged for a subpoena for AM to be issued. Ms. Bias spoke with AM who advised her that he had spoken with complainant and complainant had provided certain information to him relating to the impact of a subpoena on a party's ability to question a witness at trial. Once it came to Ms. Bias's attention that a subpoena had been issued for AM, she instructed complainant, on June 20, 1995, to have the subpoena withdrawn. Complainant

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[F] The phrasing of this sentence was modified to clarify that the hearing being referenced was the hearing before the Personnel Commission.

proceeded to withdraw AM's subpoena but mistakenly withdrew the subpoena for NC at the same time. Ms. Bias had never instructed complainant to withdraw NC's subpoena. Ms. Bias did not become aware that NC's subpoena had been withdrawn until July 17, 1995, the day of trial. In a memo dated July 24, 1995, Ms. Bias advised complainant as follows, in relevant part:

> . . . These 2 incidents illustrate that you have once again ignored clear directives given to you regarding performance of your job duties. Unfortunately, this occurred during a critical stage in the representation of our client and could have jeopardized the outcome of the jury trial.
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> . . . On Tuesday, both of these individuals came into the office asking for my payment approval on their subpoenas. During the course of these conversations they indicated that you had given them legal information regarding the subpoena and their testimony in this case. This involves giving legal information which is outside of your duties as an investigator.
>
> . . . As an investigator your job does not include giving legal advice or opinions in any shape, form or fashion. Any legal question must be referred to the attorney handling the case.
>
> If you have questions, see me or Rick [Jones] to schedule an appointment to discuss them with us.

49. During the PIP review period, complainant sought approval for overtime hours through written notes or e-mail rather than dialogue as instructed by her supervisors.

50. Complainant was provided feedback concerning her work performance continuously during her tenure in the Racine SPD office, both orally and in writing. This feedback was generally provided at the time the issue arose. During the PIP review period, complainant was provided feedback relating to the child victim assignment, AM subpoena, manner of requesting overtime, and other aspects of her work performance. Respondent regarded any interaction between a supervisor and a

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[G] Although complainant argues in her objections that this finding is based on an exhibit which was not received into the hearing record (Complainant's Exhibit 171), this finding was not based on this exhibit but instead primarily on the testimony of the complainant.

subordinate relating to work performance as a performance evaluation. Respondent regarded any face-to-face meeting between a supervisor and a subordinate as a formal performance evaluation. It is typical and appropriate to review an employee's attitude and relationships with co-workers and others as a part of a performance evaluation.

51. Complainant mentioned the incident in which she and Ms. Kremkoski were involved (See Findings 10 and 11, above) during the Investigators' meeting on May 25, 1995, and during the meeting with her supervisors which had occurred on June 14, 1995. Complainant's supervisors did not interpret these mentions as a complaint or a request for further investigation at the time.[H]

52. On June 21, 1995, complainant filed a written complaint with Sally Pederson, SPD general counsel and affirmative action officer, regarding the Kremkoski incident. Ms. Pederson advised complainant that there would be no formal investigation of the complaint by the affirmative action office since, on its face, it did not allege a cognizable violation of SPD's harassment policy; and the complaint would be handled by Ms. Bias. After reflecting on the fact that complainant had mentioned the Kremkoski incident to him more than once, Mr. Jones directed a memo to Ms. Bias on June 23, 1995, in which he indicated that complainant had first related the incident to him at the May 25, 1995, Investigators' meeting and that, since she had raised the issue again on June 14, 1995, he inferred that complainant felt the matter should be investigated even though she had never so requested.[I] Ms. Bias did investigate the incident by discussing it with Ms. Kremkoski and Ms. Banker on July 6, 1995. Ms. Banker wrote a memo which is consistent with the version of events of Findings of Fact 10 and 11, above. Bias concluded that Ms. Kremkoski did not engage in inappropriate behavior and provided written notice of her conclusion to complainant and to Ms. Kremkoski. Complainant claims that she did not receive a copy of this notice.

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[H] The phrase "at the time" was added to more accurately reflect the record.

[I] Language was added to clarify that, although Mr. Jones had not originally concluded that complainant was requesting an investigation of the Kremkoski incident, he had reached this conclusion after further reflections. This change was made for purposes of clarification

53. On June 22, 1995, complainant filed a written complaint with Ms. Pederson regarding the Jones incident which allegedly had occurred on February 4, 1995 (See Finding 7, above). Ms. Pederson assigned Robin Dorman (female, 41 years of age at the time), First Assistant in the Waukesha regional SPD office, to investigate this complaint. Ms. Dorman had participated in sexual harassment training conducted by respondent and had supervised the investigation and litigation of criminal cases for more than 20 years. Ms. Dorman interviewed complainant, Mr. Jones, and Ms. Meinert in person and Ms. Bias by phone. Complainant indicated to Ms. Dorman that she did not believe the touching was sexually motivated; and that, if the touching had been initiated by someone she had known better, she might have interpreted it as a gesture to emphasize a point. Complainant did not indicate in her written complaint or to Ms. Dorman that she had told Ms. Kollath about the incident after it had occurred, but did tell Ms. Dorman that Ms. Kollath had related to complainant that Mr. Jones had been involved in a sexual harassment incident while employed in Milwaukee. Complainant indicated in her written complaint that Mr. Jones had grabbed her right knee, and to Ms. Dorman that Mr. Jones had grabbed her left knee. Mr. Jones denied that the contact had occurred and indicated that he didn't even shake hands with complainant. Ms. Bias and Ms. Meinert indicated that they had noticed no physical contact between Mr. Jones and complainant at the meeting on February 4. Ms. Dorman, in her investigative report which she forwarded to Ms. Pederson on or around July 13, 1995, concluded that the touching, if it had occurred at all, did not constitute sexual harassment. Ms. Pederson, in a letter to complainant dated July 18, 1995, indicated that Ms. Dorman's conclusions had been adopted by respondent.

54. Respondent's discrimination/harassment policy states as follows, in pertinent part:

> . . . The SPD prohibits harassment, defined as any unwelcome conduct or action directed toward an individual, on the basis of the individual's age, ancestry, color, national origin, race, religion, creed, handicap, marital status, sex or sexual orientation, arrest or conviction record (which is not job-related), political affiliation, or membership in the military service. Retaliation against an employe who files a

> discrimination/harassment complaint is illegal and will not be tolerated by the SPD.
>
> Harassment exists whenever:
>
> -submission to harassing conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;
>
> -submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
>
> -the conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
>
> "Sexual harassment" as defined in s.111.32(13), Stats., is one type of harassment, and includes unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. Sexual harassment includes conduct directed by a person at another person of the same or opposite gender. Unwelcome verbal or physical conduct of a sexual nature includes, but is not limited to:
>
> -the deliberate, repeated making of unsolicited gestures or comments of a sexual nature;
>
> -the deliberate display of offensive sexually graphic materials which is not necessary for business purposes; or
>
> -deliberate verbal or physical conduct of a sexual nature, whether or not repeated that is sufficiently severe to interfere substantially with an employe's work performance or to create an intimidating, hostile or offensive work environment. .... .

55. Some time during 1995, Joan Bauer, who was a new employee in the Racine SPD office, said "excuse me" when she walked in front of Sean Brown, another employee in the office. Mr. Brown responded by saying, "There's no excuse for you." Ms. Bauer was offended and angry and reported the incident and her feeling about it to Ms. Bias. Ms. Bias spoke with Mr. Brown about the incident and Ms. Bauer's complaint about it within a few days of the incident. Mr. Brown said he was just

joking around, admitted that his behavior was inappropriate, and apologized to Ms. Bauer. Ms. Bauer did not regard the incident as one of harassment and felt Mr. Brown's apology took care of it. Ms. Bauer did not file a complaint with respondent's Affirmative Action office. Ms. Bauer later took a voluntary transfer to a position in another office.

56. Prior to complainant's tenure with the Racine SPD office, an arrangement had been negotiated with a neighboring private business for the free use of two parking spaces for SPD cars. Some time during 1995, due to related construction, this business notified the Racine SPD office that these spaces would be temporarily unavailable to them. Ms. Banker notified the members of the Racine SPD office staff of this fact. During this time, complainant attempted to park an office car in one of the spaces but was told she couldn't park there. As a result, complainant went to the offices of the business and rudely complained about her inability to park in one of the spaces. The receptionist to whom she spoke telephoned the Racine SPD office and complained about complainant's conduct. As a result of this incident, these spaces were not provided free of charge to the Racine SPD office in the future.

57. Due to problems with complainant's performance during the PIP review period, Mr. Jones, in a memo to complainant, directed her to attend an "investigatory meeting" on August 3, 1995. Although Mr. Jones utilized incorrect terminology in labeling the meeting, i.e., investigatory meetings are typically conducted only for permanent employees relating to an incident of misconduct, his intent had been to discuss with complainant his conclusion that her performance was continuing to be unsatisfactory. Prior to the commencement of the meeting, Ms. Bias, who had concluded that complainant should be terminated, received termination approval from Mr. Tobin. As a result, the "investigatory meeting" was canceled, and Ms. Bias met with complainant to advise her that she was to be terminated. Ms. Bias hand-delivered a letter of termination to complainant at that meeting.

58. The following is a description of the relevant employment histories of Investigators who were in the Racine SPD office during complainant's tenure or immediately before or after her tenure:

a. Ms. Harlan (dob 10/8/47) was hired in October of 1994—her probationary period was extended for three months due to the fact that, although the quality and timeliness of her work had been unsatisfactory, she had shown improvement—her supervisors noted problems with insubordination, opposition to training (she fell asleep during a handwriting exemplar), tendency to handle cases her way rather than the defense attorney's way, failure to obtain authorization for overtime hours—she successfully completed probation and transferred to a paralegal position with respondent in July of 1995;

b. Ms. Kollath (dob 12/2/56) was already employed in the Racine SPD office at the time of complainant's appointment—her probationary period was not extended—she resigned in December of 1995;

c. Deanna Thompson (dob 5/12/69) was hired to replace complainant—her supervisors noted problems with her use of the cell phone, her failure to obtain authorization for her overtime hours, and her failure to advise others in the office of her whereabouts—as a result, her probationary period was extended—she eventually successfully completed her probation and became a permanent employee—she was later placed on a PIP in February of 1997—she resigned in March of 1998 due to her feeling that she was overworked and not treated with respect by management;

d. Wayne Baumgart (dob 8/27/46) was hired in January of 1996 to fill the vacancy created by Ms. Kollath's resignation—his supervisors noted problems with the quality of his investigations and his failure to follow office policies—his probation was extended for three months and he was placed on a PIP—he resigned in lieu of termination in September of 1996 during this extended review period.

59. The following Investigators were terminated by respondent or resigned in lieu of termination prior to complainant's termination:

a. Randall Tetzner (dob 8/21/59)—employed 10/3/94-11/8/94—terminated 11/8/94

b. Darlene Nelson (dob 3/17/51)—employed 8/31/92-9/4/93—resigned in lieu of termination

c. Diane Booth (dob 6/8/37)—employed 8/10/92-4/30/93—terminated 4/30/93

60. Ms. Thompson was the only Investigator in the Racine SPD office at the time of her hire, and did not have prior investigative experience. She was not assigned to do any independent investigations during her first month of employment as an Investigator, but instead spent her time reading manuals and training materials, or accompanying defense attorneys on client and witness interviews for training purposes. Other training was provided by defense attorneys during this time period as well. When Mr. Baumgart was hired, two senior Investigators visited from another office to mentor Ms. Thompson and Mr. Baumgart. These senior Investigators did not provide training but instead provided critiques and suggestions as Ms. Thompson and Mr. Baumgart pursued one or two independent investigations. During Ms. Thompson's first nine months as an Investigator, she attended an agency-wide investigator training and an agency-wide investigator conference. These events were not held during complainant's tenure as an Investigator for respondent.

61. The supervisors in the Racine SPD office during complainant's tenure were superior to most other SPD supervisors in terms of the time spent monitoring subordinate employees' work performance and providing feedback.[J]

62. In her complaint of discrimination, complainant indicated that she felt that Ms. Bias was actually the supervisor who had discriminated against her and harassed her, and that Mr. Jones was following Ms. Bias's lead.

63. Respondent received notice that complainant had filed Case No. 96-0053-PC-ER on August 6, 1996.

64. In a letter to complainant dated July 23, 1996, an employee of the Division of Merit Recruitment and Selection of the Department of Employment Relations notified her that, at Ms. Blum's request, her name had been removed from the register

of eligibles for the classification of Public Defender Investigator because she had been dismissed from her position in state service for cause. In her memo of request of July 1, 1996, Ms. Blum had noted that respondent was the only agency which used this register.

65. In reviewing the performance of subordinate staff, it was Mr. Jones' practice, and that of other supervisors in the Racine SPD office, to write memos to other management staff relating to such performance which were maintained but not provided to the affected employee.

66. Not all documents relating to an individual's employment with respondent are maintained in, or required to be maintained in, the individual employee's "personnel file." Respondent generally maintains the personnel files of its regional office employees in its central administrative office, not in the regional offices. It was a common practice during the time period relevant to this matter for supervisors in the regional offices to maintain in the regional office certain documents relating to a subordinate's employment which were not placed in, or required to be placed in, the employee's centrally maintained personnel file.[K]

## CONCLUSIONS OF LAW

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

2. Complainant has the burden to prove that she was discriminated/retaliated against as alleged.

3. Complainant has failed to sustain this burden.

## OPINION

The statement of issues to which the parties agreed is as follows:

**Case No. 96-0053-PC-ER**

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[J] This findings was modified for purposes of clarification.
[K] This finding was added for purposes of clarification.

1. Whether respondent discriminated against complainant because of her age and/or sex in regard to the following terms and conditions of employment:

a. failure to provide training as discussed in ¶¶47 and 48 of the Initial Determination (ID).

b. failure to provide a required identification card as discussed in ¶¶22 and 23 of the ID.

2. Whether respondent harassed complainant because of her age and/or sex in regard to the following actions:

a. On 2/4/95, Richard Jones grabbed or touched complainant's knee as discussed in ¶4 of the ID.

b. On 5/4/95, Pattie Kremkoski swore at complainant and later patted her head as discussed in ¶8 of the ID.

c. On 5/18/95, Jennifer Bias and Richard Jones met with complainant and verbally attacked her as discussed in ¶12 of the ID.

d. On 6/5/95, Richard Jones and Sally Barrientes-Lugo told complainant to pick up an office key at a co-worker's home as discussed in ¶24 of the ID.

e. On 6/14/95, Jennifer Bias, Sally Barrientes-Lugo and Richard Jones met with complainant and verbally attacked her as discussed in ¶27 of the ID.

3. Whether respondent discriminated against complainant because of her age and/or sex, and/or retaliated against her for participating in activities protected under the FEA in regard to her termination on August 3, 1995.

**Case No. 96-0095-PC-ER**

Whether respondent retaliated against complainant because of her participation in an activity protected under the FEA in regard to the removal of her name from the eligibles list in July of 1996, as discussed in ¶¶51-54 of the ID.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of discrimination regarding terms and conditions of employment, a prima facie case is demonstrated if the evidence shows that 1) the complainant is a member of a protected group; 2) the complainant suffered an adverse term or condition of employment; and 3) the adverse term or condition exists under circumstances which give rise to an inference of discrimination.[L]

Issue 1.a. relates to training and references ¶¶47 and 48 of the ID. These paragraphs relate back to allegations in complainant's charge of discrimination that Deanna Thompson, the younger female hired to replace her, received six weeks of training which complainant had not received during her tenure; and that other Investigators had been provided classroom CLARIS training which had not been provided to complainant.

In regard to the investigative training, complainant has failed to show a prima facie case of sex discrimination since the person whose training she contrasts with hers is female. In addition, it is doubtful that she has shown a prima facie case of age discrimination since the evidence of record shows that Wayne Baumgart, who was 49 years of age at the time of his hire, was provided the same training as Ms. Thompson.

If, however, complainant had shown a prima facie case of sex or age discrimination, the burden would shift to respondent to articulate a legitimate, non-

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[L] In her objections to the Proposed Decision and Order, complainant argues that the "sex plus" standard articulated in *Arnett v. Aspin*, 69 FEP Cases 966 (E.D. Pa. 1994), should be applied here so that the protected group of which she is a member is "older women" or women over the age of 40. However, the *Arnett* standard has been applied by the courts in determining whether a prima facie case of discrimination exists Here, the Commission took the analysis beyond the prima facie case stage.

discriminatory reason for its actions. Here, respondent states that complainant was provided investigative training consistent with that provided other investigators and appropriate for her background. This reason is legitimate and non-discriminatory on its face.

The burden would then shift to complainant to show pretext. It is important to note first in this regard that Ms. Thompson did not have experience as an investigator and there was no senior Investigator in the Racine SPD office at the time of her hire, i.e., she was the only Investigator in the office. Ms. Thompsons's training, prior to Mr. Baumgart's arrival, consisted of the review of written manuals and accompanying defense attorneys on client and witness interviews, activities which the record shows complainant engaged in during her tenure as well. After Mr. Baumgart's arrival, two senior Investigators from another SPD office critiqued the work of these two new Investigators and offered suggestions. This service was not offered complainant because, during her tenure, there was a senior Investigator in the Racine SPD office, i.e., Ms. Kollath, available to perform this function. Moreover, complainant appears to point to the agency-wide Investigator conference and training which Ms. Thompson attended as evidence of differential treatment. However, this conference and this training did not take place during complainant's tenure and were not, as a result, available to any Investigators during this period of time. Pretext has not been demonstrated.

In regard to the CLARIS training, the record shows that this training was available to Investigators on staff in 1994, but was not offered after that. Since Racine SPD office Investigators on staff in 1994, i.e., those to whom the training was provided, included females in the protected age category, and SPD office Investigators on staff in 1995, i.e., those to whom the training was not provided, included both males and those not in a protected age category, complainant has failed to show a prima facie case of age or sex discrimination. Complainant has failed to show differential treatment in this regard.

Finally, in regard to the training issue, complainant appears to contend that her eventual termination related in some way to her failure to obtain investigative training. However, the record shows that, in general, complainant's knowledge of criminal investigative techniques was considered satisfactory, and that the primary reason for her termination was her unsatisfactory attitude and her failure to follow directions or policies.

In regard to the ID card issue (Issue 1.b.), complainant has failed to satisfy two elements of a prima facie case, i.e., she has not shown that her failure to obtain an ID card was an adverse employment action, and the circumstances shown by the evidence of record do not create an inference of discrimination. The record shows that an ID card was not a requirement of complainant's employment and that Investigators, including complainant, did not need any form of identification to access relevant venues once they presented the letter of introduction from their supervisor and were recognized on subsequent visits. The record shows that some Investigators never received an ID card and this lack of an ID card did not affect their ability to do their work. Complainant failed to show that she was ever denied access to a location because of her lack of an ID card. Moreover, the record shows that younger Investigators, e.g., Ms. Thompson, waited several months to receive an ID card; that Investigators in the protected age category, e.g., Ms. Harlan and Mr. Baumgart, received ID cards soon after their hire; and that female Investigators, e.g., Ms. Harlan, received ID cards soon after their hire. This does not create an inference of discrimination.[M]

If complainant had succeeded in showing a prima facie case of sex or age discrimination, the burden would shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has stated in this regard that arrangements were made for complainant to obtain an ID card from Mr. Goodnough but she did not appear for the appointment, and that complainant's subsequent actions

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[M] Applying complainant's "sex plus" theory to this aspect of the case, (see footnote L, above), shows that an "older female", i.e , Ms. Harlan, received an ID card soon after her hire, which does not create an inference of discrimination against women over the age of 40.

led to her failure to obtain an ID card from Mr. Goodnough. These reasons are legitimate and non-discriminatory on their face.

The burden would then shift to complainant to demonstrate pretext. The record shows that complainant had prior notice that Mr. Goodnough would be in the Racine SPD office on May 26, 1995, between 1:00 and 1:30 p.m., but she chose to schedule an appointment in another location at that time, and then became upset with Mr. Goodnough when he did not wait for her to return to the office. The record further shows that complainant subsequently expected Mr. Goodnough to be the one who would be inconvenienced, even though he was not the one responsible for her failure to obtain an ID card on May 26; and that Mr. Goodnough went so far as to make an exception to his usual practice and mailed her a blank ID card for which she was to provide the picture. Finally, the record shows that Ms. Thompson, a younger employee, made arrangements with Mr. Goodnough to have her ID card prepared when they were both in Madison for an agency-wide Investigator meeting, and that Mr. Baumgart, a male employee, traveled to Elkhorn to Mr. Goodnough's office to have his ID card prepared. This evidence demonstrates that complainant, not respondent, was responsible for her failure to obtain an ID card, and that the experience of other Investigators in this regard does not show that complainant was treated differently on the basis of her age and sex.

Two further points should be noted in regard to the ID card issue. The first of these is that Mr. Goodnough was not aware of complainant's age and had no reason to be aware of her age, so it would not have been possible for him to discriminate against her on that basis. The final point relates to a prehearing ruling which excluded the testimony of Mr. Chiarkas, the agency head, as being unnecessary and irrelevant. Complainant represented to the Commission that she would be calling Mr. Chiarkas to ask him why he did not answer her letter of July 26, 1995, about her failure to obtain an ID card. (See Finding of Fact 39, above). Complainant does not appear to be alleging that Mr. Chiarkas discriminated against her on the basis of her age or sex in this regard, i.e., complainant has indicated that Mr. Goodnough, Ms. Bias, and Mr.

Jones were those responsible. As a result, the ruling that this testimony would be unnecessary and irrelevant is upheld.

Complainant next alleges five acts of age/sex harassment (Issues 2.a.-2.e.). The first question in regard to any such allegation is whether the subject action qualifies as harassment. Section 111.32(13), Stats., defines sexual harassment as follows:

> "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature. "Sexual harassment" includes conduct directed by a person at another person of the same or opposite gender. "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes; or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employe's work performance or to create an intimidating, hostile or offensive work environment.

In *Harris v. Forklift Sys.*, 510 U.S. 17 (1993), the Court held that when determining whether an environment is hostile or abusive, all circumstances must be considered, and these may include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. *See, also, Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Kannenberg v. LIRC,* 213 Wis.2d 373 (Ct. App. 1997); *Zabkowicz v. West Bend*, 589 F.Supp 780 (W.D. Wis. 1984), and *Baskerville v. Culligan International Company*, 67 FEP Cases 564 (7th Cir. 1995).

Issue 2.a. relates to the allegation by complainant that Mr. Jones grabbed or touched complainant's knee on February 4, 1995. Complainant herself indicated to the assigned investigator that she did not believe the touching was sexually motivated and that, if the alleged touching had been initiated by someone she had known better, she might have interpreted it as a gesture to emphasize a point. Taking complainant's characterization at face value, the alleged incident would not come close to the level of severity required to sustain an allegation of actionable sexual harassment or harassment

on the basis of age. The conclusion reached by Ms. Dorman, the assigned investigator, is consistent with this result. As a result, it would not be necessary to consider further complainant's contentions as to the quality of respondent's investigation of her complaint. However, it should be noted that complainant's assertion that a defense attorney with over twenty years' experience supervising the investigation and litigation of criminal cases is not qualified to conduct a sex or age harassment investigation is without merit. In addition, the record indicates that Ms. Dorman was a female over the age of 40 at the time of the investigation and, therefore, not likely to further the alleged age and sex harassment by conducting an inadequate or whitewash investigation. Finally in this regard, complainant emphasizes Ms. Dorman's failure to interview Ms. Kollath as evidence of respondent's inadequate investigation, but the information complainant claims Ms. Kollath possessed related not to Mr. Jones' actions in this alleged incident but to Mr. Jones' conduct while employed in a different office. It is difficult to see how this information could have been directly relevant to the matter under investigation, and Ms. Dorman appeared, as a result, to exercise reasonable investigative discretion in not pursuing it.

It should also be noted in regard to this allegation that complainant disputes the hearing examiner's ruling that Complainant's Exhibit 37 would not be received into the record. This exhibit related to a previous relationship Mr. Jones had with a client and the consequences for Mr. Jones once this relationship was discovered. The hearing examiner ruled that the circumstances of the two situations were not sufficiently similar to overcome the highly prejudicial nature of the exhibit. This ruling was proper and is sustained.

In regard to the Kremkoski incident (Issue 2.b.), the record does not sustain complainant's allegation that Ms. Kremkoski used profanity in speaking to her. This conclusion is supported by Ms. Kremkoski's emphatic testimony that she has never sworn at a co-worker and never would, and by complainant's failure to report the profanity to Ms. Banker when she initially reported the incident to her. However, even if Ms. Kremkoski had used profanity as alleged, this incident would also not rise to the

level of severity required for a finding of harassment. This is consistent with Ms. Pederson's view of the allegation and it is concluded as a result that her decision not to investigate the complaint as one of actionable sex or age harassment but to refer it back to one of complainant's supervisors for further action was in conformance with the applicable law as well as with respondent's harassment policies and procedures. Complainant tries to draw a parallel between this allegation and the one involving Mr. Jones, and points to the investigation by respondent's affirmative action office of the Jones complaint but not the Kremkoski complaint. However, in the context of actionable harassment, there is an important difference between an allegation of unwanted touching by a supervisor of a different gender and an allegation of unwanted touching by a co-worker of the same gender which justifies the different treatment accorded to the two complaints here.

Even though complainant has failed to show that the actions she alleged Ms. Kremkoski engaged in satisfy the definition of harassment, several points should be noted. First of all, Ms. Kremkoski was 45 years of age at the time this alleged incident occurred so it is unlikely that she would engage in sex or age harassment of complainant. In investigating the matter, Ms. Bias interviewed all three individuals involved, i.e., complainant, Ms. Kremkoski, and Ms. Banker, who had initially followed up on the allegations once they were reported to her by complainant. This does not evidence any procedural deficiency in the investigation process. Complainant also attempts to demonstrate discrimination/harassment by attempting to draw a contrast between the manner in which her allegation was investigated and pursued and the manner in which the Bauer complaint was investigated and pursued (See Finding of Fact 55, above). However, the evidence of record does not show that such a contrast exists. Ms. Bauer brought the incident to the perpetrator's supervisor's attention, this supervisor discussed the matter with the alleged perpetrator who voluntarily apologized, and Ms. Bauer accepted the investigation/apology and did not pursue the matter further. Here, complainant brought the incident to the attention of Ms. Banker, Ms. Kremkoski's lead worker; Ms. Banker discussed the matter with Ms. Kremkoski and

counseled her about the manner in which she should relate to complainant in the future; and Ms. Banker then related the substance of this discussion/counseling to complainant. The manner in which these two situations were handled to this point is comparable. Furthermore, there is no evidence in the record which supports complainant's allegation that the memo attributed to Ms. Banker, in which she summarized the manner in which she handled the situation between complainant and Ms. Kremkoski, was forged. Ms. Banker testified that she wrote the memo and that, as written, it represented what had occurred. Finally, complainant takes issue with the failure of her supervisors to investigate this incident as soon as she reported it to them. However, it is apparent from the record that Mr. Jones and Ms. Bias did not interpret complainant's relation of her problem with Ms. Kremkoski as a request for an investigation or an allegation of harassment until she repeated it to them and reported it to the affirmative action office. Complainant has not shown that this interpretation on their part was unreasonable, i.e., she has not shown that she initially couched it in terms of a complaint requiring investigation and action on their part.

It should be further noted that complainant takes issue with the ruling of the hearing examiner not to receive Complainant's Exhibit 95 into the record. The part of this exhibit which complainant offered consisted of a paragraph from an Initial Determination in a case involving another SPD employee in which this employee described interactions he had with Ms. Kremkoski. It should be noted that this employee was not called as a witness at hearing, and there was no other evidence introduced at hearing which substantiated in any way this employee's description of his interactions with Ms. Kremkoski. This evidence was excluded on the basis of hearsay and this ruling is upheld here.

In regard to the meeting of May 18 (Issue 2.c.), complainant characterized the harassing aspects as consisting of the mention by Mr. Jones and Ms. Bias that it was not a disciplinary meeting, the fact she was not provided a copy of Mr. Jones' document describing the issues he wanted to cover, and Mr. Jones' and Ms. Bias' serious tone of voice during the meeting. In regard to the meeting of June 14 (Issue

2.e.), complainant cites Mr. Jones' and Ms. Bias' serious tone of voice and demeanor as the harassing aspects. The meetings, as described by complainant, do not satisfy the criteria for actionable harassment. It was clear from the record that the purpose of the meeting was to discuss office procedures and performance issues related to complainant's employment. An employer has a right and an obligation to have such meetings, and such meetings, conducted in the manner described here, do not constitute harassment.

The final allegation of harassment relates to the key incident (Issue 2.d.). Again, a directive by management to an employee to interrupt her duties to remedy a work emergency which she was probably responsible for creating, under the circumstances present here, does not satisfy the definition of harassment. The evidence of record shows that it was logical for Mr. Jones to conclude that complainant was responsible for locking the door to Ms. Banker's office, and logical, as a result, to direct her to fetch the key from Ms. Banker's home.

Complainant further contends that her termination was the result of sex and/or age discrimination and retaliation for engaging in protected fair employment activities. The method of analysis of the discrimination claim was set forth above. To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action.

It is doubtful that complainant made out a prima facie case of sex or age discrimination since she represents that she was replaced by Ms. Thompson (female) or Mr. Baumgart (protected age). In addition, the record shows that males and younger females were terminated or resigned in lieu of termination during the time period relevant to this case. In regard to the retaliation allegation, the complaints filed by complainant with respondent's affirmative action office would qualify as protected fair employment activities, her termination would qualify as an adverse employment action,

and their proximity in time would establish the necessary causal connection. It appears, based on the effective date of complainant's termination, that complainant has made out a prima facie case of retaliation in regard to her termination. Complainant contends, however, that the decision to terminate her was made in early April of 1995, when Ms. Bias became the acting First Assistant in Racine, and what occurred later was simply a management ruse to justify the earlier termination decision. Under complainant's theory, the termination could not have been in retaliation for engaging in protected fair employment activities since each of these activities occurred after early April. Relying upon complainant's theory of her case, she has failed to show a prima facie case of retaliation in regard to her termination.

If complainant had stated a prima facie case of age/sex discrimination or fair employment retaliation, the next step would be for respondent to articulate a legitimate, non-discriminatory reason for its termination of complainant. Respondent has stated that complainant was terminated for poor work performance and this reason is legitimate and non-discriminatory/retaliatory on its face.

The burden then shifts to complainant to show pretext. The specific reasons cited by respondent in support of its decision to terminate complainant relate primarily to her attitude, her insubordination, and her failure to follow directions.

Although complainant takes issue with respondent's characterization of her attitude as uncooperative, abrasive, demanding, and rude, the evidence of record supports this characterization. Complainant acknowledges that she read a magazine during a required training session, openly criticized Ms. Harlan's work performance during an Investigator's meeting, and stated during this meeting that she didn't like Ms. Kollath. The record further shows that complainant did not appear for an appointment with Mr. Goodnough and subsequently misrepresented what had occurred in relation to his attempt to provide her with an ID card to his supervisor and to the agency head; that clerical staff reported that complainant was demanding and unreasonable, even objecting to answering their questions relating to her handwriting; that she felt it was unprofessional and demeaning to have to type her own reports even though most staff

attorneys did so; and that the Racine SPD office received a complaint from a private business that complainant had been rude to their receptionist.

Although complainant denies she was insubordinate or failed to follow her supervisors' or other attorneys' directions, the record shows that complainant refused to participate in a witness interview as directed by Mr. Lugo; that complainant told Mr. Lugo that she expected that he would re-victimize the child witness through his questioning; that she told Mr. Lugo to take photos of a crime scene himself even though it was an investigative responsibility; that she continued to request overtime authorization through written notes and e-mails even though she had been instructed to call one of her supervisors to obtain such approval; that complainant told Mr. Jones to "move on" to another topic during the meeting of May 18 and pointed her finger at Ms. Bias and stated to her, "I told you to move on." during this same meeting; that she hung up on Mr. Jones when he directed her to retrieve the office key from Ms. Banker; that complainant ignored the directive to retrieve the key herself and return it to the office by calling Ms. Banker and persuading her to do it; that complainant arranged for a subpoena to be issued for AM despite Ms. Bias's direction to the contrary; and that she withdrew the subpoenas issued for AM and NC even though instructed by Ms. Bias to have only AM's subpoena withdrawn.

Complainant further contends that her work performance and activities after she first was made aware of performance concerns, i.e., May 18, 1995, demonstrate her commitment to being a good Investigator and meeting her supervisors' expectations, and her termination less than three months later was pretextual as a result. However, four days later, complainant read a magazine during a required training session; a week later, complainant spoke up during at meeting at which Mr. Jones and all the Racine Investigators were present, and stated that Ms. Harlan was not a good Investigator and she had decided not to talk to her any longer and that she didn't like Ms. Kollath; eight days later, complainant did not show up for an appointment with Mr. Goodnough even though she had received adequate prior notice of the meeting and she had made it known in the office that obtaining an ID card was an important issue

for her; and two and a half weeks later, complainant hung up on Mr. Jones when discussing retrieving the key and violated his directive by having Ms. Banker bring the key into the office. Complainant was placed on a PIP on June 14, 1995. Six days later, complainant withdrew NC's subpoena as well as AM's; one week later, she refused to participate in a witness interview with Mr. Lugo and told him that she felt he would be re-victimizing the child witness; and several weeks later, she reported Mr. Goodnough to his supervisor and to the agency head even though she was responsible for her failure to get an ID card. These are not the actions of an employee trying to meet her supervisors' expectations, or work smoothly with her co-workers. There is ample evidence in the record to support complainant's termination, and ample evidence to demonstrate that her supervisors expended considerable time and effort to give her an opportunity to be successful. Complainant has failed to show pretext here.

Finally, complainant charges in her complaint in Case No. 96-0095-PC-ER that respondent retaliated against her for the filing of Case No. 96-0053-PC-ER when Ms. Blum requested that her name be removed from the register for the Public Defender Investigator classification on July 1, 1996. However, the record shows that respondent did not receive notice of the filing of Case No. 96-0053-PC-ER until on or after August 6, 1996, more than a month after the request for removal from the register. As a result, the request for removal from the register could not have resulted from the filing of Case No. 96-0053-PC-ER, and complainant's contention here must fail. However, even if respondent would have had reason to be aware of this filing, the record shows that it is respondent's typical practice to request that the name of a former employee terminated for cause be removed from a subsequent employment register under the circumstances present here.

ORDER

These complaints are dismissed.

Dated: February 29, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM 960053C+dec1

Parties:

Mary Newbold
PO Box 824
Racine WI 53401-0824

Nicholas L. Chiarkas
State Public Defender
P.O. Box 7923
Madison, WI 53707-7923

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