STATE OF WISCONSIN PERSONNEL COMMISSION

NEIL E. LANE,
Petitioner,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 95-0070-PC-ER,
95-0096-PC

FINAL DECISION AND ORDER

Both cases noted above were combined for hearing held on December 7-8, 1999, and resumed on March 15-17 and 28-31, 2000.[A] The briefing schedule was delayed because the parties wished to have a transcript prepared. The Commission received the final portion of the transcript on June 19, 2000. Thereafter, a simultaneous briefing schedule was established whereby each party filed one brief, which the Commission received on July 17, 2000. Thereafter, the examiner invited responsive briefs. The Commission received the final brief on October 5, 2000.

A proposed decision and order (PDO) was mailed to the parties on February 7, 2001. The petitioner filed objections by cover letter dated March 12, 2001 (with corrections filed on March 22, 2001). Respondent replied by letter dated March 16, 2001.

The Commission has reviewed the PDO and the parties' subsequent arguments. The Commission consulted with the hearing examiner and agrees with her credibility assessments. The Commission adopts the proposed decision as its final decision with the changes denoted herein by alpha footnotes. Ms. Thompson's married name is Ms. Richards. The proposed decision and order used her maiden name at times and her married name at other times. Her maiden name is used throughout this decision (without highlighting the changes) for consistency and clarity. Also for consistency and clarity, Mr Lane is referred to herein as the Petitioner.

[A] The hearing dates were corrected.

The parties agreed to the following statement of the issues for hearing:

Case No. 95-0070-PC-ER (Conference Report dated 8/3/99)

1. Whether respondent retaliated against complainant for whistleblowing in 1995 in violation of §230.80 et seq., Wis. Stats.
2. Whether respondent discriminated against complainant in terms and/or conditions of his employment because of his disability in 1995 in violation of the Wisconsin Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats.
3. Whether respondent failed to reasonably accommodate complainant's disability in 1995 in violation of the FEA.

Case No. 95-0096-PC (Conference Report dated 7/13/95)

Whether there was just cause for the demotion of the appellant dated May 10, 1995. Subissue: Was the degree of discipline imposed excessive.

FINDINGS OF FACT

1. Petitioner earned a Bachelor's Degree in business management from the University of Wisconsin – Whitewater.

2. Petitioner began working for respondent on a permanent full-time basis on October 25, 1975 as a Correctional Officer at Waupun State Prison. He was promoted within a year to an Officer 3, Sergeant position at Oakhill Correctional Institution (Oakhill). At Oakhill he was promoted to Lieutenant and later assigned as the administrative lieutenant overseeing the operations of the other lieutenants. Later at Oakhill he transferred to the Social Services Department as a Social Worker 1 and thereafter was reclassified to a Social Worker 3. In 1986, he transferred to the Probation and Parole office in Madison as a generic agent (for 3 years), after which he was assigned high-risk cases (for 4 years) and later he transferred into a position functioning as the halfway house liaison. Petitioner was never disciplined in any of these positions. In January 1993, he was promoted to Administrative Officer 1 (AO) in respondent's Division of Intensive Sanctions (DIS). These cases involve events that occurred when he held the AO position. (T12/7/99, pp. 14-17, 22, 24-25, 55)[1]

[1] The reference is to the transcript by date of hearing and page number(s).

3. In the AO position, Petitioner's immediate supervisor was Mickey Thompson, Deputy Administrator of DIS. His second-line supervisor was William Grosshans, DIS Administrator. Ms. Thompson and Mr Grosshans were charged in September 1991, with the task of setting up the new division and, in May 1992, were promoted to head up the division. (T3/16/00, pp. 141-145) Basically, DIS was a prison diversion program, which allowed non-violent offenders to be monitored in environments less expensive than a correctional institution, such as electronic monitoring in the offender's own home.

4. Ms. Thompson and Petitioner previously worked together as probation and parole agents for 3-1/2 years, starting in September 1986. They worked well together and became friends. Their families socialized together. (T3/16/00, pp. 145-147)

5. Ms. Thompson was a member of the interview panel for the AO position, which resulted in hiring Petitioner. She recommended his hire to Mr. Grosshans and continued to advocate for his hire when Mr Grosshans expressed reservations about her hiring recommendation. (T3/16/00, pp. 149-152)

6. In January 1993, when Petitioner started in the AO position, he was responsible for supervising the Business Office and the Records Office because the position supervising the Records Office was vacant. One of the functions of the Business Office was to oversee inmate accounts. He supervised the following three individuals in the Business Office: L. Schiesser (Accountant Specialist 3), S. Freye (Program Assistant 2) and Patti Glassburn (PA 1). He supervised the following three individuals in the Records Office: J. Ehlert (Institution Registrar 2), P Powers (PA1), and D. Caldwell (PA1). The Records Office also had a vacant PA2 position. (Exhs. C-13; C-17; C-61 p. 38; T12/7/99, pp. 25-39; T3/16/00, pp. 153-155)

7. On December 26, 1993, Connie Jane Olson was hired to supervise the Records Office (T12/29/00, p.128), at which time Petitioner was responsible solely for the Business Office. He did provide assistance to Ms. Olson during an unspecified transition period.

8. The number of positions in the Business Office increased by June 15, 1994 (Exh. C-61, p. 38), as follows: L. Schiesser (Accountant), Patti Glassburn (PA1), Steve Hasz (PA1-Confidential), J Gronli (PA1), and two vacant positions classified as Financial Specialist

2s. The additional staff became necessary as the number of inmates in the intensive sanctions program grew. (T12/7/99, pp. 39-41)

Involuntary Demotion

9. Ms. Thompson conducted an investigatory interview with Petitioner on February 17, 1995. Also present was Ronald Malone. Ms. Thompson took notes (Exh. R-126), as did Mr. Malone (Exh. R-123, pp. 1-9). Thereafter, Ms. Thompson conducted interviews with other pertinent employees and kept handwritten notes on some (Exhs. R-124, R128 & R-129). She conducted some interviews without handwritten notes and those interviews were summarized in her later typewritten document (Exh. R-131). Mr. Malone took notes when he spoke with witnesses (Exh. R-123, pp. 10-12). No witness, including Petitioner, was provided an opportunity to verify the notes or summaries made by Ms. Thompson or Mr. Malone by, for example, allowing witnesses to review and sign their statements as accurate.

10. Ms. Thompson informed Petitioner by letter dated March 29, 1995, that she had completed her investigation and that a predisciplinary hearing would follow (Exh. R-145, p. 1). The memo listed the work rules at issue. Attached to the memo was Ms. Thompson's summary of her investigative findings (Exh. R-145, pp. 2-3).

11. The predisciplinary hearing was held on April 5, 1995. Ms. Thompson took notes (Exh. R-125) as did Mr. Malone (Exh. R-127).

12. Effective May 18, 1995, petitioner was removed from the AO position and returned to a position as a Probation and Parole Agent – Senior. Official notice was provided by letter dated May 10, 1995 (Exh. C-101). The pertinent text is shown below (with specific incidents assigned alpha identifiers rather than the "bullets" used in the original):

> You are being demoted because you violated the following work rules:
>
> #1 Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions or instructions.
>
> #3 Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment or supplies.

#7 Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.

On February 17, 1995 an investigatory interview was conducted and on April 5, 1995 we held a pre-disciplinary hearing. Your discipline is based on the following:

a. An inmate had filed a claim for the interest that she should have been earning on her inmate account in which she at one time had $75,000 deposited. Todd Zangl indicated that he had requested that you place her funds in an interest bearing account. This was never completed. In the investigatory interview you admitted that you didn't know which inmate accounts earned interest.
b. At the end of the investigatory interview you were instructed not to discuss the investigation with any staff involved. In the pre-disciplinary hearing you admitted to confronting Patti Glassburn regarding her statements made in the investigation.
c. In the investigatory interview you admitted that you remembered being asked for the cellular phone bills for Mickey Thompson and Bill Grosshans. You also admitted that you remembered being asked to contact Cellular One. You stated that you requested your staff to complete those tasks. Your staff indicated that they were never requested to do either task and the bills were never provided. You provided incomplete and inaccurate information.
d. The Ameritech bill showed that you had made calls to your home on 7/26/94 and 8/2/94, charging them to your state credit card. Both calls exceeded the $3.00 amount allowed for a personal call home when out of town on official business. Reimbursement was not made until 2/16/95, after you were notified that you were under investigation.
e. On 10/6/94 and 11/14/94, there were 4 personal calls with the prefix 845 made on your cellular phone. No reimbursement was provided.
f. On 10/4/94, 10/6/94, 10/22/94, 11/5/94, 12/76/94, 12/10/94 and 1/13/95 there were nine calls made to your home from your cellular phone. You indicated in the pre-disciplinary hearing that these calls were made to notify your family that your work schedule had changed or that you may have had to pick up your daughter or your wife. However, five of these calls were made on Saturday, three in the morning and one at 9:46 p.m. No reimbursement was made.
g. On 11/6/94, 11/7/94, 11/16/94, 11/18/94, 11/23/94, 12/8/94, 12/19/94 and 12/20/94 there were nine calls made on your cellular phone or the STS line to your son in Whitewater You indicated in the pre-disciplinary hearing that those calls would have been made on Fridays, since you sometimes picked your son up on Fridays. Of these nine calls only one had been made

on a Friday. In fact, two of the calls were made on Sunday. No reimbursement was made for these calls.

h. On 12/28/94 and 12/29/94, there were seven calls made in Florida and Georgia on your cellular phone. Reimbursement for this did not occur until 2/20/95, after you knew you were under investigation.

i. On 12/28/94 you took state property (your cellular phone) to Florida while on vacation. No request had been made nor permission given to use state property for personal use while on vacation. In the pre-disciplinary hearing you indicated that you took it because no one had told you that you couldn't.

j. On 1/20/95 (sic) you were given a priority assignment to complete on the reallocation of Patti Glassburn's position. You indicated that Jean Nichols gave you no direction on how to complete the assignment. You were offered assistance by Mickey Thompson and Connie Jane Olson. On 2/1/94 (sic) you handed in an incomplete assignment. Jean Nichols indicated that she personally provided you with instructions on how to complete the assignment. In the investigatory interview you indicated that she told you to outline timeframes and justify why Patti was assigned there (sic). In the pre-disciplinary hearing you indicated that Jean Nichols requested specific dates. You provided incomplete and inaccurate information.[B]

As a supervisor and the Administrative Officer for our Business Office, you had a responsibility to ensure that Department policies, procedures and rules were complied with. You were expected to show leadership abilities which included setting the standard for those you supervised. You were expected to be honest and credible with those for whom you work. Accordingly, we have determined that demotion is the most appropriate action to take in this matter to permit your continued employment and to protect the interests of the Department.

Allegation a: Inmate Account

13. The allegation here is that Petitioner failed to place inmate McBride's money in an interest bearing account despite Mr. Zangl's request that this be done. It also is noted in the letter of demotion that Petitioner "admitted" at the investigatory hearing that he did not know "which inmate accounts earned interest."

14. Ms. Thompson's notes of Petitioner's investigatory interview contained the following two observations regarding inmate McBride's account: a) "What I was told - deposits saving acct. Left it up to Steve" and b) "Supervisors - disbursing and holding the money -

[B] Changes were made to indicate that the dates are incorrect in the original document. See ¶¶50-51, Findings of Fact.

paying fees - No - don't recall any" (Exh. R-126, p.1). Mr. Malone's notes were more complete as shown below (Exh. R-123, pp. 1-2):

> ? Does account earn interest -
> Answer - Inmate earns interest if it is deposited in a saving account that is what I was told explained how account is
>
> ? How we do determine what kind of account it goes into? Is it basically all money goes into general account? Does it earn interest in general account
> A: No. I don't believe so.
>
> ?· Have any supervisors ever contacted you about this
> A. No.
>
> ?· Conversation with Todd Zangl
> A: Conversation about some money but issue was in court (restitution) and we wouldn't deal.
>
> ? Did he ever speak of this inmate earning money in their account
> A. No. I even asked Patti if we had ever been asked this subject and she said no. Now we have talked disbursement but not interest.
>
> ? Did Patti ever talk to Todd?
> A. Never mentioned it to me.
>
> ? When you talked to Todd did it ever occur to you to check about interest
> A. No because it was still being litigated
>
> ? Who approves release of money
> A: Supervisor - but I review
>
> ? $38,000 couldn't be given without you (sic) knowledge
> A. Only if I wasn't there like vacation
>
> ? $5,000 & $38,000 Do you remember this
> A. No. If someone would have asked I would have pursued it.

15. Petitioner never said at the investigative interview that he wasn't sure if an account earned interest. Also, he never said (as alleged in the investigative summary, p. 2, Exh. R-145) that Ms. Glassburn advised him as to what accounts would earn interest. He indicated that he asked Ms. Glassburn whether the Business Office had ever been asked about interest

bearing accounts. Ms. Glassburn's statement to Ms. Thompson to the effect that Petitioner never asked Ms. Glassburn for advice about interest bearing accounts is not contrary to what Petitioner said at the investigatory interview.[2]

16. Inmates may request that their money be placed in an interest bearing account by filling out a form which then must be approved by the inmate's probation and parole agent and by the agent's supervisor. The form authorizing the transaction is then sent to the Business Office for action. Transfer of inmate funds cannot be made without a written authorization form. (Dwyer testimony, T3/15/00, pp. 162-3 and Thompson testimony, T3/29/00, pp. 18-22)

17. Inmate McBride was incarcerated at Robert E. Ellsworth Correctional Center in September 1994, when she received money from her husband's life insurance policy in the amount of $75,120.56. She spoke with Glenn Link, the acting Superintendent, and requested that the money be placed in an interest-bearing account. Mr Link told her that since the money already had been deposited, there was nothing that could be done. Inmate McBride was scheduled for release to DIS in late September 1994 and, accordingly, asked her DIS agent, Bonnie Becker, to place the money in an interest-bearing account. On November 14, 1994, inmate McBride wrote to Dennis Danner, DIS Sector Chief (Exh. C-46). One topic addressed was her request to agent Becker to have money placed in an interest bearing account and that "Ms. Becker had conversations with a number of people, and was not able to make that happen." Mr. Danner replied by letter dated December 2, 1994 (Exh. C-47). Mr. Danner indicated that once the court resolved a pending restitution issue he would direct Ms. Becker and her supervisor, Todd Zangl, to "reevaluate the status of your account." A copy of Mr. Danner's reply was sent to agent Becker and Mr Zangl.

18. No form was sent to the Business Office from agent Becker or Mr. Zangl authorizing the placement of inmate McBride's funds into an interest bearing account.

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[2] Ms. Glassburn denied at hearing that she had discussions with anyone at DOC "concerning Petitioner's conduct concerning inmate Challoner McBride." (T3/16/00, p. 77) The inference the Commission is asked to make is that Ms. Thompson never talked to Ms. Glassburn after Petitioner's investigatory interview. It was the hearing examiner's credibility assessment that Ms. Thompson did not

19. On February 6, 1995, inmate McBride signed a Notice of Claim (Exh. C-67, p. 3) complaining that her money was never placed in an interest bearing account and asking for an award of the lost interest.

20. Ms. Thompson spoke with Todd Zangl and with agent Becker on February 21, 1995, in an attempt to determine whether Petitioner was at fault with regard to inmate McBride's account. Ms. Thomspon recorded in her typewritten notes of the conversations (Exh. R-131, p. 1) that Mr. Zangl said he spoke to Petitioner about this in October or November 1994, but Petitioner said inmate McBride's money already was in an interest bearing account. Ms. Thompson further recorded that agent Becker remembered Mr Zangl saying he spoke to Petitioner who said the money already was in an interest bearing account. Both statements from agent Becker and Mr. Zangl were false and appeared to be motivated to deflect attention from their own failures to appropriately process inmate McBride's request.[3] Neither of them spoke with Petitioner about placement of the inmate McBride's funds into an interest bearing account.

Allegation b: Instruction Not to Discuss Investigation with Staff Involved

21. Ms. Thompson informed Petitioner in a memo dated February 14, 1995 (Exh. C-64) that he was scheduled for an investigatory interview on February 17, 1995. The memo also contained the following directive: "Do not discuss this investigation or the fact that you have been notified of this interview with other employees."

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forge any investigative notes. Her notes were cryptic and unverified, which contributed to her incomplete and sometimes inaccurate representation of the information provided.

[3] Petitioner denied that Mr. Zangl asked him whether inmate McBride's funds were in an interest-bearing account. Ms. Thompson's notes of contrary statements from Mr. Zangl and agent Becker were unpersuasive. Neither of those individuals was able to verify the content of Ms. Thompson's notes at hearing. Furthermore, agent Becker's chronological log should have memorialized not only inmate McBride's request for an interest-bearing account but also any action taken on the request and yet her log does not even mention the request. Also, their statements to Ms. Thompson conflict to a degree with Mr. Danner's letter of December 2, 1994 (Exh. C-47) which acknowledged that the funds were not in an interest-bearing account (suggesting that Mr. Zangl and agent Becker should have known this as well without contacting the Business Office) and which put Mr. Zangl and agent Becker on notice that it was their responsibility to reassess the request. (Ms. Thompson did not have Mr. Danner's letter prior to Petitioner's demotion.)

22. Ms. Thompson instructed Petitioner at the end of the investigatory interview that he was not to talk to other employees about the investigation until the investigation was completed.

23. Petitioner did not speak with other staff about the investigation until after he received a memo from Ms. Thompson dated March 29, 1995 (Exh. C-81). The memo included the following statement: "I have completed my investigation and it has been determined necessary to proceed with a predisciplinary hearing."

24. At hearing, respondent withdrew as unsupportable the allegation that Petitioner spoke with employees in contravention of Ms. Thompson's instructions not to do so until the investigation was completed. (T3/15/00, pp. 19-21) Also implicitly withdrawn was the related claim that Petitioner had lied about this at the pre-disciplinary meeting held on April 5, 1995.

Allegation c: Failure to Provide Phone Bills to Mickey Thompson & Bill Grosshans

25. A DIS Sector Chief meeting was held on February 11, 1993, with Petitioner and Ms. Thompson among the attendees. One item discussed was that Sector Chiefs were responsible to review monthly telephone bills and printouts. (Exh. R-104, p. 12)

26. The topic of telephone bills was discussed at two Sector Chief meetings on June 14 and 21, 1994, with Petitioner and Ms. Thompson among the attendees. (Exhs. R-106, R-106, R-108 & R-109) Handouts at the meetings included newspaper articles (dated May 1994) about high cellular phone bills in State service. The minutes of the June 14, 1994 meeting (R-109, p. 6) memorialized the assignment to Petitioner to "keep an eye on future telephone bills" as well as the further statements: "All personal calls are to be reimbursed. We will look at the bills each month very carefully." The minutes of the June 21, 1994 meeting (R-108, p. 2) memorialized the instruction to Sector Chiefs to "mention and insure" staff are using cell phones "professionally and cost effectively. They are to be used for calls that cannot be made from a telephone booth or can not wait until you reach a phone." Contrary to the assignment made, Petitioner never reviewed his own or any DIS telephone bills to see if personal calls were made which should have been reimbursed.

27 Ms. Thompson in the spring of 1994, asked Petitioner for copies of the itemized telephone bills for herself and Mr Grosshans for the stated purpose of wanting to review them for personal use and reimbursement. Petitioner responded that the Business Office did not get the bills and rather, that the bills went to the field offices. Ms. Thompson knew that field offices did not pay their own bills so she asked him again. His second reply was that the bills went to central office where they were paid. Ms. Thompson then called central office and requested copies of the telephone bills for her and Mr Grosshans. She was informed that those bills were paid by Petitioner's office. Ms. Thompson then returned to Petitioner and again asked for copies of the itemized phone bills for herself and Mr. Grosshans. This time Petitioner replied that the bills were not itemized under the current service contract but noted this could be changed in the subsequent contract period.[4] Ms. Thompson believed Petitioner's reply until February 9, 1995, when she was in Ronald Kalmus' office and noted that he had a copy of an itemized telephone bill, which he said was provided at his request by Petitioner's office. (Thompson testimony, T3/17/00, p. 86 & p. 115; and Kalmus testimony, T3/16/00, p. 102)[5] Petitioner did not provide accurate information to Ms. Thompson regarding the availability of itemized telephone bills for her and Mr. Grosshans.[6]

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[4] Petitioner argued (brief dated 7/17/00, pp. 81-82) that Ms. Thompson's testimony that she "continued to request copies of the bills" shows that her testimony is unworthy of credence. Petitioner's theory is that Ms. Thompson would not have continued to request copies of the bills if she truly believed Petitioner's explanation that the bills were not itemized. Petitioner does not cite to the record as support for the statement that Ms. Thompson testified she continued to request copies of the bills. She did ask Petitioner for the bills about three times. (T3/17/00, p. 115) The testimony she provided does not conflict with the facts recited in ¶27 (*referenced paragraph was corrected*).

[5] Credibility was involved with this finding. Petitioner testified that Ms. Thompson asked where the phone bills for her and Mr. Grosshans were being sent so she could review them. He testified that he interpreted this request as an assignment to check and ensure that the bills were being sent to her office, which he did. (Petitioner testimony, T12/7/99, pp. 112-116 & T3/15/00, pp. 139-140) The problem with his explanation is that he knew Ms. Thompson said she was not receiving the bills, he checked and found the bills already were going to her office and yet he did nothing further such as report his findings to her. His version of events was less credible than Ms. Thompson's testimony (as supported by Mr. Kalmus' testimony). Further, his testimony at hearing conflicted with the information he gave at the investigative interview, as recorded by Mr. Malone (Exh. R-123):

> p. 2 Q: When asked about getting copies of cellular phone bill what was your response?

28. Petitioner provided inaccurate or misleading information at the investigative interview. Specifically, he indicated that he assigned the task of getting copies of Ms. Thompson's telephone bills to his subordinates Loren Lathrop and Lee Schiesser when he never had (Exh. R-123).

Allegations d, e, f, g and h: Personal use of state phones

29. Petitioner's use of State phones (standard STS line and cellular) was not an issue for investigation at the investigatory interview. Petitioner, however, brought a check for phone reimbursement toward charges incurred in December 1994 when he was on vacation and used the State-issued cellular phone in Georgia and in Florida. His action led Ms. Thompson to investigate his use of STS and cellular phones. Ms. Thompson reviewed his telephone bills and listed calls that she suspected were personal in nature (Exh. C-41). She gave him a copy of the list prior to the pre-disciplinary hearing.

30. Petitioner made calls to his home on July 26, 1994 and August 2, 1994, charging them to his State credit card. Both calls exceeded the $3.00 amount allowed for personal calls home when out of town on official business. Petitioner should have reviewed his own phone bill and identified the need for reimbursement but failed to do so.

31. The State was charged for four personal calls made on Petitioner's cellular phone on October 6, 1994 and November 14, 1994 to an 845 prefix. It turned out that his

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A: I think I provided those but there was an issue of getting them broken into right sector. I think I provided those.
p. 3 Q: When I asked you about getting Billy and my phone bill what was your response?
A: I can't remember for sure, but I may have had Lee and Lauren check into it. I only recall Mickey's request unless Bill was right there.
p.5 A: But he doesn't know where Mickey and Bill's bill go to.
Q: Do you recall Mickey asking for those bills?
A: Yes. Loren & Lee were supposed to send.
Q: Did you follow up to make sure they were sent?
A: No.

[6] The Commission rejected Petitioner's contention that it is "ludicrous" to believe Ms. Thompson was unaware that cellular telephone bills were itemized based on the fact that Petitioner was given the assignment of reviewing the bills at a June 1994 Sector Chief meeting. (7/17/00 brief, p. 83) This ar-

daughter had used his cellular phone to call classmates and had done so without his permission. These were unauthorized calls. Petitioner should have reviewed his own phone bill and identified the need for reimbursement but failed to do so.

32. The State was charged for seven calls made on Petitioner's cellular phone to his home as follows:

- Tuesday, 10/4/94 at 10:37 a.m.
- Thursday, 10/6/94 at 4:45 p.m.[7]
- Saturday, 10/22/94 at 10:21 a.m.
- Saturday, 10/22/94 at 11:38 a.m.
- Saturday, 11/5/94 at 1:35 p.m.
- Saturday, 11/5/94 at 1:36 p.m.
- Wednesday, 12/7/94 at 8:01 a.m.
- Saturday, 12/10/94 at 10:10 a.m.
- Tuesday, 1/13/94 at 7:40 a.m.

33. Petitioner explained at the pre-disciplinary hearing that he would have made the calls listed in the prior paragraph if he were unable to do a planned activity due to work, such as giving his daughter a ride home after school. This explanation was false as to the calls listed in the prior paragraph, which were made on a Saturday.

34. The calls made on Petitioner's cell phone on Saturdays were improper. As Ms. Thompson concluded, he did not make the Saturday calls from work nor did he work 50-60 hours per week on a regular basis.[8] (T 3/16/00, pp. 206-209 and T3/28/00, pp. 60-61)

35. The conclusion in the prior paragraph also is supported by the fact that calls made from work on Saturday would have been made on his desk phone (STS line), not on his cellular phone that he routinely kept in his car. Furthermore, Petitioner knew that calls home

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gument is unpersuasive. A reasonable assumption was made at the time the assignment was given that bills were itemized.

[7] Exh. C-41, p. 1 shows a 9:46 p.m. call on October 6, 1994 (a Thursday), which conflicted with the information on page 3 of the same exhibit, which listed the call at 4:45 p.m. This discrepancy was resolved by reference to the underlying document (Exh. C-71, p. 36) confirming that the call was made at 4:45 p.m. and that the call at 9:49 p.m. call was an "incoming" rather than a call Petitioner made to his home.

from work using the cellular phone were unauthorized. He was at the Sector Chief meeting on June 21, 1994, when he was informed that cell phones were to be used in a cost effective manner meaning only when the employee would not reach a phone. (See ¶26 above. Also see Thompson testimony T3/28/00, pp. 58-60 and Petitioner testimony T3/15/00, p 142.)

36. The State was charged for calls Petitioner made on his cellular phone to his son in Whitewater, Wisconsin, as follows:

- Sunday, 11/6/94 at 11:02 a.m.
- Sunday, 11/6/94 at 11:22 a.m.
- Friday, 11/18/94 at 5:02 p.m.
- Wednesday, 11/23/94 at 4:40 p.m.
- Tuesday, 12/20/94, at 2:24 p.m.

37 The State was charged for calls Petitioner made on his STS line to his son in Whitewater, Wisconsin, as follows:

- Monday, 11/7/94 at 3:21 p.m.
- Wednesday, 11/16/94 at 10:57 a.m.
- Thursday, 12/08/94 at 10:25 a.m.
- Monday, 12/19/94 at 3:58 p.m.

38. Petitioner explained at hearing that his son had no car. He and his wife shuttled their son back and forth either to visit him in Whitewater or to bring him to Madison for dinner or for a job he had in Madison on weekends and school holidays. Petitioner indicated that due to his work he sometimes had to change plans and either not pick his son up or else pick him up late and this is why the calls were made. (Petitioner testimony, T12/7/99, pp. 120 and T3/15/00, p. 146)

39. Petitioner did not explain why he used his cellular phone instead of his desk phone for the calls noted in ¶37 above. Nor did he provide a persuasive explanation for making the calls in ¶¶37-38 above, on any day of the week except a Friday. He was not required to reimburse the calls made on the STS line on Fridays but was required to reimburse for the

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[8] See ¶80, infra. The document cited therein provides the facts upon which Ms. Thompson concluded that Petitioner did not work on weekends or 50-60 hours a week on a regular basis. The hearing rec-

remaining calls. The explanation he provided at the predisciplinary meeting on these calls was inaccurate or incomplete.

40. The State was charged for seven calls Petitioner made on the State-issued cellular phone while he was on vacation with his family in December 1994. Petitioner explained that he made no conscious decision to take the cellular phone with him but that it was in the car, which is where he usually kept it. He decided to use the cellular phone on vacation to let hotels know that they would not be arriving as planned. He first tried to use his credit card in a pay phone but this did not work so he resorted to using the cellular phone.

41. Petitioner did not violate any of respondent's written policies by forgetting to take the cellular phone out of his car prior to his vacation.

42. Respondent did not prohibit employees from using State cellular phones for purely personal calls, such as Petitioner's calls on vacation. Respondent, however, did require reimbursement for such calls.[9]

42A.[C] Petitioner reimbursed the State a total of $66.45 as reimbursement for all calls mentioned above.

Allegation j: Glassburn Reclass Assignment

43. Ms. Thompson evaluated Petitioner's performance using a process referred to as "Performance Planning and Development" (PPD). The first step is for the supervisor to delineate performance objectives and detail expectations for each objective on a PPD form given

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ord supports the facts recited therein and her reasoning is persuasive.

[9] This finding involved credibility issues. Petitioner testified that when he made the cellular phone calls on vacation that the operator asked for his credit card and so he expected all charges to be on his credit card bill rather than on the State's bill. (T12/7/99, p. 126-129) Yet he also testified that he checked with his subordinate, Loren Lathrop, within 1-2 days of returning to work to ensure that he would get his State phone bills to enable reimbursement if charges were made on the State bill. (T12/7/99, p. 130) Petitioner was asked why he would check with Loren so soon after returning from vacation when he previously noted his belief that all charges would be on his own phone bill. His response was unpersuasive. Furthermore, charges for the vacation calls did not start to show on his personal phone bill until February 20, 1995 (T12/7/99, pp. 142-145). Yet he did not check his itemized State phone bill to see if the charges appeared there, which they did on the bill DIS received on February 1, 1995 (Exh. C-71, pp. 67-71).

[C] This information was added to inform the reader of the approximate dollars involved. It should be noted in this regard that Mr. Lane believes he overpaid for the calls by about $16.00.

to the employee at the start of the evaluation period. The supervisor then assesses the employee's performance on the same form at the end of the evaluation period.

44. The PPD given to Petitioner (Exh. R-207) on January 25, 1993 (shortly after he was hired), contained the following detailed expectations with regard to the assignment to pursue reclassification of Ms. Glassburn's position:

> C1. By 3/15/93 review position descriptions on all current staff to determine accuracy and modify as needed.
> C2. By 3/15/93 conduct Performance Planning and Development (PPD) sessions with staff and assess achievements and needs and establish expectations and goals.

45. Ms. Thompson reviewed Petitioner's progress on July 2, 1993 (R-207). He performed well in many areas. Task C1 in the prior paragraph was completed, whereas task C2 was not. Ms. Thompson acknowledged at this PPD session that Petitioner's workload was high (see Ms. Thompson's entry under task B4, Exh. R-207). She did not tell Petitioner that his performance with regard to progress on Ms. Glassburn's reclassification was unsatisfactory. Petitioner reasonably concluded that while this was a priority assignment, Ms. Thompson extended the deadline due to other workload priorities. Ms. Thompson established new deadlines for Petitioner to complete the following tasks (Exh. R-208):

> C1. By 9/15/93 conduct Performance Planning and Development (PPD) sessions with staff [in the business and in the Records Offices] and assess achievements and needs and establish expectations and goals.
> C2. By 10/15/93 conduct PPD sessions with new staff to establish expectations and goals.
> C3. By 9/1/93, meet with BPHR[10] and develop a plan for the reclassification/reallocation of the positions at the Business/Records Office.
> C4. By 9/15/93, complete position descriptions for new staff and all necessary paperwork for the hire of new staff.

46. Petitioner's performance was next evaluated on October 23, 1993 (Exh. R-208). At this time, he had completed tasks C1, C2 and C4 (as noted in the prior paragraph) and he

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[10] BPHR is an acronym for respondent's personnel office, the Bureau of Personnel and Human Resources.

had initiated, but not completed task C3. There was no indication on the PPD form that Petitioner's delay in completing task C3 was unsatisfactory, nor did Ms. Thompson did tell him that this aspect of his performance was unsatisfactory.

47. Petitioner passed probation on January 23, 1994. At this time a new PPD form was prepared (Exh. R-171) with the following task recorded *but without any completion date noted*: "C2. Develop reclass/reallocation plans with permanent staff."

48. Ms. Thompson sent Petitioner a memo dated September 13, 1994 (Exh. R-171, pp. 8-9) listing assignments he needed to work on while she was on vacation. She concluded the memo by acknowledging that his workload was high that month and so she prioritized the list of things he needed to do. There was no mention in the memo that Petitioner should work on Ms. Glassburn's reclassification.

49. Ms. Thompson sent Petitioner a memo dated November 11, 1994 (Exh. R-171, p. 10), to remind him to complete certain assignments while she was on vacation. There was no mention of working on Ms. Glasburn's reclassification.

50. At some unknown point in time, Ms. Thomspon established a deadline of January 20, 1995, for Petitioner to complete a justification for reclassification of Ms. Glassburn's position. A regular meeting was held on January 20th with Ms. Thompson, Ms. Olson and Petitioner. Ms. Thompson asked Petitioner at this meeting whether he completed the assignment and he indicated he had not. He said he spoke with Jean Nichols who said DER needed more information but she did not specify what else was needed. Ms. Thompson indicated that this was a priority assignment. She and Ms. Olson offered to help complete the assignment but Petitioner never asked for their assistance.

51. An event occurred on February 3, 1995, which triggered in Ms. Thompson's mind that a need existed to investigate Petitioner. On February 3rd, Ms. Thompson asked Petitioner what the status was on completing the justification for Ms. Glassburn's reclassification request. He told her it was done. She asked for a copy of the document. He searched his office but was unable to find it. He said it might be at his house. Later the same day, his daughter Megan who was ill at home called him at work asking him to come home because she felt dizzy. He told Ms. Thomspon he was leaving to check on his daughter. While at home,

he searched for the document but was unable to find it. He was at home only about five minutes and then returned to work. Ms. Thompson called Petitioner at home and Megan answered indicating that her dad had left already. Ms. Thompson asked how Megan was feeling to which Megan responded: "Okay, thanks."[11] After returning to work, Petitioner searched again for the missing memo and located it in Ms. Glassburn's personnel file. He provided Ms. Thompson with a copy (Exh. C-132, p. 10).

52. Ms. Thompson had many suspicions regarding the events noted in the prior paragraph. She felt Petitioner lied when he said he had completed the document and such suspicion was based on the fact that he could not find it until after he returned from home. She suspected that he used a laptop computer at home to type the document and this was based, in part, on the fact that the document was printed on plain paper rather than on letterhead or in memo format. (See, T3/28/00, pp. 25-29 and 28-39.)

53. Petitioner admitted at the investigative meeting held on February 17, 1995, that on January 11 or 12, 1995, Ms. Nichols told him what was needed. He also admitted that he forgot to follow through with the Glassburn assignment due to his daughter Megan's hospitalization for a serious illness on January 9, 1995, and he therefore "pumped out" something very short (Exh. R-123, pp. 6-7 – Malone notes which he verified at hearing & T3/16/00, pp. 117-123.)

54. The memo Petitioner tendered to Ms. Thompson on February 6, 1995 was one paragraph long (Exh. C-132, p. 10, duplicated at C-61, p. 2) as noted below:

> Jean,
>
> Instead of rewriting my whole memo that I spoke of, I'm just giving you what I had written, which includes the dates as you indicated when I was with Diana Russler. I hope this is all that is needed. If not, please let me know as soon as you can.

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[11] Petitioner characterized Ms. Thompson's conversation with Megan as an "interrogation." Megan's own testimony showed that the conversation was cordial and not inappropriate in any way. The discrepancy between Petitioner's characterization of the conversation and his daughter's own testimony lead the examiner to question the accuracy of his characterization or perception of events not only as to this factual dispute but also as to others.

55. Petitioner's memo (noted in the prior paragraph) did not complete the assignment. He knew DER wanted additional information yet he provided only what he previously submitted on two prior occasions. Accordingly, his statement to Ms. Thompson on February 3, 1995 that he had completed the assignment was inaccurate. Also, his statement to Ms. Thompson on January 20, 1995 that Ms. Nichols failed to tell him what additional information was needed was false because he did receive further instruction from Ms. Nichols on January 10th or 11th

Whistleblower Claim

56. Respondent used four databases to track inmate information. Correctional institutions used CIPIS, a computer system used to track inmate movement and sentencing computation information. CACU was a second computer system for probation and parole cases recording sentencing information, probation information, restitution activity, the assigned agent and the offender's location. Power Base was a third computer system used by the Records Office, which duplicated some of the information in CIPIS and CACU but in a different format. A fourth computer system called CARA tracked inmate account information and was used by the Business Office.

57 Not all databases were linked to one another and, accordingly, basic information such as the present whereabouts of an inmate could differ between systems. A variance list was generated on a regular basis to note the conflicts between information contained in Power Base and in CIPIS. Variances between these systems caused problems for the Business Office which needed to know where an inmate was so, for example, checks issued from an inmate's account would be sent to the inmate's current agent. Variance between information in these databases was a long-standing department-wide problem. (T3/16/00, pp. 164-6 and Exh. R-103)

58. In April 1994, Ms. Olson began implementing a new computer screen within CIPIS called DIS Tracking. DIS Tracking replaced Power Base. Another change with DIS Tracking was that staff from the Records Office input the data from source documents. A separate office outside DIS previously had entered this data with a resulting delay in data en-

try. This change had the potential of having the database updated faster with changes in an inmate's status available to the Business Office (and others) in a more timely fashion. Once the DIS Tracking system was in place, the variance list was no longer generated. Petitioner's perception that elimination of the variance report resulted in the loss of a check and balance system is incorrect. The variance report was eliminated because Power Base was no longer used and, accordingly, the data in Power Base and CIPIS no longer needed to be compared to identify differences between the two systems. (T3/16/00, pp. 164-187)

59. Records Office staff began inputting data into the new DIS Tracking system in or about April 1994. The first task was to input information from Power Base into the new system. It took 3 weeks to input the old information and then additional time to bring the data current. As of about July 1994, the input backlog was almost eliminated. (Olson testimony, T3/29/00, pp. 141 & 150).[12]

60. Forms called "source documents" were sent to the Records Office from agents on a daily basis. The DIS operation manual required that the forms be faxed to the Records Office by 9 a.m. each day, but some agents were chronically late. The source document identified any change in an inmate's location, such as whether the inmate moved from an institution to home and, if so, the inmate's home address. Other information also was collected on this form such as the discharge date, parole date and mandatory release date. (Olson testimony, T3/29/00, pp. 134-135)

61. DIS Tracking also was designed to include information DIS needed, such as the number of inmates who applied for the program as well as the number rejected and the number of offenders in Phases 1, 2 and 3. (Olson testimony, T3/29/00, pp. 138-9)

62. The DIS Tracking screen on CIPIS included information on the agent assigned to offenders, the geographic identifier and the offender's location. The Records Office did not input this information. Instead, the Central Records Unit was responsible to input this infor-

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[12] Ms. Olson's testimony was relied upon for what the Records Office did with regard to DIS Tracking. Petitioner was not well versed at hearing in the various databases, including DIS Tracking. Ms. Thompson appeared knowledgeable at hearing but was not articulate on the same subject at her pre-hearing deposition, which detracted from the reliability of her testimony about the databases. In short, Ms. Olson was the most reliable source of information.

mation into CACU which was "pulled off" into CIPIS and then "pulled off" CIPIS for inclusion on the DIS Tracking screen. (Olson testimony, T 3/29/00, p. 145 & T3/30/00, p. 25)

63. Ms. Thompson was at a conference on September 19 and 20, 1994. (T3/16/00, pp. 200-202, Exh. R-209) Petitioner telephoned her at the conference to report that the DIS Tracking was 30 days behind which caused enormous problems for his office. Not too long after the conference, he told Ms. Thompson that the backlog was a serious problem and that he was considering bringing the matter to the attention of the DOC Secretary. Ms. Thompson replied that such action would be inappropriate because the issue was not serious or new. She also indicated that it was Mr. Grosshans' role to bring issues to the Secretary. (Petitioner's testimony, T12/8/99, p. 125-6 & 136; Thompson testimony, T 13/17/00, pp. 3-5 and T3/17/00, p. 36)[13]

[D]64. Petitioner wrote a memo dated September 28, 1994 addressed to Mr. Grosshans and Ms. Thompson (Exh. C-38). He wrote the memo to comply with Ms. Thompson's request for a list of inmates whose accounts had a negative balance. In the memo, Petitioner also raised the count as a problem. Problems with the count had been discussed openly since at least 1993 and ongoing attempts were made to alleviate the problems (see, for example, Kalmus testimony, T3/16/00 pp. 105-113). The memo consists of the three paragraphs shown below in pertinent part. The text in bold print is claimed as a protected disclosure.

> Attached, as you request, you will find the most current listing of negative DIS inmate account balances .**An accurate listing of inmate location, by WITS,**

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[13] Petitioner testified that after he told Ms. Thompson he was considering going to the Secretary she said it was lucky he had not done so because if Mr. Grosshans ever found out Petitioner would be out of a job. According to Petitioner's testimony, he replied that he was not afraid of losing a job just for telling the truth and that Ms. Thompson repeated that he was lucky he had not said anything. Petitioner alleged that she was attempting to cover up a serious problem by keeping it from the Secretary. Ms. Thomspon denied threatening Petitioner and denied considering the count as a "hot topic" as opposed to an age-old concern discussed on a continuous basis. Ultimately, her testimony was deemed more credible. One reason why Petitioner felt the count issue was controversial is because he mistakenly believed the DIS Tracking was required to be accurate, as fulfillment of DOC's legal obligations on knowing where inmates were at any given point in time. Instead, DIS Tracking was used for internal DIS purposes, such as budgetary projections and for certain Business Office functions.

[D] This paragraph was changed to clarify that the claimed protected disclosure related to problems with the count.

> **is not possible at this time because of the "count issues." Inmate account staff were informed this morning, that the count/movement information remains approximately 30 days behind, with the last day of complete entry as 8/29/94. As soon as the count is current, an accurate list can be provided.**
>
> **The accuracy and efficiency of the WITS database program is contingent upon the accuracy of inmate and agent location[14], especially concerning inmate check destinations. Sending inmate checks to the wrong office/agent location is causing considerable delays and frustration to agents, inmates, and my staff.**
>
> At the present time, I ask that you request the Sector Chiefs have their staff check these lists and inmate checks closely, for their respective inmates, because of agent assignment and inmate location issues. If they receive misdirected checks, please forward them on to the correct agent, and not back to the Business Office, so we do not delay getting the checks to the inmates any longer than is necessary If you have any questions, please let me know. Thank you.

65. Petitioner asked Ms. Glassburn to document the problems she had due to the lack of current or complete information in DIS Tracking. She did so by memos dated September 22, 1994, September 28, 1994 and October 13, 1994 (Exh. C-42). Petitioner did not share these memos with Ms. Thompson.[15]

[E]66. Petitioner wrote a memo dated September 28, 1994 addressed to Ms. Thompson (Exh. C-38). He wrote the memo to comply with her request for a list of inmates whose accounts were not managed by DIS. In the memo, Petitioner also raised the count as a problem. The final memo claimed as a protected disclosure (Exh. C-40) is dated October 3, 1994, which Petitioner wrote to Ms. Thompson. The subject line stated: "Report on Control of Inmate

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[14] The proposed decision listed a footnote #14, without text. The entire footnote should have been deleted. (There is no footnote #14.)

[15] Petitioner contends in his brief (7/17/00, p. 27) that he shared Ms. Glassburn's memos with Ms. Thompson. He provided two record citations as support of this statement. First he referred to the transcript (12/8/99, p. 126) and to an exhibit (Exh. C-42). Neither the cited portion of the transcript nor the referenced document indicates that Ms. Glassburn's memos were shared with Ms. Thompson.

[E] The wording of this paragraph was changed to use the same format as in ¶64 for clarity. Also, a change was made to avoid confusion. Specifically, the memo discussed in ¶66 was not (as noted in the PDO) the "second" memo claimed as a protected disclosure, it was the "final" memo. The memos referenced in the ¶65 also were claimed as protected disclosures but as noted therein, Petitioner did not share those documents with his supervisor(s).

Funds/Direct Deposits of Funds by Phase 2 Inmates and Count/Movement Issues." As with the prior memo, the count and movement issues discussed constitute the portion of the memo claimed as a protected disclosure. The memo is shown below in pertinent part.

> This memo is, 1) in response to your request for a listing of those inmates, in Phase 2, whose funds are not being controlled by the Division of Intensive Sanctions (the primary concern was the inability to collect electronic monitoring fees) and 2) Count/Movement Issues.
>
> The Business Office staff have attempted to compile this information in a variety of different ways, but we are unable to provide anything, nearing an accurate report . because of the lack of and accuracy of count/movement information, at this time. We initially attempted to secure information, from the Records Office, listing all inmates, by phase. On 9/28/93 (sic)[F], I received a recent listing of all active inmates, dated 9/17/94. I inquired about the accuracy of phase information and was informed that phase information is not current and has not been so, for a significant period of time. This began occurring during the end of May 1994, when Powerbase was replaced by DIS Tracking. When Powerbase was replaced, it eliminated the variance list but immediately began causing a significant problem with inmate location data retrieval for Inmate Accounts staff. We then had to retrieve location information, on each and every inmate transaction, from CIPIS, in order to process any inmate financial transaction. Initially, it was manageable because the count was accurate, although it was a significant duplication of effort.
>
> On 8/22/94, the Business covered to WITS. As you are aware, the accuracy and efficiency of WITS' transactions are contingent upon the accuracy of the Count/Movement. On 8/19/94 . I was informed that the Count has been over a month behind .
>
> As of this morning, the Count is current up to 8/31/94. We cannot determine the phases for this report. The other issue, which is of serious concern to me is the fact that we cannot tell if any inmate check we send out to the offices, will reach the correct destination. This has been and continues to adversely affect the relationship between the field and the Business Office for quite some time causing a significant amount of stress and unnecessary workload issues related to errant checks . caused by the status of the Count
>
> After I called you, at the (conference), and let you know about the Count and ATR packet status, you indicated that you had discussed this matter and the

[F] A notation was added to clarify that the date was recited incorrectly in the original document.

> Count would be caught up by that Friday, September 25, 1994. It is now October 3, 1995 and the Count is now 33 days behind .

67 Petitioner complained in the memo (see prior paragraph) about phase information, a problem corrected by the Records Office before he wrote the memo. (Olson testimony, T3/29/00, pp. 159-162) He complained about the accuracy of the agent identifiers, an input task the Records Office was not authorized to do. (Olson testimony T3/29/00, pp. 162-5) He complained about not always knowing an offender's address, but it is unclear why the Business Office would need this information because inmate checks were routed to the inmate's assigned agent. He complained about WITS. The Records Office was not responsible for WITS. (Olson testimony, T3/29/00, p. 152) Also, the 30-day backlog was not attributable to the Records Office. (Olson testimony, T3/29/00, pp. 168-171)

68. Neither Ms. Thomspson nor Mr. Grosshans replied to Petitioner's memo dated September 28, 1994 or to his memo dated October 3, 1994. Ms. Thompson did not determine that the letters merited further investigation under the Whistleblower law, but also she did not know what the Whistleblower law was at the time (T3/28/00 pp. 72-3). Mr. Grosshans and Ms. Thompson viewed the issues raised in Petitioner's letters as part of respondent's ongoing concerns with the count and attempts to improve the same. The topic was discussed on an open basis (meaning not concealed from public scrutiny) prior to Petitioner's hire and probably will be discussed as long as Wisconsin has inmates in prisons.

69. Petitioner wrote a memo to Secretary Sullivan dated May 8, 1995 (Exh. R-160).[G] The subject line stated: "Whistleblower and Harassment Complaint." He mentioned in this letter that Ms. Thompson's attitude towards him changed after his conversation with her while she was at the conference and the later conversation where he alleged that she threatened

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[G] The Commission adds this footnote for clarification. Complainant's letter to Secretary Sullivan dated 5/8/95, was claimed as the only protected disclosure under the Whistleblower law in the complaint filed on February 23, 1995. On 8/1/957, respondent filed a motion to dismiss this portion of the claim and such motion was addressed in the Initial Determination (ID) issued on December 19, 1996. It was concluded in the ID that no probable cause existed to believe that retaliation occurred with regard to this letter because there was no disclosure of information within the meaning of §230.81, Stats. and because Mr. Grosshans, the individual who made the disciplinary decision, was unaware of the letter

his job if he went to the Secretary regarding the count issue. Nowhere in this letter did he indicate that any written memo he sent to a supervisor was an activity protected under the Whistleblower law or a source of retaliation or harassment.

70. Petitioner indicated at the pre-disciplinary meeting on April 5, 1995, that Ms. Thomspson believed in him before the summer of 1994 (p. 6, Exh. R-127).

Disability Discrimination/Accommodation

71. Petitioner took medical leave for stress from February 22, 1995 to March 20, 1995 and again from April 6, 1995 through half of April 27, 1995. (T12/8/99, p.69) Respondent's knowledge of the reasons for this leave are recited in the following paragraphs.

72. On February 24, 1995, Dr. William J. Hisgen in Internal Medicine wrote informing respondent as follows (Exh. C-73).

> Mr Lane has been a patient of mine for several years. He currently is suffering from extreme work stress which in my opinion necessitates that he take a 30-day medical leave of absence. This leave of absence should start as of 2/22/95.

73. Ms. Thomspson was unaware that petitioner had physical or emotional problems affecting his work until she received the physician's note described in the prior paragraph. She thought the stress was caused by the investigation. (T3/17/00, pp. 43-45)

74. Dr. Hisgen responded on March 9, 1995 (Exh. C-77), to questions posed by Ms. Thompson in her letter dated March 6, 1995 (Exh. C-76), as shown below.

1. What are the symptoms that the patient is experiencing that prevents him from working? Answer: Depression, loss of ability to concentrate, marked anxiety.
2. When will the patient be able to perform his job duties? Answer: 3/20/95
3. Will an accommodation be necessary at that time? If yes, what accommodation is needed? Answer: None
4. Is the patient presently on medication? If yes, what are the effects? (e.g. drowsiness, anxiety, memory loss, etc.) Answer: Yes. They should improve his symptoms.

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prior to making his decision. Complainant did not pursue a whistleblower allegation based on the 5/8/95 letter at hearing. (Also see footnote to ¶85.)

5. If on medication, how long will the medication be taken? Answer: 6 mos.
6. If job restricted, how long will the restriction be in effect? Answer: N.A.
7 What is the treatment plan for this patient and how often will he be re-evaluated? Answer: Counseling weekly

75. Dr Hisgen provided a report dated March 30, 1995 (Exh. C-82) indicating that medical leave was necessary from February 22, 1995 through March 19, 1995 for "major depression with anxiety." He noted that Petitioner could return to work without limitations on March 20, 1995. Dr Hisgen also noted that Petitioner had been referred to Dr. Sheldon, a psychiatrist.

76. On April 6, 1995, Dr. Sheldon's relief person, Dr. Center, provided a brief note (Exh. C-87) stating: "Mr. Lane requires a brief medical leave from work through 4/10/95."

77. On April 10, 1995, Dr. Center wrote the following note (Exh. C-89): "Neil Lane requires an ongoing medical leave from 4-10 to 4-24-95."

78. Dr. Center provided the following information on a form dated April 17, 1995 (Exh. C-91).

1. What are the symptoms that the patient is experiencing that prevents him from working? Answer: Medical illness related to stress, likely work-related.
2. When will the patient be able to perform his job duties? Answer: April 24, 1995.
3. Will an accommodation be necessary at that time? If yes, what accommodation is needed? Answer: If possible, alternative supervisory situation.
4. Is the patient presently on medication? If yes, what are the effects? (e.g. drowsiness, anxiety, memory loss, etc.) Answer: Yes - no side effects - bearing on work.
5. If on medication, how long will the medication be taken? Answer: Indeterminate
6. If job restricted, how long will the restriction be in effect? Answer: Not restricted.
7. What is the treatment plan for this patient and how often will he be re-evaluated? Answer: Ongoing treatment, appointments every 1-2 weeks or as needed.
8. Comments: Note I am providing coverage for Dr Ed Sheldon who is out on medical leave.

78A.[H] Ms. Thompson and Mr. Grosshans discussed the potential of changing Petitioner's supervisor and it was Mr. Grosshans who decided this would not be done (T3/30/00, p. 57 and T3/29/00 p. 38). He made this decision because he did not interpret the physician's statement as saying that a change of supervisors was medically necessary and because he felt it was unreasonable and not possible for a number of reasons (T3/30/00, pp. 57-58 and T3/30/00, pp. 129-130).[I] A change in supervisors was not medically necessary.[J]

79. On April 21, 1995, Petitioner wrote a note to Ms. Thompson and attached forms he had completed for filing a Worker's Compensation claim for his time off work due to stress (Exh. R-154). She received the forms on April 25, 1995 (Exh. R-154, p. 9). He noted on the claim form as shown below in pertinent part (Exh. R-154, p. 3).

> Describe the activity engaged in at the time of the accident (Explain in detail)
> Excessive workload with corresponding 60+ hours/week for over two (2) years as Administrative Officer causing diagnosed high anxiety and insomnia. Unreasonable expectations and harassment by supervisor Threat of job loss. Violation of ADA regulation, family leave law, intimidation, failure to follow established practices for EAP/AA/and discipline. So causing diagnosed major depression, medical problems and anxiety and insomnia.

[H] This paragraph was added as relevant to the new discussion of the accommodation claim.

[I] Mr. Grosshans reasonably considered it inappropriate for someone in a position at a lower classification than Petitioner to function as Petitioner's supervisor (T3/30/00, pp. 59-60). Besides Ms. Thompson, the only DIS employees classified higher than Petitioner were Mr. Grosshans and three sector chiefs. Mr. Grosshans was too busy to take on the role of Petitioner's first-line supervisor. Similarly, the Section Chiefs were too busy and, also, they only had a superficial knowledge of the business office functions. (T3/30/00, pp. 58-60) Petitioner suggested at hearing that Secretary Sullivan could have functioned as his supervisor as could Ms. Belakovsky or her subordinate Mr. Ruhland (T3/15/00, pp. 198-199); all are DOC managers outside of DIS. Mr. Grosshans testified that it would not have been appropriate for any of these individuals to function as Petitioner's supervisor (T3/30/00, pp. 58, 60-61). Ms. Belakovsky testified that her office monitors payments made by various DOC offices, including the business office managed by Petitioner and, accordingly, a conflict of interest would exist if her office were expected to also function as his supervisor. She further indicated that her office was not familiar with the day-to-day operations of the business office. (T3/30/00, pp. 170-174)

[J] Although Petitioner's physician testified at hearing he did not give an opinion on whether a change in supervisors was medically necessary, nor was he asked to give such an opinion.

> In your opinion, what could be done to prevent other accidents of this nature?
> Provide harassment-free work environment, reasonable expectations, reasonable work hours.

80. In late April 1995 (T3/17/00, p. 67), Ms. Thompson wrote a document entitled "Supervisor's Accident Analysis" to address the Worker's Compensation claim (Exh. R-154, pp. 8-10). She noted in the document as shown below in pertinent part.

> Neil indicates in his report that his workload was increasing since August 1994, however, this is not the busy time of the year for our Business Office. By August, the year-end closeouts have already been completed and the Purchase of Service Contracts are already submitted. At no time, did Neil indicate that he was overworked or working 60+ hours/week.
>
> In October, 1994 when the Records Office supervisor was on vacation, Neil and I met for his supervisory conference. At that time, he requested that he take over the Records Office in addition to his responsibilities with the Business Office. He indicated that he wanted more work and felt he could run both offices.
>
> At our November, 1994 supervisory conference, Neil indicated that he was bored and unchallenged and requested additional assignments. He discussed several possible tasks that he could perform to assist me with my workload, however, no additional work was assigned due to my concerns regarding his current work performance.
>
> In January, 1995, Neil's daughter had a medical emergency and he took time off to be with his daughter. During that time, he indicated that he was working some evening and weekend hours. This was the first time that Neil ever indicated that he was working evening or weekend hours and was the first time that he expressed being stressed. The stress, however, was related to his daughter's illness.

81. Petitioner did not report for work on April 24, 1995, which was Dr. Center's return to work date (see ¶78 above[K]). On April 24, 1995, Ms. Thompson wrote to Dr Center reporting that Petitioner had not returned to work and requesting information (Exh. C-95). Her letter also stated in pertinent part as shown below:

[K] The referenced paragraph number was corrected.

> In February 1995 we began a personnel investigation on Mr Lane for alleged work rule violations of 1) Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions or instructions; 2) Stealing or unauthorized use, neglect, or destruction of state-owned or leased property, equipment or supplies; and 3) Failure to provide accurate and complete information when required by management or improperly disclosing confidential information.
>
> Since the start of the investigation, Neil has been on medical leave for a significant amount of time, which has made it difficult to complete the investigatory process. Our Division would like to complete the investigation as quickly as possible, since it is stressful for all staff involved. However, the investigation can not be brought to a close without meeting with Neil to obtain the final information needed. This would involve a meeting which should not take more than one hour to conclude.
>
> My questions for you are as follows:
>
> 1. Is Neil Lane medically able to participate in the remainder of the investigatory process while on medical leave?
> 2. If not, what is preventing his participation and what must occur medically before we can conclude the investigation?
>
> Also, I have not received further documentation indicating that additional time off of work is medically necessary. Therefore, I cannot approve Neil's leave time and he will be on leave without pay status until further information is provided.

82. Dr. Center replied by letter dated May 26, 1995 (Exh. C-109), as shown below:

> I am writing to you regarding Neil Lane. Neil was on a necessary medical leave until April 27, 1995. There was confusion regarding this letter at our office and I apologize for the delay.
>
> Mr. Lane's care has now again been assumed by Dr. Edwin O. Sheldon. I again apologize for any inconvenience to you or Mr Lane.

83. Dr Center wrote another letter dated June 1, 1995 (Exh. C-110), stating that Petitioner was on a "necessary medical leave" on April 24, 25, 26 and half of the 27th

84. Ms. Thompson reasonably believed from the information provided by Petitioner and by his physicians that he was suffering from stress due to the temporary situation of his investigation and that he could return to work without restrictions.

[L]85. The Petitioner's wife provided the only other information known to respondent about the petitioner's health in her letters to Secretary Sullivan[M] which were shared with at least one of the decision makers, Mr Grosshans.

From letter to Secretary Sullivan dated April 6, 1995 (Exh. C-88)

> I am writing to you about my husband, Neil Lane. Neil is very ill due to work-related stress
>
> I am afraid that Neil will have a heart attack or stroke if the harassment does not come to an end . . .
>
> Neil and I have been married for 25 years and I have never seen him so ill

From letter to Secretary Sullivan dated April 28, 1995 (Exh. C-97)

> (On April 7, 1995,) Neil was treated at Meriter Hospital for chest pains. He was alone at home when he was overcome with chest pains, shortness of breath, profuse sweating, and confusion. He finally was able to successfully dial 911 after many failed attempts. The Emergency Medical Team broke through our front door in order to get to him, as he was non-responsive by the time they reached our home. The police officer who notified me at work described my husband as "non-responsive" and appearing to be suffering from a heart attack
>
> .
>
> Neil did not, in fact, have a heart attack, but his symptoms were brought on by the acute stress of dealing with continuing harassment by his supervisor He is being treated by several doctors .
>
> Our family has been suffering for several months due to the stress brought on by Neil's supervisor This harassment began soon after Neil notified his supervisor several months ago of a serious backlog in the DIS Records Office . .

[L] This finding was added to provide a complete summary of the information known by respondent regarding Petitioner's medical condition. Mrs. Lane is referred to as "Petitioner's wife" here and throughout the decision for clarity and consistency.

[M] This footnote is added to supplement information contained in the footnote to ¶69. The letters referenced in ¶85 were sent to Secretary Sullivan from the Petitioner's wife. By letter dated 9/22/95, the complainant added these letters as claimed Whistleblower disclosures. The ID rejected these claims finding that they contained no disclosure of information within the meaning of §230.81, Stats. Petitioner did not pursue these claims at hearing.

CONCLUSIONS OF LAW

Case No. 95-0070-PC-ER[N]

1. The Commission has jurisdiction over this case pursuant to §230.45(1)(b) and (gm), Stats.

2. Petitioner failed to meet his burden of proof to establish that respondent demoted him because of a disability and/or in retaliation for having participated in an activity protected under the Whistleblower law.

3. Respondent did not fail to reasonably accommodate petitioner's medical condition.

Case No. 95-0096-PC

4. The Commission has jurisdiction over this case pursuant to §230.45(1)(a), Stats.

5. Respondent met its burden to prove that just cause existed for imposing the disciplinary demotion.

6. The discipline imposed was not excessive.

OPINION

I. Case #95-0096-PC: Whether there was just cause for the demotion of the appellant dated May 10, 1995. Subissue: Whether the degree of discipline imposed was excessive.

Petitioner contends that just cause did not exist for respondent's decision to demote him. The first question is whether respondent has shown to a reasonable certainty, by the greater weight of the credible evidence, that Petitioner committed the conduct alleged in the letter of demotion. The second question is whether respondent has shown to a reasonable certainty, by the greater weight of the credible evidence, that the conduct proven under the first question constituted just cause for imposing discipline. The third question is whether the imposed discipline was excessive. *Reinke v. Personnel Board*, 53 Wis.2d 123, 137-8, 191 N.W.2d 833 (1971), *Hogoboom v. Wis. Pers. Comm.*, Dane County Circuit Court, 81-CV-

[N] The conclusions of law have been reorganized slightly and expanded to address all issues raised.

5669, 4/23/84; *Jackson v. State Personnel Board*, Dane County Cir. Court, 164-086, 2/26/79 and *Mitchell v. DNR*, 83-0228-PC, 8/3/84.

Just cause for imposing discipline (the second question noted above) is established when some deficiency has been demonstrated which can reasonably be said to have a tendency to impair the employee's performance of duties or the efficiency of the group where the employee works. *Safransky v. Personnel Board*, 62 Wis. 2d 462, 474, 215 N.W.2d 379 (1974). Factors to consider when determining whether the discipline was excessive (the third question noted above) include: a) the weight or enormity of the employee's offense or dereliction, including the degree to which, under the *Safransky* test, it did or could reasonably be said to tend to impair the employer's operation; b) the employee's prior record; c) the discipline imposed by the employer in other cases; and d) the number of the incidents cited as the basis for discipline for which the employer has successfully shown just cause. See, for example, *Kleinsteiber v. DOC*, 97-0060-PC, 9/23/98.

Respondent established the alleged conduct noted in the letter of demotion except for the following (using the same alpha identifiers as used in ¶12 of the Findings of Fact): allegation "a" (inmate McBride's account), allegation "b" (discussing investigation in violation of Ms. Thompson's directive) and allegation "i" (taking state cellular phone on vacation).

Petitioner contends that since respondent withdrew one allegation and/or because respondent failed to establish all conduct relied upon for the imposed discipline that the degree of discipline cannot survive. (7/16/00 brief, pp. 84-86) Petitioner cites *Durkin v. Board of Police and Fire Commissioners for the City of Madison*, 48 Wis. 2d 112, 122-23, 180 N.W.2d 1 (1970) as support of his contention but the citation is misplaced. In *Durkin*, the Board of Police and Fire Commissioners based a decision to impose a lengthy disciplinary suspension on an employee. The Supreme Court found that the board's decision was based on a mix of appropriate and inappropriate factors. The court noted that it had no means of determining whether the board would have imposed the same discipline if only the legitimate factors had

been considered. Based upon this uncertainty (as well as upon due process concerns) the matter was remanded to the board. [O]

The Commission has issued decisions in cases where the employer failed to prove some of the conduct[P] upon which the discipline was based and did not follow a strict rule whereby the discipline was rejected outright. Instead, the Commission assessed whether the proven conduct supported the degree of discipline imposed. For example, *Eft v. DHSS*, 86-0146-PC, 11/23/88 and *Hintz v. DOC*, 87-0079-PC, 8/2/99, affirmed *Hintz v. Pers. Comm.*, 99-CV-000340 (Dane County Circuit Court, 11/16/00) with the Circuit Court applying the same principle in its decision. It is this approach which the Commission used in the other cases cited in Petitioner's brief, and such approach is not contrary to the *Durkin* case.[Q] The Commission now turns to the question of whether just cause existed for imposing discipline based on the allegations established by respondent.

Petitioner's failure to provide Ms. Thompson with copies of cellular telephone bills for herself and Mr. Grosshans (allegation "c") deprived his supervisors of the opportunity to reimburse the State for their personal calls. This was an expectation of management of which Petitioner was aware. Of great concern here is Petitioner's false representations to Ms. Thompson regarding the availability of itemized phone bills for her and Mr. Grosshans and his incomplete information during the investigation after Ms. Thompson had discovered the matter These actions impaired the efficiency of DIS because supervisors have a right to expect truthfulness from subordinate supervisors in conducting business and when the individual is under investigation. These actions violated work rule 1 (negligence in carrying out directions) and work rule 7 (failure to provide accurate and complete information).

Petitioner failed to review his own telephone bills to determine what calls he needed to reimburse (allegations "d" through "h"). Such conduct reasonably can be said to have a tendency to impair the performance of his own duties as well as the efficiency of the group. He, as supervisor of the Business Office, had a high responsibility to ensure that his own conduct

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[O] This paragraph has been changed to better describe the *Durkin* decision.
[P] The wording was changed here to clarify that the employer proved some of the alleged conduct in the cases discussed.
[Q] This sentence was changed to comport with the changes in the prior paragraph.

conformed to what was expected of his subordinates and other DIS employees, especially in areas over which he had final oversight responsibility – such as use of cellular phones. Of great concern here is Petitioner's false representations during the investigation regarding the cell phone calls he made on Saturdays (allegation "f") and over the weekend (allegation "g"). These actions violated work rule 1 (negligence in carrying out directions) and work rule 7 (failure to provide accurate and complete information).

Petitioner's failure to complete the paperwork for Ms. Glassburn's reclassification (allegation "j") prior to January 20, 1995 was excusable because as far as he reasonably knew Ms. Thompson was not dissatisfied with the progress he had made. The crux of this issue, however, was that he told Ms. Thompson on February 3, 1995, that the assignment was completed when he knew it was not. He indicated at the investigatory interview that (in essence) this assignment was neglected due to his concern over his daughter's health. This explanation is reasonable and legitimate. The problem is that he was not forthright about it on February 3rd. His failure to accurately respond to Ms. Thompson on February 3rd had a negative impact on the efficiency of DIS because supervisors should be able to rely on information provided by a subordinate. This is especially troublesome because Petitioner was himself a supervisor and as such, had the responsibility to behave in a manner that could serve as a model for his own subordinates.

The remaining question is whether the demotion was excessive for the established allegations. The Commission answers this question in the negative. Petitioner's incomplete and false information given to Ms. Thompson as noted above eroded the level of trust that she had in his ability to continue as supervisor of the Business Office. Demotion to a non-supervisory position was warranted and reasonable.

[R]Petitioner argued that the hearing examiner appeared not to have taken into account the following factors: a) Petitioner's prior work history without discipline, b) Petitioner's mental state, and c) discipline imposed by respondent in similar cases. The Commission wishes to clarify that in reaching the above conclusions, petitioner's prior discipline-free work history (as

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[R] The remaining paragraphs in this section were added to address arguments raised in petitioner's objection to the proposed decision and order (3/12/01 brief, pp.27-36).

noted in ¶2, Findings of Fact) was considered. His prior history, however, was insufficient to offset the conclusion that he could not be relied upon as trustworthy to the extent required to continue in the supervisory position.

Petitioner contends the Commission should take his mental state into consideration when reviewing the fairness of his discipline (3/12/01 brief, p. 30). He notes that in February 1995, he was diagnosed as suffering from depression, concentration and marked anxiety and likely suffered from such condition since August 1994. He also states (*id.*, p. 31) as shown below:

> Lane was accused of, *inter alia,* being untruthful about completing an assignment, using his state-issued cellular telephone improperly, and failing to comply with a supervisor's directive. These alleged errors and omissions were likely the result of his mental state at the time.

The record is insufficient to support a conclusion that the actions for which discipline was imposed were caused by Petitioner's medical condition. Whether a causal link exists between Petitioner's depression and anxiety and the problems for which he was demoted is not within the realm of common knowledge. Accordingly, this must be established by testimony from an expert witness. For example, *see Wal-Mart Stores, Inc. v. Labor and Industry Review Commission*, 2000 WI App 226, ¶¶16-18, 2000 Wis. App. LEXIS 927, 11 Am. Disabilities Cases (BNA) 231 (Ct. App. 2000). Petitioner had an expert testify at hearing but failed to explore with the expert whether any of the actions for which discipline was imposed were caused by his medical condition.

Petitioner also argued as shown below (3/12/01 brief, pp. 29-30):

> Because Respondent failed to present any evidence of its prior imposition of similar discipline, Lane is forced to review Personnel Commission decisions in order to compare his discipline to the discipline received by his colleagues at the DOC. In *Bergh v. DOC*, 98-0018-PC (1/27/99), the Complainant disobeyed the direct orders of his supervisor, sexually harassed subordinates, engaged in an affair with a subordinate, placed lengthy personal calls to this subordinate while on duty, demonstrated favoritism toward this subordinate, and failed to provide truthful information when questioned about his conduct. This Complainant was demoted from Supervising Officer 2 (Captain) to Officer 3 (Sergeant). *Id.*

> When deciding on the degree of discipline, the Department of Corrections considered the recent 10-day suspension imposed upon the Complainant, as well as the seriousness of his actions. *Id.*
>
> The severity of the actions of the Complainant in *Bergh* clearly surpass the severity of the allegations of mere errors and omissions presented against Lane. Moreover, Lane had a stellar employment record and, at the time, twenty years of dedicated service to the Department. The fact that both men received the same discipline is ludicrous.

The point missed in making the above argument is that a range of actions may warrant the same degree of discipline. For example, if respondent terminated the employment of one individual for killing someone at work this would not mean that terminations would be warranted only for actions amounting to the same severity. Respondent clearly established in Petitioner's case (as already discussed) that he could no longer function effectively in his position and the demotion decision, accordingly, was not excessive.

II. Case #95-0070-PC-ER: Whether respondent retaliated against complainant for whistleblowing in 1995 in violation of §230.80 et seq., Wis. Stats.

The allegation here is that respondent's decision to demote Petitioner was made in retaliation for his protected whistleblower activities. To establish a prima facie case in the whistleblower retaliation context, there must be evidence that: 1) the petitioner participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was a disciplinary action, and 3) there is a causal connection between the first two elements. *Sadlier v. DHSS*, 87-0046, 0055-PC-ER, 3/30/89.

The first element is comprised of three components: a) whether the petitioner disclosed information using a procedure described in §230.81, Stats., b) whether the disclosed information was of the type defined in §230.80(5), Stats., and c) whether the alleged retaliator was aware of the disclosure. The definition of "disciplinary action" identified in the second element is found at §230.80(2), Stats. In the third element, a "causal connection" is shown if there is evidence that a retaliatory motive played a part in the disciplinary action.

Petitioner claims as protected disclosures his discussion of the count and its impact on the Business Office as noted in his September 28, 1994 memo to Mr Grosshans and Ms.

Thompson (¶64, Findings of Fact) and his October 3, 1994 memo to Ms. Thompson (¶66, Findings of Fact).[S] The memos having been sent to his supervisor(s) meet the disclosure procedure described in §230.81(a), Stats. ("in writing to the employee's supervisor"). The memos also establish that the supervisor(s) to whom the memos were addressed were aware of the matters asserted therein.

The next question is whether the count issues and resulting problems to the Business Office as discussed in the memos constitute a disclosure of information under §230.80(5), Stats. The pertinent statutory sections are shown below:

> §230.80(5), Stats.. "Information" means information gained by the employee which the employee reasonably believes demonstrates:
> (a) A violation of any state or federal law, rule or regulation.
> (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.
>
> §230.80(7), Stats: "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

[T]A threshold question was raised by the examiner at hearing (T12/8/99, p. 121-124), with the examiner asking the parties to include in post-hearing briefs a discussion of whether a memo generated in response to a work assignment could be considered as a protected disclosure under the Whistleblower law. Both memos at issue here (see ¶¶64 and 66, Findings of Fact) were prepared by Petitioner in reply to a work assignment. In his post-hearing brief (7/17/00 brief, pp.35-36), Petitioner cited the Commission's decision in *Bentz v. DOC*, 95-0800-PC-ER, 3/11/98 as standing for the proposition that "a written report made at the request of the employer met the whistleblower disclosure requirements." The circumstances in *Bentz*,

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[S] This sentence was changed to add references to the findings of fact.
[T] This and the next two paragraphs were added to clarify that the issue exists and was addressed in post-hearing briefs.

however, are not identical. In *Bentz*, co-workers were harassing an employee. A specific event of harassment occurred which she verbally reported to her supervisor The supervisor asked the employee to put her version of the event in written form and it was this report that was considered as a protected disclosure under the Whistleblower law. The report at issue in *Bentz* was not a written response to a work assignment as exists in Petitioner's case.

The Petitioner also noted that his claimed disclosures regarding problems with the count may have arisen in the context of a work assignment but was not a topic covered by the assignment (7/17/00 brief, pp. 34-36). As to the memo dated September 28, 1994, the assignment was to provide a current list of negative DIS inmate account balances. Petitioner contends he provided the list and also went beyond the assignment when he disclosed that "the Count/movement information remains approximately 30 days behind, with the last day of completed entry as 08/29/94" a situation which he characterizes as a violation of state law, regulations and rules. As to the memo of October 3, 1994, the assignment was for the Petitioner to provide a list of Phase 2 inmates whose funds were not controlled by DIS. He again contends he provided the list and went beyond the assignment to discuss a second topic that he characterized as "Count/Movement Issues" which he also characterizes as a violation of state law, regulations and rules.

It is a question of first impression for the Commission whether information contained in a written memo tendered in response to a work assignment could be considered as a protected disclosure under the Whistleblower law. Petitioner observed (7/17/00 brief, p. 35) that the law contains no express exclusion of information disclosed in the context of a written work assignment. Respondent, on the other hand, raised the following policy argument (7/17/00 brief, p. 9):

> If Complainant's memos are whistleblower complaints then so are the countless thousands of memos issued by state employees on a myriad of topics every day. Must management assume that each and every written communication is a whistleblower complaint, even if it is a response to a supervisor's request?

As detailed in the following paragraphs, it is unnecessary for the disposition of this case to resolve this question of first impression and the Commission declines to do so.

[U]Petitioner contends that his concerns about the count involved a violation of state law. He cites to §§301.048 and 301.11(1), Stats., §DOC 333.01, Wis. Adm. Code and a section of DOC's operating manual (Exh. C-8). The text of these provisions is shown below (in pertinent part).

> §301.048(4)(b), Stats.. The department shall operate the program as a correctional institution . The institution is subject to §301.02 . .
>
> §301.02, Stats.. INSTITUTIONS GOVERNED. The department shall maintain and govern the state correctional institutions.
>
> §301.11(1), Stats. MONTHLY REPORT. The officer in charge of each state institution under the control of the department shall report monthly to the department an itemized statement of all receipts and disbursements and of the daily number of inmates, officers, teachers and employees, and of the wages paid to each.
>
> §DOC 333.01, Wis. Adm. Code: AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of §§227.11(2)(a) and 301.048, Stats., to provide rules for the administration of the intensive sanctions program. The purposes of the intensive sanctions program are to:
>
> (1) Provide a cost-effective sentencing and placement option which satisfies punishment and public safety issues for offenders who would otherwise be incarcerated;
> (2) Provide public safety through the administration of sanctions and supervision standards appropriate to the needs and requirements of the offender;
> (3) Provide the necessary treatment and services to assist the offender in making meaningful, positive changes;
> (4) Promote a crime-free lifestyle by requiring offenders to be employed, perform community service, make restitution and remain drug free; and
> (5) Increase communication among victims, victim service agencies and legal professionals.
>
> DOC/DIS Operations Manual:
>
> | | |
> |---|---|
> | AUTHORITY | Statutes 301.048,
Administrative Code: DOC 333
Policy |
> | GENERAL POLICY | DIS is accountable for accurately reporting the total number of inmates under its supervision, daily, and the daily inmate move- |

[U] This paragraph was changed to include consideration of §§301.02 and 301.048(4)(b), Stats.

STATEMENT ment into, within, or out of its supervision.

GUIDELINES The counts referred to are the 12:01 a.m. counts broken down by sex, location and status.
The movements include out to court, in custody, MR releases, SD, NSD and etc. .

COUNT
1. By 9:00 a.m. each working day, the Unit Supervisor will call in the count to the PRC Coordinator who will submit, by WSNS [Wilson Street Network Services], their midnight count. On Monday mornings, counts must be sent separately for Friday, Saturday and Sunday. Holiday counts are sent the next working day as a separate report.
2. Each working day the DIS Registrar will coordinate the counts received from each sector and consolidate them into the DOC-355A report [Daily Population Report Worksheet] required for entry into CIPIS using screen 20.
3. DIS Registrar retains a copy of the report for DIS Record Office file.

MOVEMENT
1. At the time count is called in, the record of movement for the preceding day, (Midnight to Midnight), is reported. On Monday morning, the movement must be reported separately for Friday, Saturday and Sunday. Holiday movements are reported separately on the next working day.
2. Each working day the DIS registrar will coordinate these reports and, using DOC 354 [Daily Absences, Returns and Releases Worksheet] in WSNS, report movements to: Classification, Office of Information Management.
3. DIS Registrar retains a copy of the report for DIS Record Office file.

[v]The focus here is not whether Petitioner's legal analysis is correct in fact. Rather, the question is whether the Petitioner "reasonably believes" the count issues involved a violation of state law or rule or of federal law or regulation (as noted in §230.80(5), Stats.). The Commission agrees that an argument could be made that DIS was subject to the monthly reporting requirements of §301.11(1), Stats., by operation of §S§301.048 and 301.02, Stats. Although Petitioner did not testify that he relied upon this statutory scheme, he did say the count prob-

[v] This paragraph was changed to correct the legal analysis and to presume for discussion sake that Petitioner established this element of his case.

lems were a violation of law because respondent was "responsible for the accurate and up-to-date accounting of all inmates" (T12/8/99, pp. 120-121). Without resolving the issue, the Commission will presume this is sufficient.

[W]The Petitioner also contends that he disclosed in the memos a pattern of negligent or incompetent management actions, within the meaning of §230.80(7), Stats. Without resolving the issue, the Commission will presume the allegation is correct.

The analysis in this and the following paragraphs would apply if Petitioner had established that the memos disclosed information within the meaning of §230.80(5), Stats. The second element of the prima facie case was established because a demotion is listed as a disciplinary action in §230.80(2)(a), Stats. Arguably, the causal connection required of the final element of a prima facie case was established due to the closeness in time between the disclosures (dated 9/28/94 & 10/3/94) and the demotion (by letter dated 5/10/95).[X]

The burden would then shift to respondent to attempt to establish that the demotion was caused by factors other than the protected disclosures.[CC] Respondent met this burden. One consideration here is the fact that respondent established just cause for the disciplinary demotion. The other consideration is the lack of credible evidence to establish that Ms. Thompson or Mr Grosshans thought the issues raised by Petitioner were anything but the count problems discussed on an ongoing basis within DOC. See *Balele v. DOA, et al.*, 00-0077-PC-ER, 8/2/00: "It is also a matter of common sense that a whistleblower disclosure must relate to circumstances which are not already common knowledge in order for the alleged retaliator to have any reason to retaliate because of it." [Z] The credible evidence of record does not support a conclusion that Ms. Thompson or Mr. Grosshans' actions were motivated by resentment about the count issues raised in Petitioner's memos.

[W] This paragraph was change to presume for discussion sake that Petitioner established this element of his case.

[X] This sentence was changed. The proposed decision stated that the causal link was established using the presumption noted in §230.85(6)(a), Stats. This is appropriate, however, only if respondent had determined that the disclosures warranted further investigation (see, §230.85(6)(b), Stats.). Respondent did not make such a determination here.

[CC] Ibid.

[Z] Reference to the Commission's decision was added.

The Commission notes that the record supports a conclusion that even Petitioner did not feel that the two memos now claimed as protected under the Whistleblower law played a part in the decision to demote him. He did not mention the letters in his Whistleblower complaint to Secretary Sullivan in May 1995. Also, he indicated at the pre-disciplinary meeting on April 5, 1995, that Ms. Thompson believed in him before the summer of 1994. According to his own estimate, therefore, Ms. Thompson's attitude towards him changed in the summer of 1994, which was before he wrote the two memos claimed as protected activities under the Whistleblower law.

III.[AA] Case #95-0070-PC-ER: Whether respondent discriminated against complainant in terms and/or conditions of his employment because of his disability in 1995 in violation of the Wisconsin Fair Employment Act (FEA), Subchapter II, Ch. 111, Stats.

Petitioner's post-hearing argument regarding the allegation that the demotion was based on his disability is repeated below (7/17/00 brief, pp. 44-45):

> Disparate treatment claims, such as for discriminatory discharge or demotion, are usually proven using the *McDonnell Douglas* burden-shifting method of proof, because there is rarely direct evidence of discrimination. [Citations omitted.] Here, circumstantial evidence supports Lane's claims.
>
> Thompson and Grosshans were aware of Lane's condition. Grosshans and Thompson were also aware that Lane's physicians placed him on medical leave from work due to his disability just months before his demotion. [Record citations omitted.]
>
> Yet Thompson gave Lane additional assignments and sent them to his home while he was ill. (Exh. C-78). Additionally, when Thompson rated him an Unsatisfactory on many duties and assignments she sent a copy of the PPD to Lane's home, further increasing his distress. (Exh. C-85) Finally, Thompson requested a doctor's written approval for each day of medical leave Lane took, a practice usually reserved for employees with a history of abusing sick leave, and refused to reassure Lane that she was not applying to him the policy usually applied to such employees (Tr. March 28, 2000:46-47). Thus, Thompson intentionally exacerbated Lane's depression and anxiety while he was at home trying to recover sufficiently in order to go back to work.

[AA] This section was added to address petitioner's claim of disparate treatment.

> Thompson claimed she demoted Lane because he committed allegedly wrongful actions as outlined in his demotion letter. [Record citations omitted.] In the remainder of this brief, Lane disproves each allegation, thereby showing that Respondent's reasons were pretextual. Section III, *infra*. Thompson's aggressive behavior, once she knew Lane was ill, clearly indicates that she did not want a disabled person working for her in a position of responsibility.

Before turning to the above argument the Commission notes that the investigation of Petitioner began prior to respondent knowing that he suffered from any medical condition. This establishes that the initial concerns about his performance were unrelated to his medical condition.

Petitioner does not allege that he was treated differently from non-disabled employees facing similar situations, which is a traditional element of proof in a disparate treatment case. Instead, he asks the Commission to find that Ms. Thompson's actions were intended to exacerbate his condition and to conclude therefrom that such conduct is sufficient to show pretext.

Petitioner failed to establish that any of the cited activities worsened his condition. He had an expert testify at hearing but failed to explore with the expert whether any of these actions worsened his condition. Furthermore (as discussed in the following paragraphs), the record does not support a conclusion that Ms. Thompson took the actions complained of with the intent to exacerbate his condition.

It is true that Ms. Thompson sent Petitioner a letter to his home dated March 13, 1995 (Exh. C-78) and that the letter contained a discussion of work assignments. At this point in time, Ms. Thompson had received the initial medical excuse from Dr. Hisgen dated February 24, 1995, stating that Petitioner was suffering from "extreme work stress." She reasonably thought such stress stemmed from the investigation of Petitioner (¶¶72-73, Findings of Fact) and her opinion was based at least in part upon her knowledge of other employees who also experienced stress while under investigation and, accordingly, requested leave time. (T3/17/00, pp. 73-74) At this point in time she also had received Dr. Hisgen's report dated March 9, 1995, indicating that Petitioner could return to work on March 20, 1995, without restrictions or accommodations (¶74, Findings of Fact). As explained in the March 13th letter, Ms. Thompson was off work for vacation the week of March 20th. The strong inference from

the wording of the letter and surrounding circumstances is that Ms. Thompson sent the letter to ensure a smooth transition when petitioner returned to work.

It also is true that Ms. Thompson, by memo dated April 5, 1995 (Exh. C-85), sent to Petitioner's home a copy of an unsatisfactory performance evaluation. The PPD review had been scheduled for February 17, 1995, but did not occur. Instead, the investigative interview occurred on that date (T3/17/00, pp. 5-8.) Ms. Thompson stated in the May 5th memo as follows:

> In February, I completed your annual PPD, however, we have been unable to schedule a meeting time due to your medical leave and my vacation. I would like to meet with you for your PPD review to discuss the results, however, I would like to wait until the pending investigation is concluded, as not to add additional stress to you at this time.
>
> Lets (sic) plan to get together in mid-April for your review.

The information known to Ms. Thompson from Petitioner's physicians is the same here as for the prior allegation. Ms. Thompson credibly testified on direct examination as to why she sent the PPD to Petitioner at his home, as repeated below (T3/17/00):

> pp. 51-52:
> A. That's the cover memo that I sent Neil with his PPD when I sent it to his home and the reason I sent it was his PPD was overdue. He was going to be coming back to work. I wanted to schedule a time for us to try to do that and I wanted to give some time to take a look at his PPD in advance. So that he would have time to process it because I know there were some negative things in that PPD and I wanted to give him an opportunity to review that.
>
> pp. 65-66:
> Q: Do you recall Mr. Lane's testimony, I believe it was yesterday, concerning his panic attacks and that something to the effect that he believed that you might try to cause him to have another panic attack?
> A. I recall his testimony, yes.
>
> Q: Would you have done that?
> A: Absolutely not. First of all, Neil and I had been friends for years. So why would I want to cause him to have a panic attack. That would be actually

> pretty absurd to me to want any or to inflict harm on anybody. I knew his wife. I knew his children and so I certainly would not want to inflict a panic attack on those children's father. It's – frankly, I find it absurd.

In short, the record does not support a conclusion that Ms. Thompson's action of sharing the document with Petitioner was inappropriate or that Ms. Thompson did so with the intent of exacerbating his medical condition.

The final action by Ms. Thompson complained of here is repeated below:

> Finally, Thompson requested a doctor's written approval for each day of medical leave Lane took, a practice usually reserved for employees with a history of abusing sick leave, and refused to reassure Lane that she was not applying to him the policy usually applied to such employees (Tr. March 28, 2000:46-47)

The cited transcript pages are unrelated to Ms. Thompson's request for medical verification. It appears the intended citation was to pp. 46-47, T3/29/00, wherein Ms. Thompson gave the following testimony under cross-examination:

> Q: You asked Mr Lane for proof from his physician for each day that he did not attend work in 1995, isn't that correct?
> A. I believe so.
>
> Q: And you inquired a number of times in order to, inquired a number of times to Mr Lane in order to provide more information concerning – Let me rephrase that. You, you sent a number of memos to Mr. Lane asking for more information in order to approve his sick leave, is that correct?
> A. Yes, there are some memos.
>
> Q: Okay. And you actually contacted Dr. Center or contacted her office in order to remove (sic) more information in order to approve Mr. Lane's sick leave, correct?
> A. I believe there was one contact, yes.
>
> Q: But there was also a, a letter to her as well, is that true?
> A. From what I recall, yes.
>
> Q: Okay. You never told Mr. Lane that you weren't applying the sick leave policy or procedures used for employees who abused sick leave, did you?
> A. We did not discuss that.

Q: Okay. And you never assured him that, that this policy was not being applied to him?
A. There was no discussion about that.

Q: Okay. And you testified that you didn't believe Mr. Lane was, in fact, abuse, or you didn't test, you testified that you didn't think that Mr. Lane was, in fact, a candidate to apply that policy and procedure, correct?
A: That's correct.

The above passage does not establish that the method Ms. Thompson followed was "usually reserved for employees with a history of abusing sick leave." In fact, such a reading of the quoted testimony would be unreasonable in light of Ms. Thompson's credible testimony on direct examination (T3/17/00, pp. 46-76). Some examples are noted below (T3/17/00):

pp. 72-73
A. That is, maybe I should backtrack a little bit. This doesn't fall under the sick leave policy of someone who abuses sick leave on a regular basis. One of the things that happens very frequently when employees are under investigation is time off. And at that point, personnel recommends and what a very common practice within the Department is is then when somebody is taking leave time while under investigation then we do request doctor's excuses for the continued leave time

[D]uring these kinds of situations it's not atypical for us to request doctors' excuses or doctor's permission for continued leave time particularly when an investigation has been pending and we're unable to complete the investigation

p. 74:
A. We do have a sick leave policy and a sick leave policy is more for chronic abusers of sick leave. For example, when people's balances fall when they have a zero sick leave balance or when they're continually taking every Friday off sick or there is guidelines about that for chronic abuser of sick leave. This situation it's like comparing apples and oranges because this was a very different situation and it was unrelated to that particular sick leave policy

Part of this final allegation is Petitioner's statement that Ms. Thompson "refused to reassure" him "that that she was not applying to him the policy usually applied to such employees." Some background is provided here to understand the context of this allegation. As

noted in ¶81, Findings of Fact, Petitioner did not report for work on April 24, 1995, which was his most recent medical return-to-work date. Ms. Thompson wrote to his physicians on April 24th and, when a reply was not forthcoming from the doctors, she wrote a memo to Petitioner on May 4, 1995 (Exh. R-159) saying as follows:

> When I spoke with you on April 27th you indicated that your doctor would be sending me a letter, approving additional time off for April 24, 25, 26 and half of the 27th. The most recent correspondence I received from Dr. Center indicated that you were able to return to work on April 24th
>
> Without documentation from a doctor, I cannot approve the additional time off. Therefore, those days will be considered leave without pay. If you have any questions, feel free to contact me.

Petitioner responded by memo dated May 9, 1995 (Exh. R-165), stating (in pertinent part) as follows (emphasis added):

> I agree that I informed you that I spoke with Dr Center and she agreed to send you documentation for additional time off, specifically, April 24-27 (AM)
> [Y]ou made no indication to me that you had not received verification, until I received your memorandum, dated 5/4/95, on May 8, 1995, indicating that those days would be considered leave without pay.
>
> I will be seeing my doctor today at 4:15 pm at which time I will request copy of that verification. **I have never abused sick leave during my entire career with the Department of Corrections, which is well-documented. I am quite disturbed that I am being treated in this manner and not in accordance with sick leave policy guidelines and procedures**.

The day after Petitioner wrote the above memo, he was provided notice that he was being demoted (see ¶12, FOF). The fact that under these circumstances Ms. Thompson did not explain to Petitioner that the request for medical verification was based on something other than the sick-leave-abuse policy is insufficient to show discrimination.

In objections to the PDO, Petitioner further alleged that the following additional actions taken by Ms. Thompson "demonstrated that she wished to contribute to Lane's deteriorating mental health, rather than aid him in his return to work" (3/12/01 brief, pp. 20-21):

> Thompson demonstrated her desire to discover information upon which to base discipline of Lane, regardless of the consequences on his mental health, when she began investigating the Notice of Claim from McBride on February 6, 1995. Without any logical explanation or reason, Thompson immediately investigated the allegations included in the Notice of Claim by asking Todd Zangl whether Lane was at fault. The facts do not support such a line of investigation. Yet, finding him at fault for this allegation seemed to be Thompson's plan. Proposed Decision and Order, p. 8. She even went so far as to pay McBride the money McBride was not owed by the Department in order to continue with the charade. (Exh. C-112, C-113; Tr March 28, 2000: 3-23).
>
> Additionally, in her letters to Lane's physicians, Thompson included information irrelevant to her requests for information, in what appeared to be an attempt to discredit Lane to his physicians and cause him further anxiety and depression. Thompson outlined the allegations against Lane for his physicians. (Tr March 29, 2000: 27-28). Thompson claimed she provided this information to Lane's physician because she "thought the physician should know." (Tr March 29, 2000: 27-28). This explanation does not make much sense. Her actions are consistent with her quest for a basis upon which to base Lane's discipline and her steadfast refusal to acknowledge the possible effects of Lane's mental condition on his performance.
>
> Then, after the investigation was almost completed, Thompson asked Lane's physician if his condition precluded him from participating in the investigatory process. (Exh. C-95). However, she did not bother to wait for an answer to these questions before she had him demoted. (Tr. March 29, 2000:43-44).

The Commission again notes that the record is devoid of testimony from a medical expert stating whether the incidents for which Petitioner was disciplined were caused by his medical condition. Each of the remaining allegations is discussed below.

The McBride matter was discussed at the initial investigatory meeting on February 17, 1995. Ms. Thompson contacted Mr. Zangl and Ms. Becker for their version of events on February 21, 1995 (see ¶20, Findings of Fact). These events occurred before Petitioner started his stress leave (¶71, Findings of Fact), before Dr Hisgen signed the initial medical leave slip (¶72, Findings of Fact) and before Ms. Thompson was aware that Petitioner had a medical condition (T3/17/00, pp. 43-44). Accordingly, the record does not support Petitioner's contention that Ms. Thompson's investigation of this matter was motivated in any part by his medical condition. Nor should the wording of ¶20 of the Findings of Fact be read to suggest

that Ms. Thompson's investigation of Petitioner's possible role in the situation was inappropriate. In fact, Ms. Thompson testified (T3/17/00, p. 85) that Ms. McBride's money had not been put in an interest-bearing account and that this would have been Petitioner's responsibility as business manager. It was reasonable for her to see if Petitioner was at fault under the circumstances. Her inquiry into the matter had a reasonable and rational basis. As a final note, the Commission reviewed the portion of the record cited in Petitioner's written arguments (Exh. C-112, C-113; Tr. March 28, 2000: 3-23) and found nothing therein to support his contention that Ms. Thompson's investigation was inappropriate or that she conducted the investigation to exacerbate his condition.

Petitioner next faults Ms. Thompson for sending his physicians two letters, one dated March 6, 1995 (Exh. R-142, p. 2 and C-76) and the other dated April 24, 1995 (Exh. C-95). Ms. Thompson sent copies of both letters to Petitioner when they were mailed to the physicians. Each letter is discussed separately below.

The relevant text of the March 6th letter is shown below. (Also see ¶74, Findings of Fact.) The portion, which apparently is objectionable to Petitioner, is shown in bold type:

> I am the Deputy Administrator of the (DIS) (DOC) and am the direct supervisor of your patient, Neil Lane. Neil is the Administrative Officer for our division and is responsible for overseeing the Business Office which manages our financial operations.
>
> On March 3, 1995 I received your letter dated February 22, 1995 (sic) indicating that Neil needed 30 days off due to extreme work stress. In order for me to approve his continued leave, I need further information . .
>
> **I have attached a copy of Neil's position description for you to refer to. Also, I felt it was important for you to know that this time of year (April, May, June) is the busiest time of year for our Business Office due to finalizing next year's contracts and the year-end closeouts that need to occur.**

Petitioner's apparent objection to the letter is his perception that it was "irrelevant to her request for information." In support of his argument, he cites to only two pages of the transcript (T3/29/00, pp. 27-28) omitting Ms. Thompson's further explanation found on the

next two transcript pages (also see T3/17/00, pp. 46-47). Relevant portions of Ms. Thompson's testimony are shown below:

pp. 26-27

Q: During your direct examination, you indicated that you conferred with Personnel prior to sending out this document, is that correct?

A. Yes

p. 28

Q: [T]he letter to Dr. Hisgen, on the third paragraph you indicated that you attached a copy of Mr. Lane's position description. Did you make the decision to attach the position description?

A. No, that was recommended to me.

Q: By whom?

A. Someone in Personnel.

Q: And you –

A. I wouldn't have known to do that, otherwise. I had never had a case like this before, so I, I had to rely on Personnel to guide me through this. I wouldn't have known to do that

p. 29-30

Q: The second, second sentence in that paragraph said: "Also I felt it was important for you to know that this is" – "that this time of year, April, May, June, is the busiest time of year for our Business Office due to finalizing next year's contracts and the year-end closeouts that need to occur." Is that what it says?

A: That's what that says.

Q: Okay. And you, did you make the decision to put that statement in there?

A. I decided to put it in there upon the recommendation of, again, whoever I was talking [to] in Personnel. Because one of the things that had been stressed is to give them an idea of what his workload was and what the status of the job was so that the doctor could accurately make a recommendation on if that person was prepared to come back to that job as it was.

And that's what I remember about putting that in there. But it, it wasn't my recommendation. Again, because I wouldn't have known about putting that kind of thing in a letter like that.

Q: Did you talk to Mr. Lane before put, sending this letter out about this letter?

A. I did not.

Q: Did you consult him as to whether or not his, he wanted his doctor to have his position description?
A. I did not.

Q: Did you consult him as to whether or not he wanted his doctor to know that this was a busy time of year for him?
A. I did not.

The record, in summary, does not support a conclusion that Ms. Thompson's letter was inappropriate or that she sent the letter to exacerbate Petitioner's medical condition.

The April 24th letter from Ms. Thompson to Dr Center is noted in ¶81, Findings of Fact. When Ms. Thompson sent the letter to Dr. Center, the investigatory interview had been held (on 2/17/95), as had the pre-disciplinary meeting (on 4/5/95), with the remaining task of informing Petitioner of the results. Ms. Thompson included in her letter to Dr. Carter a description of the allegations against Petitioner and an inquiry of whether Petitioner could participate in completing the investigation. No answer came from Dr. Carter Petitioner returned to work without restrictions on April 27, 1995. On May 10th, he was informed that he would be demoted. Dr Center eventually replied about a month after Ms. Thompson's inquiry (replied by letter dated 5/26/95 as noted in ¶83, Findings of Fact) but Dr. Carter did not answer Ms. Thompson's question about whether Petitioner was able to participate in the investigation. At no time did Petitioner inform respondent that he was unable to complete the investigation. In short, the record does not support Petitioner's contentions that Ms. Thompson should not have shared information about the pending investigation, or that Ms. Thompson should have waited longer for Dr. Carter to reply to her inquiry when Petitioner, in the interim, had returned to work without restrictions. The record does not support Petitioner's contention that the timing of the demotion was orchestrated by Ms. Thompson to exacerbate his condition.

IV.[BB] Case #95-0070-PC-ER: Whether respondent failed to reasonably accommodate complainant's disability in 1995 in violation of the FEA.

Petitioner's contention here is that respondent failed in its accommodation duty when Ms. Thompson and Mr Grosshans "unilaterally rejected" the possibility of a change in supervisors "without discussing it with Lane, his physician, or BPHR" (brief dated 7/16/00, p. 45). This is a claim under §111.34(1)(b), Stats., the text of which is noted below:

> Employment discrimination because of disability includes, but is not limited to:
>
> (b) Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

The Commission first notes that it is clear from Petitioner's objections to the proposed decision that he equates respondent's knowledge of his medical condition to mean that respondent knew he was disabled (3/12/01 brief, starting on p. 15). This reasoning is flawed because not every medical condition rises to the level of a disability protected under the FEA. *See*, *Polesky v. LIRC*, No. 98-1356, 1999 Wis. App. LEXIS 506, (Ct. App. 1999) ["Simply because a person is unable to perform a particular job because of an individual characteristic or mental inaptitude does not automatically mean that the employee must be deemed to be handicapped."], citing *American Motors Corp. v. LIRC*, 119 Wis. 2d 706, 716, 350 N.W.2d 120, 125 (1984).] The Commission now turns to petitioner's remaining arguments.

The respondent in this case received medical information from Petitioner's treating physicians only upon the respondent's initiative in writing to the physicians, with the sole exception being the first leave slip dated February 24, 1995 (see ¶72, Findings of Fact). Further, the information respondent requested from the physicians was appropriate and fulfilled any obligation respondent might have had to ferret out information about Petitioner's condition. Under these circumstances, the focus is on what the employer knew about Petitioner's medical condition. *Target Stores v. Labor and Industry Review Commission*, 217 Wis. 2d 1, 15, 576 N.W.2d 545 (Ct. App. 1998) ["LIRC is interpreting the employer's obligation in light of the

---

[BB] This section was modified to clarify Petitioner's arguments as well as the Commission's rationale.

information that the employer had, and this is a reasonable construction and application of the statute."]

The information available to respondent as of Petitioner's return to work on April 27, 1995, was insufficient to support a belief that he was an individual with a disability. The information known to respondent about Petitioner's medical condition is detailed in ¶¶71-85 of the Findings of Fact. As noted in ¶78, the medical release signed on April 17, 1995, indicated that Petitioner could return to work on April 27, 1995, without restrictions and that he would continue to take medication and undergo treatment every 1-2 weeks or as needed. Dr. Center, in response to respondent's question of necessary accommodations also noted "If possible, alternative supervisory situation" but, as noted in ¶78A, respondent reasonably believed it was not medically necessary to do so. Respondent also was aware of the perceptions of Petitioner and his wife about Petitioner's condition (see ¶¶80 and 85, Findings of Fact), but respondent reasonably believed that where these lay perceptions conflicted with the available medical information that such opinions were inaccurate (see ¶80, Findings of Fact).

It is Petitioner's burden to establish that he was an individual with a disability, within the meaning of §111.32(8), Stats., the text of which is shown below:

> (8) "Individual with a disability" means an individual who:
> (a) Has a physical or mental impairment which makes achievement usually difficult or limits the capacity to work;
> (b) Has a record of such an impairment; or
> (c) Is perceived as having such an impairment.

The information available to respondent does not support a conclusion that Petitioner's impairment made achievement unusually difficult, or that his impairment limited the capacity to work. Nor did respondent perceive him as having such impairment. The only related history was his recent leave which respondent reasonably believed was a temporary condition caused by stress associated with the investigation.

There are no cases under the FEA addressing a change of supervisors as an accommodation. It is clear, however, that under the federal Americans with Disabilities Act (ADA) an individual is not considered as "substantially limited" in the major life activity of work if the

employee "merely cannot work under a certain supervisor because of anxiety and stress related to his review of her job performance." *Weiler v. Household Finance Corporation*, 101 F.3d 519, 524, (7th Cir 1996) It also is instructive to note that the Equal Employment Opportunity Commission (EEOC) in interpreting the ADA's reasonable accommodation requirement flatly rejected the notion that a change of supervisors is a reasonable accommodation. (*Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans With Disabilities Act, Requesting Reasonable Accommodation*, question/answer #32.) The Commission found this information instructive while recognizing that differences exist between the language of the ADA and the FEA.

Petitioner faults respondent for failing to discuss the possibility of a change in supervisors with him, his physicians or with respondent's personnel office. He contends that under the FEA, reasonable accommodation "can only occur when the employee and the employer communicate regarding the employee's condition and potential accommodation of that condition" (brief dated 3/12/01, p. 18). The Commission finds the case law cited by Petitioner to be unpersuasive (as discussed below) and disagrees with his assertion that respondent's actions here failed to meet its obligations under the FEA.

The EEOC guidelines referenced above encourage an "interactive approach" when considering an employee's accommodation request (*Id.*, question/answer #5: "[A]n employer should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.") Footnote #22 in the guidelines explains the contemplated interactive approach as noted below:

> Engaging in an interactive process helps employers to discover and provide reasonable accommodation. Moreover, in situations where an employer fails to provide a reasonable accommodation (and undue hardship would not be a valid defense), evidence that the employer engaged in an interactive process can demonstrate a "good faith" effort which can protect an employer from having to pay punitive and certain compensatory damages.

Petitioner correctly noted that federal courts interpreting the ADA have favored the interactive process (brief dated 3/12/01, p. 18), citing the following passage from *Bultemeyer v. Fort Wayne Community School*, 100 F.3d 1281, 1285 (7th Cir 1996):

> [P]roperly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say, "I want a reasonable accommodation," particularly when the employee has a mental illness. The employer has to meet the employee half-way and if it appears that the employee may need an accommodation, but doesn't know how to ask for it, the employer should do what it can to help . . . [T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.

In regard to the above quote, the Commission notes there was no expert testimony in this case that Petitioner's medical condition included an inability to communicate his needs to respondent.

The Commission also notes that there is no "bright-line" rule under the ADA or under the FEA requiring a face-to-face encounter between the employer and employee prior to an employer making an accommodation decision. As noted in *Bultemeyer*, *Id.* at 13-14:

> An employee's request for reasonable accommodation requires a great deal of communication between the employee and employer. We recognized this in *Beck* where we held that both parties bear responsibility for determining what accommodation is necessary. *Beck*, 75 F.3d at 1135. We further explained that:
>
> > No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Even if the federal guideline favoring an interactive process were applicable to cases litigated under state law (a question raised but unresolved in *Target Stores*, *Id.* at ftnt. 13), the respondent here neither acted in bad faith nor obstructed the process. At all times, the respondent acted in good faith.

ORDER

Case No. 95-0070-PC-ER is dismissed on the merits. Respondent decision to demote Petitioner in case No. 95-0096-PC is affirmed and the case is dismissed.

Dated: June 7, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

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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