EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Arthur Morgan 917 Northport Drive Madison, WI 53704 Complainant vs. Community Action Commission 1045 East Dayton Street, Room 308 Madison, WI 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2642

A complaint was filed on June 19, 1980 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race in regard to both (1) terms and conditions of employment and (2) discharge. Said complaint was investigated by MEOC Human Relations Investigator Mary Pierce and an Initial Determination was issued dated October 27, 1980 finding probable cause to believe that discrimination had occurred as alleged.

Conciliation failed and/or was waived. The matter was then certified to public hearing, and a hearing was held beginning on July 13, 1981 and (after several continuances) concluding October 2, 1981.

Attorney Roberta A. Klein of CULLEN AND WESTON appeared on behalf of the Complainant who also appeared in person. Attorney Timothy C. Sweeney of WALSH, WALSH AND SWEENEY, S.C. appeared on behalf of the Respondent who also appeared by designated representative Jay Vercauteren. Based upon the record of the hearing, and after consideration of the post hearing briefs and reply briefs submitted by the parties, I propose the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Arthur Morgan, is an adult, black male residing in the State of Wisconsin.

2. The Respondent, The Community Action for the County of Dane and the City of Madison, Inc., is an employer doing business (as a non profit corporation) in the City of Madison.

3. The Complainant was hired in June of 1977 as an Energy Outreach Worker for the Respondent. He initially worked in a program under the supervision of William Schwarz, Respondent's Director of Community Development.

4. Morgan's performance as an Energy Outreach worker was excellent, and Schwarz hired (promoted) him for the supervisory position of Fuel Assistance Coordinator in October, 1977.

5. The job duties of the Fuel Assistance Coordinator included, but were not limited to, operation of the fuel program, supervision of the program staff, contacting organizations, and client contact. He was responsible for the Crisis Intervention Program which included responsibility to insure utilities were paid for eligible clients, insuring that clients whose utilities were disconnected had the utilities reconnected, and advocating for clients before utility companies.

6. Schwarz viewed Morgan as the best employee he ever supervised. Schwarz wrote for Morgan an open letter of recommendation in January, 1980 (See Complainant's Exhibit 29 A and 29 B).

7. Due to a reorganization in Respondent's agency in November or December, 1978, all fuel assistance programming was moved to a different section within the Respondent's agency at which time Jay Vercauteren became the Complainant's supervisor.

8. Many of the duties of Morgan's job under Vercauteren were the same as under Schwarz, including responsibility for a 24 hour on-call crisis hotline, negotiating on behalf of clients with utilities, supervision of staff and client advocacy.

9. Morgan was receiving an average of 60 calls per day regarding the Fuel Assistance program, and often times had no one to assist him. Morgan was on call 24 hours per day, and he received calls at all hours of the evening and morning on a not infrequent basis.

10. Morgan answered approximately 7,200 calls per heating season (60 calls per day, five days per week for six months). Out of
these 7,200 calls, 200 calls were situations that required emergency fuel assistance. Out of these latter 200 calls, six to ten resulted in the provision of emergency assistance to ineligible clients. The six to ten improper certifications usually occurred when Morgan had to respond to calls in late evening or early morning.

11. Due to his increasing workload, Morgan requested assistance from the Respondent's management. Tim Bruer, a white male, was eventually hired to assist Morgan.

12. Bruer was hired by Vercauteren. Bruer had previously applied for a position in the programs under Schwarz's supervision, but Schwarz had refused to hire him.

13. Morgan requested that certain of his job duties be delegated to Bruer. Morgan was under the impression that Bruer would be his assistant, and that Bruer would execute the job duties under Morgan's supervision. Vercauteren generally participated in discussions and decisions regarding the reassignment of the job duties. As time went on, Bruer was given more and more authority by Vercauteren to the point where he was no longer Morgan's assistant, but was operating separately from Morgan. Bruer became essentially to be under Vercauteren's direct supervision.

14. Morgan had an authorized arrangement with Vercauteren permitting him to report late to work and/or otherwise take off time as "comp time" to compensate him and to accommodate him for times when he (Morgan) was required to handle emergency fuel situations after working hours.

15. Sometime before April 30, 1980, the Complainant distributed a memo to Vercauteren, Bruer and his secretary, Kelly Bartell, indicating he would be taking two days off for a vacation starting on May 1, 1980. On April 30, 1980, before he left, he placed his filled in timesheet on his secretary's desk. April 30 was a Wednesday. The Complainant did not leave the timesheet with Vercauteren or Vercauteren's secretary because they had left for the day.

16. When the Complainant returned to work on Monday, May 5, 1980, Bruer told him that his timesheet had not been turned in and that Bruer had looked for it and could not find it.

17. Bartell had not come to work on May 1 or 2. When the Respondent's payroll people discovered that the Complainant's timesheet had not been turned in by noon on May 2, a Respondent's employee to reach the Complainant at home. After being unsuccessful in one attempt to do so, another employee told the payroll person that s/he thought the Complainant had gone to Chicago. Consequently, the payroll person made no further attempts to contact the Complainant on the afternoon of May 2.

18. After discussing the matter with Vercauteren May 5, and with the understanding that he would not receive a payroll check because his timesheet had been turned in late, the Complainant filed a grievance

19. Later, Vercauteren told the Complainant that he should drop the grievance because it would take too long, and that Vercauteren would check into a loan for Morgan. Vercauteren first told the Complainant he would contact CUNA about a loan. Morgan applied at CUNA and was denied the loan. Vercauteren then told Morgan he would give him a personal loan. However, Vercauteren did not have the money, and Bruer gave the Complainant a loan around May 16, 1980 or shortly thereafter.

20. The Complainant's regular gross pay was $527.29 biweekly, with a biweekly net pay (after taxes) of $442.24. Morgan would ordinarily have received his paycheck on May 16, 1980 had he turned in his timesheet on time on May 2, 1980. (The timesheet covered the two weeks he worked prior to and including May 2, 1980.)

21. On May 30, 1980, Morgan received a check covering two pay periods:
(a) The pay period for which a timesheet had been due on May 2, 1980 and which he had not turned in on time; and
(b) The pay period for which a timesheet had been due on May 16, 1980, the only period which he normally would have received a check for on May 30, 1980.

22. The paycheck received by the Complainant on May 30, 1980 was for the proper gross amount of $1,054.58. The net pay was $775.33 which was $109.15 less than the net the Complainant would have received had he received two separate paychecks. The reason for the lower net pay was because a higher percentage of taxes were withheld from his pay than usual. The taxes were withheld as if he were making $1,054.58 biweekly rather than monthly.

23. The Complainant first went to William Benisch, the Respondent's Executive Director, on the morning of May 30, 1980 to complain about the problem. Benisch denied that the check was wrong; i.e., Benisch denied that too much money had been withhold.

24. Morgan next called his wife, Clove Morgan, to tell her about the withholding problem and to advise her to figure out how bills would be paid for that month. She said she would try to figure out what to do.

25. Morgan went back to Benisch's office around noon and attempted to get Benisch to understand that the Complainant had too much money withheld from his check.

26. Benisch said he would talk to Ms. Johnson, the Respondent's bookkeeper. Morgan went to Benisch's office again around 1:30 or 2:00 p.m. Benisch told Morgan that there did not seem to be anything he could do about the overwithholding. Morgan left Benisch's office.

27. Morgan went back to Benisch's office at 2:45 p.m. At this point, Morgan's wife called him while he was in Benisch's office. She told the Complainant that she had contacted various agencies about the check, including the Community Services Administration and a Madison Mayoral Assistant. Morgan repeated what his wife was saying to him (over the telephone) in the presence of Benisch. At the end of the day (around 4:00 p.m.), Benisch's wife came to pick him up. She indicated to Benisch, in Morgan's presence, that a mistake had been made regarding the tax withholding on Morgan's check.

28. On Sunday, June 1, 1980, the Complainant's wife contacted Osa Mendez, the Chairperson of the Respondent's Board.

29. On Monday, June 2, 1980, Morgan called Benisch's office to see if a decision had been reached regarding the overwithholding on his May 30 payroll check. The Complainant was unable to contact Benisch that day.

30. On Tuesday, June 3, 1980, Morgan was away from work for a doctor's appointment. He called Benisch's office and spoke to his secretary. The secretary told Morgan that Benisch had written a memo, and she read the memo to Morgan over the phone:

    Donna Johnson will be working with the First National Bank in order for the bank to process a special "adjustment" check for you to make up for excessive deductions in federal and state taxes from your most recent paycheck.

31. On June 4, 1980, Morgan went to Benisch's office. Benisch said he wanted to talk and took Morgan into a smell room off the main office and gave him the June 3 memo (see Finding of Fact 30). Benisch then asked Morgan if he thought he would have gotten his money if he had not called other agencies. Benisch told Morgan, "I don't like you going over my head." Morgan said that he was not responsible for the calls and that his wife had made them without Morgan's knowledge (and told him about the calls after they were made).

Benisch then told Morgan that he had documentation that Morgan was not performing his duties and that clients complained about him. Morgan asked for the documentation. Benisch said Vercauteren had it. Benisch then claimed a sexual harassment complaint had been filed against Morgan by Kelly Bartell. Benisch later acknowledged that Bartell had admitted the charge was a fabrication.

Benisch continually repeated that he was upset about the phone calls being made to agencies. Benisch finally told Morgan that he wanted a letter of resignation by Friday or Morgan was fired. Morgan walked out of the meeting shortly thereafter.

32. Morgan, later on June 4, 1980, went to talk to Phyllis Roderer, the Respondent's Personnel Director, to see if there were any negative evaluations of his performance in his personnel file. Roderer told Morgan that Tim Bruer had been accused of breaking into a personnel file and that an affidavit was on file about this. Morgan did not ask to see the affidavit. Morgan did not return to work after June 4, 1980.

33. Morgan received a letter of termination written by Benisch (and dated June 6, 1980) on June 7 or June 8, 1980. Morgan came back into the office later in June to collect his belongings (and pick up his check for the amount overwithheld). Morgan had never previously been a discipline problem.

34. Since Morgan was terminated, the Respondent has reorganized some of its programs. Bruer currently holds a position which includes many of the responsibilities which Morgan previously had. Other responsibilities of Morgan's are now included in positions held by Sandra Hoff and Sue Simmons, both white females. Simmons was promoted within months after Morgan's termination.

35. Helen Covelli, a white female employee who was supervised by Morgan, was rude to clients, used foul language, and was nasty to people on the telephone. Morgan informed his supervisor, Jay Vercauteren of these problems. While Morgan did not recommend renewal of Covelli's contract upon its expiration, Vercauteren did renew her contract.

36. Vercauteren, on one occasion approved timesheets authorizing "sick days" for crew members who took the day off for a party.

37. Steve Strong, a white male supervisor, once filled out a timesheet for Rodney Torgerson and signed Torgerson's name to it.

38. Two white employees were discharged for alleged insubordination by the Respondent:
Joan Torgerson, a white female, was terminated by the Respondent for allegedly personally going outside the agency to influence people against the agency. Torgerson was progressively disciplined prior to her termination.

Will Gilmore, a white male, was terminated by the Respondent for allegedly personally going over Bill Benisch's head to try to get funding sources to reverse decisions made by Benisch. Gilmore allegedly did this more than once over a number of months. Gilmore also allegedly exhibited physically threatening behavior against people in the agency prior to his termination.

39. Employee Mike Gibbs, a white male, turned in a late timesheet in May, 1980. He received a wage advance to tide him over until the subsequent pay period. Until he received the advance check, Gibbs spoke openly and in harsh terms to other employees about his dissatisfaction with Respondent's management at not having received his regular paycheck.

40. The Complainant had received a paycheck in June, 1979 after he had turned in a late timesheet. Benisch authorized the pay-check on that occasion. At least one white employee had not been granted a paycheck by Benisch after a timesheet had been turned in late.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of race within the meaning of Section 3.23, Madison General Ordinances.

2. The Respondent is an employer within the meaning of Section 3:23, Madison General Ordinances.

3. The Respondent did not discriminate against the Complainant on the basis of his race in regard to any terms and/or conditions of employment in violation of Section 3.23, Madison General Ordinances.

4. The Respondent did discriminate against the Complainant on the basis of race in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of his race.

2. That the Respondent reinstate the Complainant into the next available supervisory position for which he is qualified. Such reinstatement shall include all seniority, rights, privileges and benefits of employment to which he would be entitled to had he not been unlawfully discharged in June of 1980. Said reinstatement is intended to mean reinstatement to a supervisory position of a level of responsibility and compensation comparable to the position from which the Complainant was terminated from.

3. That the Respondent pay to the Complainant all wages that he would have received and that he would in the future receive from June 5, 1980 to the time of his reinstatement by the Respondent, had he not been unlawfully terminated by the Respondent.

MEMORANDUM OPINION

This case involved two primary allegations, one being an allegation of race discrimination regarding terms and conditions of employment and one being an allegation of race discrimination in regard to discharge.

The terms and conditions allegation encompassed five suballegations:

1. Denial of training opportunities to Complainant;

2. Intimidation by management not to oppose unlawful employment discrimination in Complainant's capacity as Affirmative Action Officer;

3. Disparate treatment towards Complainant in regard to Respondent's payroll practices;
Disparate treatment by Respondent towards Complainant in regard to job assignments; and

4. Disparate treatment by Respondent towards Complainant in regards to compensation and salary differential.

Suballegations 1, 2 and 5 were dismissed orally at the hearing by the granting of the Respondent's oral motion to dismiss these issues for failure to establish a prima facie case of discrimination regarding those issues. The Complainant did not take exception to the Examiner's ruling. Consequently, I will not dwell on these issues other than to say that the Complainant presented very little, if any, evidence on each of these issues and the evidence presented was insufficient to shift the burden to the Respondent to articulate legitimate, non discriminatory reasons for its actions regarding suballegations 1, 2 and 5.

Suballegations 3 and 4 remained along with the discharge issue, and it is these issues that I will now address.

I. PAYROLL PRACTICES (SUBALLEGATION 3)

Briefly, the Complainant failed to turn in his timesheet by noon on Friday, May 2, 1980. As with all employees, the Respondent attempted to contact the Complainant at home. No one answered after one attempt to call. Someone at the Respondent's office then suggested the Complainant might have gone to Chicago.

In the past, the Complainant had received a paycheck or an advance[1] on an occasion when he had failed to turn in his timesheet by the deadline. So had some white employees. However, there had been at least one occasion when a white employee had not received a paycheck or an advance after missing the timesheet deadline.

Overall, the Respondent exercised its discretion in authorizing advances or paychecks for late timesheets in a non discriminatory manner. The Respondent made the same good faith attempt to contact the Complainant on Friday afternoon as it did for all employees, and whites as well as blacks have both received and been denied paychecks or advances for late timesheets.

II. JOB ASSIGNMENTS (SUBALLEGATION 4)

During the course of the Complainant's employment, the quantity of his duties dramatically increased when the program shifted from the project supervised by Schwarz to the project supervised by Vercauteren. The Complainant desired an assistant and discussed those desires with his supervisor Vercauteren. Vercauteren hired Bruer in this capacity, but eventually permitted Bruer to exercise more and more of his own authority over the duties which the Complainant wished to delegate to an assistant.

Bruer is an aggressive employee who would frequently call around to find out where Morgan was located. Bruer called Morgan at home when Morgan was in fact in the office. A power struggle was developing between Bruer and Morgan with Bruer desiring to get ahead. Vercauteren started to require Morgan to keep his whereabouts posted on a bulletin board. There is a dispute as to whether Morgan was the only employee required to do so, or whether other employees also were. Previously, Morgan had been on an honor system agreement with Vercauteren, as Morgan was on 24 hour call and was permitted time off for overtime hours worked in the evening.

The issue is whether or not the transfer of duties away from Morgan to Bruer, i.e., the eroding of Morgan's supervisory authority, was racially motivated. I find that the Complainant has also failed to meet the burden of proof in this regard. The fact that the Complainant is black does not insulate him from the battles of the workplace, however unfairly they are fought by some. The evidence supports the conclusion that the Complainant was being challenged for power by an aggressive white employee, Bruer, seeking to advance. However, there is insufficient evidence to support the conclusion that the consequences being borne by him in relation to his supervisory duties and his accountability for attendance were racially motivated.

III. TERMINATION

The termination of Morgan is perhaps one of the strongest reasons why, in addition to protection against discrimination, employees in this City and State ought to be afforded protection against "wrongful discharge."

I find that Morgan was discharged primarily because his wife made phone calls to a Madison mayoral assistant (Kevin Upton), Josh Carter of the Community Services Administration (the Respondent's primary funding source), and Osa Mendez (then Chairperson of the Respondent's Board of Directors) to inquire how the Complainant's overwithholding problem might be solved.

While discharging an employee for such a reason was severe and rather insensitive, by itself it was not a discriminatory reason. Although an employee's discharge may be "unfair", an unfair, unreasonably severe and,/or insensitive discharge is not necessarily an unlawfully discriminatory one.

However, where there is evidence as here that white employees who committed more serious offenses were terminated only after progressive discipline or repeated recurrences, the termination of a black employee without warning gives rise to liability for racial discrimination.

THE BURDEN OF PROOF

The burden of proof to be applied in Title VII disparate treatment cases was discussed at length by the U. S. Supreme Court in Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1084, 25 EPD 31,544 (1981). The Burdine court discussion may be summarized as follows:

1. The ultimate burden of persuading the trier of facts (in this case, the Hearing Examiner) that the Respondent intentionally discriminated against the Complainant remains at all times with the Complainant.[2]

2. The Complainant must prove by a preponderance of the evidence a prima case of disparate treatment.

   a. The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[3]

3. The burden then shifts to the Respondent to rebut the presumption of discrimination (i.e., to rebut the presumption raised by the Complainant's prima facie case) by producing evidence that the Complainant was terminated for a legitimate nondiscriminatory reason.

   a. The Respondent need not persuade the Examiner that it was actually motivated by the pro offered reasons.[4]

   b. It is sufficient if the Respondent's evidence raises a genuine issue of fact as to whether it discriminated against the Complainant.

4. The Complainant retains the burden of persuasion and must now show that a discriminatory reason more likely motivated the employer than the employer's articulated nondiscriminatory reason or the Complainant must show that the employer's pro offered reason is unworthy of credence (i.e., the Complainant must prove by a preponderance of the evidence that the Respondent's articulated reasons for the employment action are pretextual of discrimination).

The facts of this case lend themselves to two legal analyses. I will discuss both analyses.

I. Analysis 1 - The Complainant Established a Prima Facie Case of Unlawfully Discriminatory Disparate Treatment Which the Respondent Failed to Rebut

I find that the Complainant established a prima facie case of discrimination as follows:

1. He is black and a member of the protected class of race within the meaning of Section 3.23.

2. He was discharged by the Respondent.

3. He was qualified for and was performing his duties satisfactorily at the time of his discharge.

4. White employees who had committed more serious or comparable offenses had been discharged only after progressive discipline (or after committing repeated violations) or had not been disciplined at all while the Complainant had not been a previous discipline problem.

The Complainant's race and the fact that he was discharged are undisputed on the record. While the Respondent attempted to portray the Complainant as suffering from "burnout" and exhibiting declining and unsatisfactory job performance, it is clear from the record that the Respondent did not terminate the Complainant for his job performance or his qualifications (see Complainant's letter of termination marked as Complainant's Exhibit 22 A through 22 D). No mention is made of unsatisfactory job performance in the June 6, 1980 letter of termination, and the Respondent's own testimony (that of Vercauteren and Benisch, specifically) supports a finding that job performance was not a factor in the Complainant's termination.[5] Further, while the Complainant's personnel file does contain a handful of memos critical of his performance, the overall record establishes that the Complainant's performance was - at all times relevant to this complaint - at least satisfactory and was for the most part superior.

The Complainant also established that white employees who had committed more serious offenses were discharged only after progressive discipline (Torgerson) or after repeated violations (Gilmore).

A white employee, Gibbs, who had spoken openly about his dissatisfaction with not receiving a paycheck received an advance and no discipline. A white employee, Covelli, was rehired despite having been rude to clients, having used foul language, and having been nasty to people on the telephone. Supervisor Strong, a white employee, had signed another employee's name to a timesheet[6] and received no discipline.

It is undisputed that the Complainant had never been a previous discipline problem.

As stated in McDonald v. Santa Fe Trail Transportation Company, 427 U. S. 273, 283 84 (1976),

Title VII, although permitting discharge without a warning, will not tolerate discriminatory application of a warning policy.

And in this case, the Madison Equal Opportunities Ordinance will not tolerate a discharge policy which permits white employees to commit multiple offenses of a more serious nature prior to termination while immediate termination without warning for a less serious infraction results for a black employee, nor will the ordinance tolerate a policy whereby white employees who committed comparable offenses are neither disciplined nor discharged as was the black employee.

While the Respondent spends a great deal of time discussing how reliable and trustworthy its sources of information allegedly were, the Respondent never articulates a reason (i.e., never raises a genuine issue of fact as to whether it discriminated against the Complainant) as to why white employees were treated differently than Morgan in regard to discipline prior to discharge.

Consequently, the Respondent has failed, even under its very light burden of having merely to articulate a reason for disparate discipline, to rebut the Complainant's prima facie case of discrimination in regard to discharge, and the Complainant must prevail.

An additional element of a prima facie case often involves "replacement" of the terminated employee with someone outside the protected class. Replacement is not, however, always a necessary element of a prima facie case.[7] Nor does it necessarily negate a prima facie case where an employee is replaced by someone within the same protected class.[8] However, in this case, it is clear that Morgan's duties were eventually divided up and incorporated into the jobs of three white employees (Bruer, Hoff, Simmons), of which two jobs were created after Morgan's discharge. While the Complainant's specific job does not now exist in the form that the Complainant occupied it due to funding changes and the Respondent's reorganization, I find that the Complainant's discharge opened the door to Bruer's, Simon's and Hoff's advancements and that the Complainant would have continued in the Respondent's employ at a supervisory level but for the discharge. In other words, the Complainant was constructively "replaced".

II. Analysis 2 - The Complainant Established A Prima Facie Case of Unlawfully Discriminatory Disparate Treatment and Then Proved that the Respondent's Articulated Reasons Were Pretextual

I find in the alternative that the Complainant established a prima facie case as follows:[9]

1. He is black and a member of the protected class of race within the meaning of Section 3.23, Madison General Ordinance.
2. He was discharged by the Respondent.
3. He was qualified for and was performing his job duties satisfactorily at the time of his discharge.
4. He was "replaced" by white employees.

All four elements were established as discussed under Analysis 1.

The Respondent's articulated reasons for the discharge are embodied in Complainant's Exhibit 22 A through 22 D and are discussed
below as is the evidence by which the Complainant established that the Respondent's reasons were pretextual and/or unworthy of credence.

The Respondent's termination letter sent to the Complainant (dated June 6, 1980) states the following reasons for his termination:

> "I am terminating your employment with ten (10) days notice to be effective Friday, June 20, 1980. Per Section VII D.2.a(1) on page 20 of the Personnel Policies, I have determined 'that you

> may be a liability to the agency' and thus will be prohibited from working during the ten days following this notice; however, you will be given severance pay for these days per those policies.
>
> "The grounds for this termination as listed in the Personnel Policies are:
>
> "d. Unwillingness to submit to a supervisor's authority or insulting behavior toward a supervisor.
>
> "e. Failure to respect confidentiality of records, except where it is work related.
>
> "Any one of the above by itself can be deemed grounds for termination. The Personnel Policies state that termination is not limited to the grounds listed. To that list I would add:
>
> "- Insubordination as relates to willful disregard for my authority as Executive Director (relates to d. above).
>
> "- Factionalism as relates to the promotion of divisiveness and dissension or even subversiveness."

The letter, written by Benisch, further goes on to state that "You are being terminated on the basis of events surrounding and in the
wake of receipt of a paycheck on Friday, May 30, 1980 that had excessive Federal and State taxes withheld."

Benisch relied on the following written "Personnel Policies" in making his decision to discharge Morgan (see Complainant's Exhibit 24):

III. EMPLOYEE BEHAVIOR: PERFORMANCE AND DISCIPLINE RULES AND TERMINATION POLICIES

B. EMPLOYEE RULES AND REGULATIONS

1. Grounds for disciplinary and/or dismissal as a Community Action Commission employee may include, but not be limited to the following violations: (Emphasis Added)

d. Unwillingness to submit to supervisor's authority or insulting behavior toward a supervisor.

e. Failure to respect confidentiality of records, except where it is work related.

(A list of violations from a to s are listed.)

First, I hold that even if the Complainant had committed all those offenses listed in Benisch's June 6, 1980 letter, the Complainant would prevail because he has shown, as described in Analysis 1, that white employees who committed more serious offenses were progressively disciplined or allowed repeated offenses prior to termination, and that white employees who had committed comparable offenses (particularly Covelli) were either not disciplined or (as in Covelli's case) were extended when their contract ran out.

Second, a further analysis of the evidence supports the finding that some of the employer's reasons for the termination are not worthy of credence, thus strengthening the Complainant's disparate treatment argument. Basically, I reject the Respondent's arguments that Morgan's walking out of the June 4, 1980 meeting with Benisch and his subsequent meeting with Roderer (where Morgan allegedly asked to see a "sensitive personnel document") had any bearing on his termination, as both these events occurred after Benisch had offered him the ultimatum to resign or be terminated. Further, I find the Complainant's version of the facts surrounding the termination to be generally more credible than the Respondent's. My discussion follows.

The Respondent contends that the phone calls to Upton (the mayoral assistant), Carter (the CSA Wisconsin/Ohio Branch chief) and to Mendez (the Respondent's Board Chairperson) were made prior to Benisch's being given an opportunity to solve the withholding problem and in order to leverage" Benisch into making a decision.

I find, based on the testimony, however, that the calls were made by the Complainant's wife,[10] they were made only after the Complainant had met with Benisch at least once and as many as four times,[11] and they were made only after Benisch had indicated to the Complainant a lack of understanding and an unwillingness to remedy the issue. I specifically reject Benisch's statement that the calls to Upton and Carter were made prior to Morgan's having met with Benisch or that the call to Mendez (on Sunday) was made after Benisch in a late afternoon meeting on Friday had indicated that he would look into the matter on Monday.

The evidence also supports the finding that the Complainant never had or was provided with knowledge of a check for the amount overwithheld being ready until sometime after June 6, 1980 (the date of the termination letter), and not as early as June 3 or 4 (if in fact the check was ready then, as the Respondent argues).

Another ground for termination alluded to in the letter was that Morgan had stated, after his late Friday afternoon meeting with Benisch and in the presence of another employee, that he would "sue Benisch's ass" and the agency was "screwing me (Morgan) out of my money." The testimony at the hearing clarifies that the statement was made by Morgan in the presence of Sue Simons, a white female employee. While the statement was not addressed to her conversationally, she clearly overheard it and at Bruer's urging reported it to Benisch on Monday.

Although I do not condone Morgan's statement, I find it to be disparate treatment that such a statement .would be a factor in Morgan's termination where there is evidence that other white employees openly criticized supervisors without consequence. While Morgan's choice of language was perhaps distasteful, it is suspect that he would be so severely disciplined (discharged) for a single isolated statement made after no less than four frustrating discussions with Benisch whereas white employees at most received progressive discipline for far more severe and damaging behavior.

Benisch also states in his letter that Morgan's walking out of their June 4th meeting was "another act of insubordination." This was the meeting in which Benisch offered Morgan the option of resigning or being involuntarily terminated. I reject the argument that Morgan's walking out of the meeting had anything at all to do with his termination. How Morgan can be terminated for walking out of a meeting where he has just in effect been terminated escapes this Examiner's sense of logic.

Benisch also tacks on to the June 6th letter a section entitled "Actions in the Wake of the Paycheck Issue." The Respondent's statement is that the Personnel Director (Phyllis Roderer) informed Benisch that Morgan had told her he wanted to get rid of Benisch and that Morgan had requested a "sensitive personnel document that had nothing to do with you or this case."

First, I do not find this incident to be in any way related to Morgan's termination. The meeting between Morgan and Roderer occurred after the meeting between Benisch and Morgan on June 4 where Morgan had already been given the ultimatum to resign or be involuntary terminated. Second, I reject the Respondent's statement and find Morgan's testimony credible that it was Roderer who advised him of the existence of the "sensitive personnel document" (regarding Bruer) because she thought Morgan was being unfairly treated. Third, I find again that Morgan was treated disparately in that the Respondent failed to investigate his version of the story as had been done for Bruer when more serious allegations were made against Bruer.

Overall, I find that even if all of the Respondent's allegations were true, as embodied in Benisch's June 6, 1980 letter, the Complainant still has established the reasons for his termination were pretextual by showing, among other things, that two white employees who had committed more serious offenses were terminated only after progressive discipline or repeated offenses.

And, in applying a closer analysis to the facts, I find that the only possibly credible reasons offered by the Respondent were that the Complainant was terminated for the phone calls made by his wife to Upton, Carter and Mendez, as well as the statement relating to "suing Benisch's ass" made in the presence of Simons.

However, in light of the less severe treatment of white employees regarding discipline and termination, I find that the Complainant has sufficiently carried his burden to establish that even the Respondent's seemingly credible articulated reasons for his termination were not legitimate but were pretextual of race discrimination in regard to discharge.

Signed and dated this 12th of February, 1982.

Allen T. Lawent
Hearing Examiner

FOOTNOTES

1. The Respondent creates a lot of hoopla about the difference between an "advance" and a "paycheck". I now have no doubt that an "advance" is something that is different from a "paycheck" at the CAC. However, the issue is whether or not an employee who turned a late timesheet was authorized to be paid on or very shortly after the scheduled payday for the period covered by the timesheet. Whether the form of the payment is an "advance" or a "paycheck" is irrelevant the issue is whether or not the "advances" or "paychecks" authorized after late timesheets had been turned in were authorized on a non discriminatory basis.

   The evidence supports the finding that the Respondent was not motivated by race in the granting or refusing to grant a paycheck or an advance after a late timesheet had been turned in.

2. See also Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24,18 EPD par 8673.

3. See also Furnco v. Waters, 438 U.S. 567,577, 17 EPD par 8401.

4. See also Board of Trustees (cited in Footnote 2).

5. Not only was job performance not a factor in the Complainant's termination, but I find as curious and suspect the Respondent's testimony in this regard. Morgan, during those "heating seasons" that he worked, estimated that 200 calls (out of approximately 7200 total calls) resulted in authorization of emergency fuel assistance.

   While only producing six instances of applicants who had been certified and later found to be ineligible, Vercauteren testified that there were "many, many" more instances of Morgan's having certified ineligible applicants. Morgan claimed there were only six to ten such instances.

   I reject Vercauteren's testimony, however, as I find unbelievable the proposition that Morgan was terminated because of his wife's calls while major job performance problems (certifying ineligible clients) went undisciplined. Morgan's testimony is far more credible in this regard, and I find his job performance in dealing with emergency fuel assistance to be generally outstanding and self sacrificing.

6. See "Personnel Policies" (Complainant's Exhibit 24) - VII. h. which cites "Falsification of forms or expense vouchers" as a grounds for disciplinary action and/or termination.

7. See McKuen v. Home Insurance, 24 EPD par 31,442.

8. See McCorstin v. U.S. Steel Corp., 23 EPD 31,112.

9. See Flowers v. Crouch Walker, 552 F.2d. 1277, 14 EPD 7510.

10. The Respondent argues that Morgan's wife was carrying out his intentions in making the phone calls. I find that the calls made to Upton and Carter were made by Morgan's wife on her own and without Morgan's influence. However, even if all the calls had been made by Morgan or with Morgan's influence, the discharge would still have been discriminatory because of the disparate discipline (or lack of it) imposed on whites for more serious or comparable offenses. In fact, I have written my decision as if Morgan were responsible for the calls.

11. While I have found that at least four conversations between Benisch and Morgan occurred on May 30, 1980, it is unclear after which conversation Morgan's wife's calls to Upton and Carter were made. Clearly, they were made after the first conversation and prior to the fourth. The call to Mendez, made on Sunday, June 1st, was of course made after the fourth conversation on Friday.