EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Ricardo De Leon 6804 Schroeder Rd. Madison, WI 53711-6170 Complainant vs. Woodman's Food Market - West c/o Willard P. Woodman Woodman's Janesville 2919 N. Lexington Dr. Janesville, WI 53545 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 22080

On April 18 and 19, 1996, a public hearing was held in the above captioned matter before Commission Hearing Examiner Clifford E. Blackwell, III, in Room LL 120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard Madison, Wisconsin 53710. The Complainant, Ricardo De Leon, appeared in person and by his attorney, Teresa Elguezabal of the law firm of La Follette & Sinykin. The Respondent, Woodman's Food Market, Inc., appeared by the Manager of its Madison West store, Dale Martinson and by its attorney, Bonnie Wendorff of the law firm of Boardman, Suhr, Curry and Field. Based upon the record in these proceedings, the evidence presented at hearing and the arguments of the parties, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant is a Black, Hispanic male from the Dominican Republic.
2. The Respondent is a Wisconsin corporation with six stores in the State of Wisconsin. Two of these stores are located within the City of Madison. The store in question in this complaint is located at 711 S. Gammon Road and is identified as Woodman's West.
3. The Respondent employs approximately 2,000 people within the State of Wisconsin approximately 300 of whom work at the store in question here, Madison West.
4. The Complainant began working at the Respondent's Madison West store in 1989. This was shortly after the Complainant first came to the United States. When the Complainant first began working for the Respondent his English language skills were poor. The Complainant took classes in English for the next three or four years and gained a considerable measure of proficiency with the English language.
5. At all times relevant herein, the Complainant and the Respondent and its employees apparently had no particular problem communicating. At the time of hearing, the Complainant spoke with a strong but understandable Hispanic accent.
6. The Complainant began his employment as a Utility Clerk performing the duties of a Bagger. After approximately three (3) years, the Complainant was promoted to the position of Checker.

This promotion apparently followed a grievance filed on the Complainant's behalf by his Union, the United Food and Commercial Workers.

7. The Respondent maintains its employment records at its corporate offices in Janesville, Wisconsin. Forms that are generated at the local store such as time cards or records of employee absences are sent to the corporate offices for processing and maintenance. Records that are generated in the corporate offices for use in the local stores such as work schedules are posted in the local stores and are then returned to the corporate office after a period of time for processing and maintenance. The local stores do not maintain files of duplicate records.
8. Policies concerning attendance and discipline are generated in the corporate offices. These policies are generally contained in the Employee Handbook. Additional rules or notices are posted on a bulletin board located near the time clock at Woodman's West.
9. Work schedules are prepared in the corporate office and are sent to the local store on Thursdays. The schedule is posted on Thursday evening and covers the period beginning on the following Sunday through the next Saturday. Work schedules are taken down on Saturday. The work schedules, once taken down, are returned to the Janesville office.
10. Employees may trade work shifts with other employees so long as each employee is qualified to work the other's job. When trading such assignments, both employees must sign a form. This form must be filed with the employee's supervisor prior to the start of the first work shift to be changed.
11. The Respondent maintains a log of employee's calls identified as 329. The calls on this list are to report an anticipated late arrival or an inability to come to work because of illness or for some other reason. Employees are supposed to call in before the scheduled start of their shift.
12. Where absence is due to illness, a doctor's excuse is not necessarily required until an employee has been absent for at least two days. Failure to call in or to provide a doctor's statement when required may subject an employee to discipline.
13. Discipline may be initiated by either the corporate office in Janesville or supervisors at the local store. Discipline initiated by the corporate office is most likely to be for violations of the Respondent's attendance policy. Discipline initiated by a local supervisor is most likely to relate to some form of conduct or performance problem though may relate to attendance.
14. The Respondent utilizes a system of progressive discipline. At the low end lies verbal warnings. At the high end lies termination. In between these extremes lie written warnings (policy reminders), one day layoffs, three day layoffs and demotion. Each step may be repeated or skipped depending upon the circumstances surrounding a particular violation of policy. Under some circumstances, past instances of discipline may be considered favorably or unfavorably when issuing new discipline.
15. Discipline is memorialized in a document called a "Management Employee Meeting Record (MEMR). The MEMR form is identified within the Respondent as #475. MEMRs are also known as a grievance. In this context the term grievance is to be distinguished from the type of grievance filed on behalf of an employee by a union.
16. A MEMR describes the incident or violation for which it was issued. There is also a notation of the discipline to be applied as well as the next level of applicable discipline should there be another violation. Accompanying a MEMR is a sheet containing the employee's work record including attendance and discipline so that a local manager will have this information available when disciplining an employee.
17. The local manager has a significant amount of discretion concerning discipline of employees at his store. Where the incident requiring discipline occurs at a store, the local manager or supervisor may determine the level of discipline to be imposed without necessarily seeking approval from the office in Janesville. Where the discipline is issued from the corporate office, the local manager may treat the discipline specified in the MEMR as advisory. The local

manager may impose the recommended discipline or may impose a higher or lower level of discipline depending upon his or her knowledge of the local circumstances and the employee. From time to time, the local manager may consult with Willard P. Woodman, the Respondent's president, about discipline. Where discipline is issued, the ultimate goal is to preserve the employment, if possible, of an otherwise good employee.

18. On February 12, 1994, the Complainant called prior to his scheduled shift to report that he was ill and would not be in to work that day. On the #329 form, memorializing the Complainant's call, there is a notation that the Complainant was going to the doctor. The Complainant was not scheduled to work on either of the next two days.
19. On February 15, 1994, the Complainant reported for work but still felt ill. He was excused from work by his supervisor, Mike Malafa.
20. The Complainant called in sick the next day that he was scheduled to work, February 17, 1994. There is no indication that the Complainant anticipated seeking medical attention on that date.
21. On February 18, 1994, the Complainant was scheduled to work a 3:00 p.m. to midnight shift. He arranged with another employee to cover this shift for him.
22. On February 19, 1994, the Complainant was scheduled to work a 10:00 a.m. to 7:00 p.m. shift as a Checker. As permitted by the Respondent, the Complainant switched shifts with another employee and instead worked a Parcels and Carts shift that day from 8:00 a.m. to 1:00 p.m.
23. The Complainant next worked on February 21, 1994 from 1:00 p.m. to 10:00 p.m. The Complainant also worked on February 22, 1994.
24. The Complainant was next scheduled to work on February 24, 1994 beginning at 10:00 a.m. The Complainant was excused from work on February 24, 1994 by Dale Martinson, the store manager, at approximately 10:15 a.m. but was told to return by 5:00 p.m. with a doctor's excuse. The Complainant next came to work on February 25, 1994.
25. On February 25, 1994, the Complainant began to perform his duties as a Checker but was told that he could not check and was directed to bag groceries instead. The Complainant left work at approximately 2:00 p.m. with the permission of the Respondent because business was very slow due to a snow storm.
26. Prior to February 12, 1994, the Complainant had experienced substantial attendance problems. From July 1, 1993 to the end of the year, the Complainant received six (6) MEMRs related to attendance problems. The Complainant received other MEMRs during the same period for other than attendance related problems, however, the number and nature of these MEMRs are not in this record.
27. In accordance with the Respondent's progressive discipline policy, the MEMRs issued the Complainant for attendance reasons increased the level of discipline with succeeding MEMRs. The last MEMRs issued in October and December of 1993 recommended that the next violation result in the Complainant's termination. Martinson, rather than accepting the corporate office's recommendation of termination, combined separate MEMRs into one violation and issued one 3 Day Layoff for all of the incidents.
28. Subsequent to the Complainant's absence from work on February 12, 1994, the Respondent's corporate office prepared a MEMR relating to the February 12, 1994 absence proposing to terminate the Complainant's employment. Martinson, believing because of the notation on the #329 form about going to the doctor, that the Complainant would supply a doctor's excuse held the MEMR pending production of the anticipated doctor's excuse.
29. Martinson issued the MEMR on February 24, 1994. Instead of terminating the Complainant's employment, Martinson demoted the Complainant to Utility Clerk. Martinson believed that the Complainant could improve his attendance record and preserve his employment. As was Martinson's practice, he forwarded a copy of the amended MEMR to the Complainant's union to alert it to the Respondent's action.

30. On several occasions between February 15 and February 24, Martinson asked the Complainant for the anticipated medical statement. Martinson indicated to the Complainant on these occasions that Martinson needed this document to prevent the Complainant's termination or other discipline. Though it is not clear how the Complainant responded to Martinson's inquiries, it is clear that he did not tell Martinson until at least February 24 that he had not gone to the doctor on February 12 and would not be able to present a doctor's excuse.
31. On February 24, 1994, the Complainant began work at approximately 10:00 a.m. At approximately 10:15 a.m., Martinson spoke to the Complainant about the medical excuse that Martinson believed the Complainant was going to present. The Complainant told Martinson that he did not have the statement. Martinson took the Complainant's time card and clocked the Complainant out. Martinson told the Complainant to return with the doctor's excuse by 5:00 p.m. because Martinson was scheduled to leave for the day at that time.
32. Though the Complainant knew he probably could not get a doctor on February 24 to provide him with an excuse for February 12, the Complainant called or visited several clinics in an attempt to obtain such an excuse. The Complainant visited a clinic near his work place and received a statement indicating that he indicated that he had been ill on February 12 but not providing any verification of the Complainant's condition on February 12. This statement was written on a form of the Respondent. The 468 form is used to document conditions that may need accommodation by the Respondent and is not customarily used to document an employee illness.
33. The Complainant did not return to work as he was expected to. At approximately 4:45 p.m., Martinson called the Complainant at the Complainant's home. He told the Complainant that he was to be demoted to Utility Clerk when he appeared at work the next day.
34. On February 25, 1994, the Complainant reported for work at approximately 10:00 a.m. When he began his Checker duties, Martinson directed him to bag groceries instead because of the demotion to Utility Clerk. The Complainant told Martinson that if he was going to be demoted, Martinson should go ahead and terminate him. The Complainant bagged groceries until lunchtime. The Respondent decided that employees who wished to leave early could do so because of a lack of business due to a snow storm. The Complainant obtained permission from a supervisor and left early.
35. Martinson believed that the Complainant had left work on February 25 without permission. Martinson concluded that the Complainant had quit because of the demotion. Martinson noted the Complainant's termination on the work schedule. On February 26, the Complainant came to work to get his work schedule for the next week. He was surprised to see the notation about his termination. The Complainant clarified that he had received permission to leave early and after a meeting between the union and the Respondent, the termination was rescinded. However, the Complainant was unwilling to accept his demotion to Utility Clerk and did not return to work.
36. Eric Zolot, a White employee, had significant attendance problems over the course of his employment including absences for illness. Zolot's personnel file contains numerous doctor's excuses relating to some of his absences. Zolot's employment was terminated in 1995 for fraud connected with the acceptance of coupons. Zolot was not terminated for attendance-related problems though he received discipline for such problems.
37. At his deposition, Willard P. Woodman, president of the Respondent, indicated that on his first meeting with the Complainant in 1989, Woodman believed that the Complainant was pretending not to understand Woodman when Woodman spoke to the Complainant. The incident recounted by Woodman occurred shortly after the Complainant began work for the Respondent and while the Complainant's English language skills were poor.
38. At the same deposition, Woodman answered a question about the last names of two Hispanic employees, "No comprendo." Additional questions revealed that Woodman intended to indicate

that he did not know the last names of the employees in question not that he had not understood the question.

39. Store Managers such as Martinson would often consult with Woodman about discipline or other problems involving employees. Martinson kept Woodman informed about developments relating to the Complainant's attendance problems.
40. The Respondent did not refuse to answer questions of the Commission's Investigator/Conciliator because the Investigator/Conciliator is Hispanic.
41. The Respondent demoted the Complainant because it believed that the Complainant had abused the Respondent's leave policy. The Complainant's race and national origin were not factors in the Respondent's decision to demote the Complainant.

RECOMMENDED CONCLUSIONS OF LAW

42. The Complainant is a member of the protected group "race" and is entitled to the protections of the ordinance.
43. The Complainant is a member of the protected group "national origin" and is entitled to the protection of the ordinance.
44. The Respondent is an employer within the meaning of the ordinance and is subject to the requirements of the ordinance.
45. The Respondent did not discriminate against the Complainant on the basis of his race when it required him to produce a doctor's excuse for the Complainant's absence on February 12, 1994.
46. The Respondent did not discriminate against the Complainant on the basis of his race when it demoted him to the position of Utility Clerk on February 24 or 25, 1994.
47. The Respondent did not discriminate against the Complainant on the basis of his national origin when it required him to produce a doctor's excuse for the Complainant's absence on February 12, 1994.
48. The Respondent did not discriminate against the Complainant on the basis of his national origin when it demoted him to the position of Utility Clerk on February 24 or 25, 1994.
49. The Hearing Examiner is without jurisdiction to hear the Complainant's claim of discrimination resulting from the termination of the Complainant's employment.

RECOMMENDED ORDER

50. The complaint is dismissed with prejudice. The parties shall bear their own costs and fees.

MEMORANDUM DECISION

This complaint demonstrates the problems created for an employer when it adopts a policy and then fails to closely adhere to it. At question here is the Respondent's attendance and disciplinary policies. Issues similar to those raised in this complaint were addressed in another complaint brought before the Commission. Maas v. Woodman's Food Markets, Inc., MEOC Case No. 21742 (Ex. Dec. 08/04/94).

The Complainant, a Black, Hispanic from the Dominican Republic, began his employment with the Respondent in 1989 shortly after coming to the United States. When applying for employment with the Respondent, the Complainant was aided by someone from Centro Hispano, a local advocacy and service group working with Hispanics in the Madison area. During the early stages of his employment, the Complainant's English language skills were not very good. He took classes at the Madison Area Technical College to improve his fluency and the Respondent accommodated his needs by not scheduling the Complainant to work during his class time.

The Complainant began his employment as a Utility Clerk. Virtually all employees of the Respondent begin as Utility Clerks. Utility Clerks may perform a variety of duties including bagging groceries, clearing the aisles of empty boxes or distressed items or taking carts in and groceries out from the store. The Complainant was designated to be a Bagger. After 2 to 3 years, the Complainant was promoted to the position of Checker. Checkers are the next likely employment step for Baggers. This promotion carried an increase in wage.

The record is essentially silent on the Complainant's work performance until the second half of 1993. From approximately July 1, 1993 through the end of that year, the Complainant received 6 Management Employee Meeting Records (MEMR) or grievances for attendance related problems. The Complainant received other MEMRs for problems not related to attendance, but the specifics of those MEMRs are not part of this record. A MEMR is the document used by the Respondent to memorialize employee violations of work rules or policy. A MEMR contains a brief statement of the circumstances surrounding the violation, a suggested penalty or discipline for the infraction and a recommended penalty or discipline for the next violation. The MEMR is accompanied by a copy of the employee's work or attendance record for the past year.

Among the MEMRs received by the Complainant in the latter half of 1993 were ones in October and December. Each of these MEMRs called for the imposition of a 3 Day Layoff. Each MEMR indicated that another violation should lead to the Complainant's discharge. In the case of the December MEMR, if the Respondent had stringently followed its discipline policy, the Complainant would have been terminated. Instead of terminating the Complainant, Dale Martinson, the Store Manager, combined the penalties for the then outstanding MEMRs into a single 3 Day Layoff. Martinson apparently believed that the Complainant could learn from the discipline and amend his ways.

The Respondent utilizes a system of progressive discipline. The progression of discipline runs from a verbal warning at the low end to termination at the end of the ladder. Between these extremes are written warning also known as a policy reminder, 1 Day Layoff (1 DLO), 3 Day Layoff (3 DLO) and demotion. Discipline is embodied in a MEMR. A Store Manager may elect to impose the discipline indicated in a MEMR or increase or decrease it depending upon his knowledge of the circumstances surrounding a violation. In exercising his or her discretion, a Store Manager may consult with Willard P. Woodman, the president of the Respondent. The ultimate goal of the Respondent's discipline policy is to preserve the employment of an otherwise good employee.

Most MEMRs are generated by the Respondent's corporate office in Janesville. These are generally for attendance related problems. A local Store Manager may issue MEMRs relating to a problem at his or her store such as fighting or fraud. MEMRs issued by the corporate office for attendance related problems are generated from attendance forms that are collected at each store and are transferred to the corporate office on a regular basis. The local stores do not maintain records for more than a short time. All employment records are ultimately maintained in the corporate office.

After the MEMRs of October and December, 1993, the Complainant's next attendance problem occurred on February 12, 1994. That day, the Complainant was scheduled to work a shift from 10:00 a.m. to 6:00 p.m. At approximately 7:30 a.m., the Complainant called the store to report that he was ill and would not be in to work. This call was taken by a Front End Supervisor named Frank Popp. Popp memorialized this conversation on a form #329. This form is used by the Respondent to keep track of employee's calls about attendance problems. Popp noted on the #329 form that the Complainant had called and reported having trouble sleeping, that something was wrong and that he was going to see a doctor. Shortly before the Complainant called, Popp had taken a call from another employee, Antonette Krumbien. Ms. Krumbien had been ill for several days.

It is this absence on February 12, 1994, which triggered the circumstances that brought about this complaint. The Complainant alleges that his demotion to Utility Clerk on February 24, 1994, was caused at least in part because of his race or national origin. The Respondent asserts that the Complainant was demoted because of his abuse of the Respondent's sick leave policy on February 12, 1994.

Subsequent to February 12, 1994, the Complainant was not scheduled to work on either February 13 or February 14. The Complainant reported to work as scheduled on February 15, 1994. After having been at work for a short time, the Complainant reported to his supervisor, Mike Malafa, that he was not feeling well and was feverish. Malafa excused the Complainant from working the rest of his shift. The Complainant was not scheduled to work on February 16 and called in sick on his next scheduled day, February 17, 1994.

On February 14, 1994, the corporate office prepared and sent to Martinson a MEMR for the Complainant's absence of February 12, 1994. This MEMR called for the Complainant's termination consistent with the indication of discipline for the next violation stated in the October and December 1993 MEMRs. When Martinson received the February 14 MEMR, he wrote "paperwork?" on it and held it pending production of a doctor's excuse by the Complainant as per the notation on the #329 form completed by Popp on February 12. During the short period of time that the Complainant was at work on February 15, Martinson spoke with the Complainant to ask for the doctor's excuse. Martinson was told that the Complainant did not have it. It is not clear from this record whether the Complainant told Martinson that the Complainant had left the excuse at home or not. The Complainant disputes this version of the facts. There is no dispute that the Complainant's absences for part of the day on February 15 and all of the day on February 17 were excused by the Respondent.

On February 18, 1994, the Complainant was scheduled to work a 3:00 p.m. to midnight shift. He arranged with another employee to cover this shift for him. On February 19, 1994, the Complainant was scheduled to work a 10:00 a.m. to 7:00 p.m. shift as a Checker. As permitted by the Respondent, the Complainant switched shifts with another employee and instead worked a Parcels and Carts shift that day from 8:00 a.m. to 1:00 p.m. The Complainant next worked on February 21, 1994 from 1:00 p.m. to 10:00 p.m. The Complainant also worked on February 22, 1994. The Respondent asserts that Martinson asked the Complainant on each of the days on which he (the Complainant) worked, if the Complainant had his doctor's excuse for the February 12 absence. Martinson stated that on each occasion, the Complainant told him that he had left the excuse at home. The Complainant testified that the first date on which Martinson asked him for a doctor's excuse was February 22. The Complainant testified that he told Martinson that he (the Complainant) did not have a doctor's excuse. Apparently Martinson told the Complainant that he (Martinson) needed the excuse in order to prevent the Complainant's termination.

The problem for the parties at this stage in the facts is that the Complainant had not gone to the doctor on February 12 and therefore had no doctor's excuse. The Complainant testified that on February 12, he only had cold or flu symptoms and did not need to see a doctor.

On February 22, 1994, Martinson told the Complainant to bring his doctor's excuse on February 24, 1994. Neither the Complainant nor Martinson were scheduled to work on February 23, 1994. On February 24, 1994, the Complainant punched in for a shift beginning at 10:00 a.m. About 15 minutes later, Martinson located the Complainant and asked the Complainant for his doctor's excuse. When the Complainant told Martinson that he did not have an excuse, Martinson took the Complainant's time card and punched the Complainant out. Martinson told the Complainant to get the doctor's

excuse and to report back to Martinson by 5:00 p.m. when Martinson was scheduled to leave for the day. Martinson also told the Complainant not to return without the excuse.

The Complainant called several doctor's offices and clinics in an admittedly futile attempt to obtain a doctor's excuse for a day on which he was not seen by a doctor. The Complainant learned that a Physicians Plus clinic on Mineral Point Road close to work would see him on a walk-in basis. The attending physician, in addition to noting that the Complainant had recently been drinking alcohol, provided information about treating current cold or flu symptoms. The doctor completed a work capacity form given him by the Complainant. The form made no reference to the Complainant's condition on February 12, 1994.

The Complainant did not return to work on February 24, 1994. Martinson called the Complainant at home at approximately 4:45 p.m. and told the Complainant that Martinson was demoting him. On February 25, 1994, the Complainant came to work at 10:00 a.m. and gave the statement that he obtained the previous day to Greg Holmes, a Front End Supervisor. Shortly thereafter, Martinson found the Complainant and ordered him off of his checking duties pursuant to Martinson's demotion of the Complainant the previous day. The Complainant reluctantly agreed to bag groceries but indicated that if Martinson were going to demote him, Martinson should just terminate him.

Business was slow on February 25, 1994 because of a snow storm. The Respondent allowed employees to leave early to reduce the work force. The Complainant obtained permission from a supervisor to leave early and did so at approximately 2:00 p.m. Martinson did not know that the Complainant had received permission to leave early and mistakenly believed that the Complainant had walked off the job because of his demotion. Martinson or another employee of the Respondent noted on the work schedule by the Complainant's name "term".

On February 26, 1994, the Complainant came to the store to check the work schedule for the next week. Work schedules are posted on Thursdays to begin on Sunday. Work schedules are taken down on Saturday after the last shift. The Complainant had been unable to check his work schedule on Thursday or Friday because of the unusual events outlined above.

The Complainant was surprised to see the notation indicating that he had been terminated on the current schedule. He left work and called the union to see if anything could be done. The union arranged for a meeting with Martinson and other representatives of the Respondent on February 28, 1994. The misunderstanding about February 25, 1994 was straightened out. However, the Complainant again insisted that he would not agree to the demotion. The Complainant did not return to work after that date.

The Commission utilizes the burden shifting approach commonly known as the McDonnell Douglas/Burdine paradigm. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). This approach has been further refined by St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). While this process is appropriate for analyzing this complaint, it is also acceptable as here where the Respondent fully contests the issue of liability, to simply address the ultimate question of discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

Under either approach, the first stage is to determine whether the Complainant has made out a prima facie case. In general, the Complainant must establish that he is a member of a protected group, that he was meeting the employer's legitimate performance expectations, that he suffered some adverse

employment action and that there is reason to believe that the Complainant's membership in the protected group played at least some part in his adverse action.

There is no actual dispute that the Complainant has established elements one and three of the prima facie case. He is a Black Hispanic from the Dominican Republic. His skin color and other physical features readily identify him as Black. Though the Respondent may object that it did not know that the Complainant was from the Dominican Republic, for purposes of this complaint that is irrelevant. The Complainant speaks with a noticeable Spanish accent. When he first applied for employment with the Respondent, he was assisted by a representative from Centro Hispano, an organization well known for its work in the Hispanic community. One may easily conclude that the Complainant was a member of a specifically identifiable cultural background or community, that of foreign-born Spanish speaking Hispanics. The Complainant has adequately demonstrated that he is a member of the protected groups "race" and "national origin/ancestry." There is no dispute that the Complainant's demotion represents an adverse employment. action. The position to which the Complainant was demoted, Utility Clerk, carries less authority and a lower hourly wage than the position from which the Complainant was demoted, Checker. The Complainant also asserts that he suffered an additional adverse action when he was required to obtain a doctor's excuse under circumstances where such an excuse was not customarily required. While the Complainant put significant effort into this separate allegation, the Hearing Examiner believes that it is more appropriately considered as a part of the demotion claim.

Both parties spent a significant amount of time in their final arguments discussing issues surrounding the Complainant's termination from employment. The original complaint filed in this matter stated claims relating to the Complainant's demotion and his termination. In the Initial Determination issued in this complaint on May 31, 1995, the Investigator/Conciliator concluded that there was no probable cause to believe that the Respondent discriminated against the Complainant on the bases of either his race or national origin/ancestry in his termination from employment. The Complainant did not appeal the Initial Determination's conclusion of no probable cause. This failure on the part of the Complainant prevents the Hearing Examiner from considering those issues as a separate claim and acts to limit any award for back pay. The Hearing Examiner will consider factual issues surrounding the Complainant's termination to the extent that they are relevant to the demotion claim.

The parties dispute whether the Complainant had been performing his job satisfactorily prior to his demotion. The Respondent asserts that an employee's attendance history makes up an important part of his or her overall performance. The Complainant points to the fact that he had remained employed with the Respondent for approximately five (5) years as evidence of his satisfactory performance. The Complainant also points to Martinson's testimony to the effect that the Complainant was a pretty good checker.

While the Hearing Examiner generally agrees with the Respondent's position that attendance is an important part of any employee's performance, the facts and circumstances of this complaint demonstrate that the Complainant was likely performing his job as a Checker satisfactorily. In addition to the factors pointed to by the Complainant, the Hearing Examiner looks to Martinson's actions in 1993. On at least two occasions, Martinson could have terminated the Complainant because of attendance related problems. Instead of termination, Martinson elected to preserve the Complainant's employment by issuing a 3 Day Layoff. Martinson must have believed that except for the attendance problems, the Complainant was at least an adequate employee and that the attendance problems were not so severe as to require the Complainant's termination. Similarly, Martinson stated that he chose to demote the Complainant in February of 1994 because he believed that the Complainant could improve his attendance. Had Martinson believed that the Complainant was truly

not performing his job satisfactorily, he would have issued the February 14, 1994 MEMR with the recommended penalty of termination rather than reducing the penalty to demotion. The Hearing Examiner believes that the Respondent, by failing to follow its own progressive discipline policy, has sufficiently muddied the waters about the adequacy of the Complainant's performance to warrant a finding that the Complainant's performance was adequate.

The remaining element of the Complainant's prima facie case is whether the adverse action suffered by the Complainant was motivated at least in part by the Complainant's membership in a protected group. This element is the crux of any discrimination case. If one's status as a member of a protected group is not a motivating factor then, no matter how badly one may have been treated, a case of discrimination cannot be proven.

The Complainant asserts several reasons as grounds for believing that either his race or national origin/ancestry played at least a part in the Respondent's decision to demote him. For purposes of his argument, the Complainant treats his membership in the two protected groups as essentially a single protected group. The Hearing Examiner will do so also.

First, the Complainant contends the Complainant was treated less favorably than other employees who were White. He points specifically to the case of Eric Zolot. Zolot, a White, had been employed by the Respondent from the late 1980s to 1995. Zolot was terminated in 1995 for engaging in coupon fraud. While Zolot was employed by the Complainant, he had significant attendance problems some of which were attributable to illness. Zolot was not demoted or terminated as a result of these attendance problems. The Complainant also asserts that Zolot was never required to obtain a medical excuse particularly after the fact. Second, the Complainant characterizes his treatment around the doctor's excuse and demotion as being unreasonably and unusually harsh in general as well as vis a vis Zolot. The Complainant points to the fact that the Respondent's sick leave policy does not require a medical excuse except after repeated absences or when abuse of the policy is suspected. The Complainant asserts that to require the Complainant to provide a medical excuse for a one day absence particularly when the validity of the absence is verified by circumstances once the employee returns fails to comply with the Respondent's own policies and procedures. Equally, the Complainant contends that the Complainant's demotion for not providing a medical excuse under circumstances where it was impossible to provide one is unreasonable.

Third, the Complainant asserts that the Respondent's president, Willard P. Woodman, has demonstrated an antipathy towards Hispanics. Woodman's negative feelings are asserted despite the fact that Woodman is married to an Hispanic. The Complainant points to two incidents during Woodman's deposition as being illustrative of Woodman's beliefs. The first incident surrounds a brief meeting between the Complainant and Woodman shortly after the Complainant began working for the Respondent. When Woodman observed the Complainant standing in front of the store, Woodman directed the Complainant to go do his job. When the Complainant did not respond to Woodman's order, Woodman assumed that the Complainant was ignoring him and pretending not to understand Woodman. It is Woodman's assumption that the Complainant was pretending not to understand so that he could take it easy that the Complainant argues supports his claim.

The other incident arising out of Woodman's deposition involves Woodman's answer to a question concerning the last name of two Hispanic employees. In response to a question asked by the Complainant's counsel in English, Woodman responded "No comprendo." It took several questions to determine that Woodman had intended to indicate that he did not know the employees last names rather than that he had not understood the question. Woodman's insensitivity and lack of seriousness in this instance is what the Complainant contends demonstrates Woodman's discriminatory attitude.

Finally, the Complainant points to Woodman's failure or refusal to respond to questions of the Commission's Investigator/Conciliator as demonstrating both a lack of respect for the Commission's Hispanic Investigator/Conciliator and Woodman's guilty knowledge with respect to the information requested of him.

The Hearing Examiner concludes that the evidence presented by the Complainant, individually and in combination, fails to demonstrate that the Complainant's race or national origin/ancestry played any role in his demotion. First, the testimony concerning Eric Zolot was vague and failed to draw any clear comparison between Zolot and the Complainant. Zolot did not testify and the records presented are incomplete. To the extent that the Complainant wishes to demonstrate that Zolot was treated more favorably than the Complainant with respect to the need to present a doctor's excuse when absent for illness, the record contains a number of doctor's excuses. It is not clear whether these excuses are the complete inventory and how they match up to Zolot's absences. It is not clear whether the excuses were produced independently by Zolot or in response to a request by the Respondent.

On the other hand, the record contains no doctor's statement produced by the Complainant. Oddly, the record does not even contain the statement obtained by the Complainant on February 24, 1994. While it is clear that Zolot had some attendance problems, they do not seem to be as great as those experienced by the Complainant, especially in the 6 to 8 months prior to his demotion. The Hearing Examiner does not find the comparison between Zolot and the Complainant to be significant or persuasive.

The Complainant's attempt to demonstrate that he was subjected to unreasonable and unusual treatment also falls short of the mark. As of the end of 1993, the Complainant had been extended great consideration by the Respondent due to Martinson's view that the Complainant was a good employee. If the Respondent had followed its own discipline policy to the letter, the Complainant would have been demoted or terminated in December of 1993. Instead, Martinson combined infractions and issued only one 3 DLO for the separate problems. Again with the February 12, 1994 absence, the corporate office recommended the Complainant's termination and Martinson, attempting to preserve the Complainant's employment, demoted him rather than terminating him. From this record, Martinson appears to have given the Complainant every opportunity to demonstrate that his absence on February 12, 1994, was legitimate. The Complainant failed to make this demonstration and now complains about the consequences.

In large part, the Complainant's contention of unreasonable and unusual treatment rests on his testimony that he did not tell Popp on February 12, 1994, that he was going to see a doctor. The Complainant asserts that Martinson's later requirement that he obtain a doctor's excuse after the fact when it would be impossible for the Complainant to obtain such a statement demonstrates the extra and unreasonable burden that was being placed upon the Complainant. The Complainant argues that because of his obvious illness on February 15 and February 17, 1994, Martinson should have realized that the Complainant's February 12 absence was legitimate.

The Hearing Examiner finds no compelling reason to doubt Popp's note of his conversation with the Complainant on February 12, 1994. While the Complainant offers a theory that Popp mistakenly carried into the Complainant's note information from Ms. Krumbien's earlier call, this remains mere speculation. Had the Complainant wished to present this hypothesis in more substantial form, he could have called Popp to admit that possibility. Instead, the Complainant asserts that the Respondent had an obligation to call Popp to remove the possibility and that the Hearing Examiner should draw an inference that Popp's testimony would be unfavorable to the Respondent because of his absence. The Hearing Examiner declines the request to draw such an inference. It seems to the Hearing

Examiner that the same logic utilized by the Complainant for seeking the inference applies equally to the Complainant. The Complainant could have benefited from Popp's testimony had he testified that he could have made a mistake in recording Krumbien's and the Complainant's information on February 12, 1994. The Complainant's failure to call Popp could lead to the inference that Popp would have testified that he would not have corroborated the Complainant's position. Given the competing inferences that can be drawn by Popp's absence at hearing, the Hearing Examiner is unwilling to draw either. The Hearing Examiner is left with the written note indicating that the Complainant would be seeking a doctor's help.

The Complainant continues his assertion of unreasonable treatment by denying that Martinson asked him about his doctor's excuse before February 22, 1994. Martinson testified that he had asked the Complainant for the doctor's excuse on several days prior to February 22, 1994.

The Hearing Examiner finds that Martinson likely did ask the Complainant for an excuse prior to February 22, 1994. The Hearing Examiner rests this finding on the note appearing on the February 14, 1994 MEMR, "paperwork." The Hearing Examiner concludes that this is a reference to the doctor's excuse that Martinson expected to receive based upon Popp's note of February 12, 1994. Martinson would have been aware of Popp's note as Store Manager. Since Martinson did not wish to terminate the Complainant's employment, it is more likely than not he would seek out the Complainant to obtain the anticipated documentation. These attempts are noted on Ex. D.

While the Complainant is generally sincere in his beliefs, the Hearing Examiner finds that Martinson's testimony on this point is more credible. Martinson's testimony is somewhat corroborated by documentary evidence and fits more with the Hearing Examiner's experience of the world. It seems unlikely, given the MEMR calling for the Complainant's termination, that Martinson would wait for almost 10 days before seeking the Complainant's doctor's statement.

On this record it is not possible for the Hearing Examiner to determine what the Complainant told Martinson when Martinson requested the doctor's statement. Martinson testified that the Complainant repeatedly told him that he had left the statement at home. The Hearing Examiner would like to believe that there was a misunderstanding between the Complainant and Martinson, i.e. that the Complainant told Martinson that he did not have the statement and Martinson assumed that this meant the Complainant had forgotten to bring it. There is no support in the record for this postulation of the Hearing Examiner. Given the fact that the Complainant was only actually at work on two days between February 12 and February 22, it is not unbelievable that Martinson would accept a statement from the Complainant that he had forgotten the excuse.

Given the fact that Martinson expected a doctor's excuse to be available based upon Popp's February 12, 1994 note, the Hearing Examiner finds nothing in this record to indicate that the Complainant was treated unreasonably or unusually. Martinson reasonably attempted to verify the information that he had. When it appeared that the Complainant was unwilling to verify the information or that the original information given by the Complainant was false, Martinson rather than washing his hands of the Complainant demoted him instead of terminating his employment. The Hearing Examiner believes that the Respondent was interested in maintaining the Complainant as an employee and did not treat him unreasonably or harshly. Even if the Hearing Examiner is wrong with respect to this conclusion, the record is devoid of evidence linking this treatment to either the Complainant's race or national origin/ancestry.

The record does indicate that Willard Woodman, the Respondent's president, holds some unfavorable and possibly discriminatory attitudes towards Hispanics. The deposition testimony highlighted by the

Complainant paints a disturbing picture of an employer who assumes Hispanics use a language difference to pretend that they do not understand work directions willfully in an attempt to avoid work. Woodman's mocking answer, "No comprendo" to a question about two employee's last names is further evidence of Woodman's disdain for Hispanics. It is difficult to reconcile these obvious indications of an insensitive and arrogant nature with the fact that Woodman is married to a Hispanic woman. The Hearing Examiner accepts that it is entirely possible for a person who has a member of a protected group as a member of his or her family to hold discriminatory attitudes towards other members of the same protected group under different circumstances.

The problem is demonstrating that Woodman and his views were involved in Martinson's decision to demote the Complainant. It is admitted that Martinson had consulted with Woodman about the Complainant's employment problems, both attendance and other, from time to time. However, there was no testimony indicating that Martinson had spoken with Woodman about the decision to demote the Complainant. Under the circumstances, it seems unlikely to the Hearing Examiner that Martinson would have consulted with Woodman on February 24, 1994.

On February 22, 1994, Martinson told the Complainant that he needed the Complainant's doctor's statement in order not to demote or terminate him. Martinson directed the Complainant to bring the statement on February 24, the next day on which Martinson and the Complainant both worked. The Complainant did not tell Martinson that he did not have a doctor's statement because he had not gone to the doctor. If the Complainant had clearly stated that particularly at an earlier date, much of the trouble caused by these facts would have been eliminated. When the Complainant came to work on February 24 without a doctor's statement, Martinson punched the Complainant out on the time clock and told him to go get his statement and return by 5:00 p.m. That hour was important because that is when Martinson left for the day. It was clear that the Complainant was not to return without a doctor's statement for February 12. The details of the Complainant's efforts that day are reported above. What is important is that the Complainant did not return and Martinson had to call the Complainant at home at approximately 4:45 p.m. to see what had happened. It was at this time that Martinson demoted the Complainant.

It is possible that Martinson had consulted with Woodman during the day on February 24 but there is nothing in the record to indicate that actually happened. More likely, Martinson found himself at the end of his patience with the Complainant and acted on his own. Again, the Hearing Examiner wishes to stress that Martinson took a more moderate route than that proposed by the corporate office. It does not appear to the Hearing Examiner that Woodman's attitudes as exemplified by his deposition testimony were reflected in Martinson's decision to demote. Prior to the issuance of the Initial Determination in this matter, the Commission's Investigator/Conciliator, Juan Alvarez, a Hispanic, sent the Respondent a list of questions to answer and documents to provide. Woodman refused to submit the requested material. On this record, it cannot be found that the Respondent refused to submit the material because of any lack of respect for the Commission's Investigator/Conciliator stemming from the fact that he is Hispanic. Alvarez's questions were issued at the end of a lengthy investigation that had been delayed for a variety of reasons. Most notably, Alvarez's request came after he had given the parties one last opportunity to provide any material that they wished him to consider.

Given these circumstances, it is not unreasonable to believe that the Respondent's refusal to cooperate with the Commission's investigation was based upon the Respondent's frustration with the investigation. Nothing in the ordinance compels a Respondent to cooperate and in general it is difficult to draw any meaningful conclusion from a Respondent's refusal. It may stem from a mistaken belief that the Commission's process is unfair or from the belief that a Respondent is better off not

participating in the investigation because of the lack of control the Respondent has over the use to which the materials it produces will be put.

The Hearing Examiner cannot find on this record that the Respondent refused to cooperate with Alvarez because he is Hispanic. There are legitimate reasons for a Respondent to decide not to cooperate and there is insufficient evidence for the Hearing Examiner to determine whether the Respondent's decision in this case was more likely motivated by a discriminatory motive or a legitimate one. It should be pointed out that the Respondent had responded to earlier requests for information without particular objection.

The Hearing Examiner concludes that the Complainant has failed to demonstrate a prima facie case of discrimination and the complaint should be dismissed. Specifically, the Complainant has failed to demonstrate that his race or national origin/ancestry played a role in Martinson's decision to demote him. However, assuming that the Hearing Examiner is wrong in his conclusion, the Respondent has presented a legitimate, nondiscriminatory explanation for Martinson's action.

The Respondent contends that the Complainant had simply reached the end of the disciplinary ladder and had been unable to assist with any of Martinson's attempts to help the Complainant avoid the consequences of the Complainant's attendance and other problems. The Complainant points out that the Respondent hired the Complainant and accommodated his need for special scheduling consideration. The Respondent argues that this is a strong indication of the Respondent's lack of discriminatory animus. Had the Respondent intended to discriminate against the Complainant, it either would not have hired him in the first place, not accommodated his school schedule, would not have retained him as an employee for approximately 5 years and would have terminated him when he had significant attendance problems rather than demoting him.

The Hearing Examiner finds that the Respondent has presented a legitimate, nondiscriminatory reason for its action. The Respondent has a legitimate right to seek the consistent attendance of its employees. Without a stable work force, it is difficult for an employer to know how many persons it needs to accomplish the work of the day. Where an employer has reason to believe that an employee is abusing its policies, the employer has a legitimate right to attempt to enforce those policies so long as it is done in a manner that does not violate the ordinance.

Continuing with the assumption that the Complainant has actually presented a prima facie case, the Complainant must also rebut the Respondent's offer of a legitimate, nondiscriminatory reason for its actions. The Complainant may do this by either demonstrating that the Respondent's evidence is not credible or that the proffered reason is a pretext for an otherwise discriminatory motive. Burdine, supra; Saint Mary's Honor Center, supra. The Hearing Examiner has previously discussed many of the Complainant's arguments regarding credibility and pretext. There are two arguments that the Hearing Examiner will separately address at this time.

The Complainant contends that the Respondent's discrimination against him is demonstrated in part by his treatment throughout his employment. Specifically, the Complainant contends that he was discriminatorily kept in the position of a Bagger for a longer than usual length of time and that he was promoted to the position of Checker only once he filed a grievance. The record on this point is too speculative for the Hearing Examiner to reach the conclusion urged by the Complainant. None of the documents relating to the grievance were offered at the time of trial. Similarly, the Complainant did not offer any testimony about Checker positions for which he may have applied and been rejected or offer any documentary evidence. The Complainant's testimony to the effect that he was kept a Bagger longer than usual lacks any foundation concerning the usual length of time to move from the Bagger

position or what it takes to become a Checker and whether the Complainant possessed those qualifications or not. The Hearing Examiner cannot credit this testimony with any weight.

A second argument advanced by the Complainant to challenge Martinson's credibility relates to Martinson's belief that the Complainant had walked off the job on February 25, 1994. The Complainant argues that this incident is a reflection of Martinson's prejudicial attitude towards the Complainant. Under the circumstances of this complaint, the Hearing Examiner does not agree with the Complainant's conclusion. When Martinson reassigned the Complainant to grocery bagging duties on the morning of February 25, 1994, the Complainant told Martinson that if Martinson was going to demote him, he might as well terminate him. Martinson might well believe that the Complainant had decided to quit rather than accept the demotion. Also, Martinson could have believed that the Complainant had quit given the Complainant's apparent refusal to return to work on February 24, 1994, when he had been directed by Martinson to return with his doctor's excuse by 5:00 p.m. The Hearing Examiner cannot conclude that Martinson's belief that the Complainant had walked off the job on February 25, 1994, demonstrates any particular animus towards the Complainant.

As noted in the Maas case, the Respondent's departure from its own discipline policy creates confusion and misunderstanding. If an employee is repeatedly sheltered from the consequences of his or her own infractions of policy, there is little question that the employee will be upset when the Respondent eventually says that enough is enough. The employee who has repeated the same discipline and not moved smoothly up the disciplinary ladder can with reason be heard to ask, "Why is this time different from the other times?" In the employee's attempt to find the reason for why the rope snapped this time, discrimination is an understandable avenue for the employee to follow. The Hearing Examiner finds very interesting the remark of Complainant's counsel in the Complainant's initial brief. It was noted that the Respondent's indication in the October MEMR that the next violation would lead to termination made no impact upon the Complainant. It is not clear that he knew that was the next likely step, but to the extent that he knew he did not understand the potential gravity of his position. The Hearing Examiner suggests that this lack of impact results in part from an inconsistent application of the policy to given individuals and possibly between individuals.

The Hearing Examiner recognizes that the employer is in a difficult position. On one hand, the Respondent as any employer might wish to do, would like to keep good employees who are experiencing a temporary difficulty in meeting the employer's expectations. On the other hand, by varying its own policies in an apparently arbitrary manner, the employer gives the impression of favoritism and possibly discrimination. In order to strike a balance, the Respondent may find it helpful to permit some discretion but to more closely limit how and when its managers, particularly new managers, may exercise this discretion.

While neither party contended that the Complainant had any particular language barrier, it seems to the Hearing Examiner that a fundamental lack of communication caused the problems that resulted in this complaint. The Hearing Examiner does not assert that the Complainant's language ability played a role in this breakdown of communication. Had the Complainant told Martinson that he did not and could not have a doctor's excuse the first time Martinson asked about it, both parties could have attempted to figure out what had gone wrong. The passage of time and repeated miscommunication bred distrust and forced the hands of the parties. By that time, neither side could repair the problem. It is unfortunate.

For the foregoing reasons, the Hearing Examiner concludes that the complaint must be dismissed for a lack of proof.

Signed and dated this 11th day of June, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner