STATE OF WISCONSIN PERSONNEL COMMISSION

GERALD SORGE,

Complainant,

v.

Secretary, DEPARTMENT OF NATURAL RESOURCES

Respondent.

Case No. 85-0159-PC-ER

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss on the basis of res judicata. In its brief supporting its motion to dismiss, respondent presented the following statement of facts:

1. By letter dated September 25,1985 (hand-delivered to the Complainant on September 27, 1985) the Complainant was informed that his employment with the Department of Natural Resources as a Facilities Repair Worker 4 had been terminated effective September 19, 1985.

2. On November 14, 1985, Complainant, Gerald A. Sorge filed a charge of discrimination with the Personnel Commission alleging Respondent, Department of Natural Resources, discriminated against him as to the terms and conditions of employment and his termination on September 19, 1985, based on sex and/or retaliation based on fair employment activities, whistleblowing and/or occupational safety and health reporting.

3. By letter received from the Personnel Commission on December 10, 1985, the Complainant withdrew his allegations of discrimination based on sex and retaliation for fair employment activities.

4. By Interim Decision and Order dated January 23, 1986, the Personnel Commission dismissed that portion of complainant's case that alleged retaliation based on safety and health reporting. Therefore, Complainant's remaining allegation in this case is his allegation that he was discriminated against on the basis of retaliation with respect to whistleblowing in violation of Ch. 230, Stats.

5. On February 5, 1987, an Initial Determination was issued finding no possible [sic] cause to believe that the Complainant was retaliated against for making a disclosure under the whistleblower law.

6. By letter dated February 27, 1987, the Complainant appealed the Initial Determination.

7. The Commission's prehearing conference report of September 16, 1987 recites the Issues for hearing as follows:

> "Whether there is probable cause to believe that respondent retaliated against the complainant in violation of §230.83, Stats., in regard to terms and conditions of employment and/or his termination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed."

8. Following his discharge effective September 19, 1985, Mr. Sorge grieved his discharge under the applicable provisions of the collective bargaining agreement between the State of Wisconsin and the Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO. The grievance was heard by an arbitrator on August 5 and October 10, 1986. The issues for the hearing were "Is the discharge of the grievant for just cause? If not, what is the remedy? ["]At the hearing, the Department of Natural Resources had the burden of proof to establish just cause of the Complainant's discharge.

9. At the arbitration hearing, the Complainant through oral testimony (direct examination of the Complainant, Art Lendingham and William Singsime and by cross-examination of Elmer Dorava) reasserted the allegations contained in his written complaint to the Commission dated November 13, 1985. A copy of the transcript is marked as Exhibit 1, attached hereto and made a part hereof.

10. The arbitrator read and considered all arguments and contentions advanced by the Complainant and the Respondent in their briefs and considered all the evidence of record.

11. The arbitrator concluded that "The discharge of the grievant was for cause. The grievance is dismissed." A copy of the Arbitration Award is marked as Exhibit 2, attached hereto and made a part hereof.

12. At the arbitration hearing, each party had a full and fair opportunity to argue their version of the facts, to examine and cross-examine witnesses under oath and offer exhibits on all matters including the Complainant's whistleblower allegations. The arbitrator considered all of the Complainant's contentions and found just cause existed for the discharge.

Respondent's brief submitted December 16, 1987, was in compliance with a briefing schedule set by the Commission. The complainant failed to submit a brief on respondent's motion within the scheduled time period. On February 24, 1988, the Commission sent a certified letter to complainant's last known address informing him that unless he responded within 10 days, the Commission would consider respondent's motion without his input. This letter was returned to the Commission with an expired forwarding sticker. On February 29 1988, a Commission staff member telephoned complainant's parents, who provided complainant's current address. Another letter, advising complainant to respond to respondent's motion, was sent by first class mail and certified mail March 1, 1988 to complainant's address, obtained from his parents. This letter was never claimed by complainant. Again on March 18, 1988, the Commission resent its March 1, 1988 letter to complainant. There has been no response by the complainant to these Commission letters.

Subsequently, the Commission advised complainant by letter dated September 26, 1988, that the complaint would simply be dismissed for lack of prosecution if he did not respond within 20 days. Complainant did contact the Commission by telephone within that period and advised that he did want to continue to pursue his case and was awaiting a Commission decision on the motion. Therefore, the Commission will address the motion.

Section 230.88(2)(b), Stats., provides in part:

> ...if the commission determines that a grievance arising under... a collective bargaining agreement involves the same parties and matters as a complaint under §230.85, it shall order the arbitrator's final award on the merits conclusive as to the rights of the parties to the complaint, on those matters determined in the arbitration which were at issue and upon which the determination necessarily depended.

In its brief in support of its motion to dismiss, respondent asserts the following:

> ...Complainant alleges in the whistleblower portion of his November 13, 1985, complaint that he was discharged by virtue of his disclosure of certain activities of his co-workers and his immediate supervisor (Elmer Dorava). These specific allegations were raised at the arbitration hearing. See testimony of Sorge, Art Lendingham, William Singsime, Mark Smith, Elmer Dorava and Earl Meyer... The basic elements of the whistle-blower complaint before the Commission and the issue(s) before the arbitrator are extremely similar. In deciding on whether or not there was just cause for the discharge, the arbitrator was forced to consider the spurious charges of the Complainant....

The Commission has reviewed the arbitration award and the parts of the transcript referred to by respondent. The testimony in question falls into two categories. The first may be categorized as tending to show that there was widespread employe use for private purposes of employer tools and materials (part of the charges against complainant) and that management participated in, condoned and approved this practice. The second was that shortly before his termination, one of complainant's supervisors (Arthur Clarke) confronted him concerning certain inquiries complainant was making about a log-splitter that had been built on DNR time with DNR material and was used by employes for their private use. Complainant testified that although he reminded Clarke about the whistleblower law, Clarke said: "...I am telling you to shut your mouth and forget about what is going on around here or I am going to make your life miserable for you." T., p. 225.

The arbitration award addressed the issue of whether "the discharge of the grievant was for just cause...," and in so doing considered four separate specifications of misconduct. The arbitrator ruled that the employer failed to sustain his burden as to three of the four specifications,

but that the discharge could be sustained on the basis of the fourth specification -- utilization of DNR equipment and materials to construct a sign that he sold for $105.00 -- because it was so serious.

The arbitrator addressed complainant's evidence concerning similar conduct by other employes:

> ...While the testimony establishes that some time ago there were episodes where Company's equipment and materials had been used, the matter here is distinguishable, in the opinion of the undersigned, since the conversion for personal use is tantamount to theft, particularly when considering... the use of Employe materials for making the sign, where the materials amount to a value of roughly 150.00.... Award, p. 8.

The complainant does not have to establish there was widespread use of tools and materials by other employes for private purposes in order to prevail on his whistleblower claim. A whistleblower claim is established by a showing that a complainant made a protected disclosure and that the employer took or threatened retaliatory action because of the disclosure. Here, the complainant may be contending that his protected disclosure was that there was widespread use of tools and materials by other employes for private purposes. Whether or not there in fact was such use does not determine whether the disclosure is protected. The whistleblower law only requires that the employe reasonably believes the information to be true. As long as the truth of whether other employes misused tools and materials is not an essential element in maintaining a successful whistleblower claim, any conclusion on this point by the arbitrator cannot serve as the basis for dismissing the whistleblower claim.

The second aspect of the arbitration raised by this motion, Clarke's alleged concern and threat concerning complainant's activities with respect to the log-splitter, presumably involves an attempt by complainant to show that Clarke terminated him in retaliation for these activities. However,

the arbitrator made no findings as to whether this exchange actually occurred, and he did not address the retaliation issue in his award. In the Commission's opinion, it cannot conclude that the award "necessarily depended," §230.88(2)(b), Stats., on the arbitrator implicitly rejecting complainant's retaliation theory. It is possible that in the arbitrator's opinion, it was immaterial whether or not Clarke was motivated to discharge complainant in retaliation for complainant's activities concerning the log-splitter, because there was just cause in any event.

Therefore, respondent's motion to dismiss must be denied. The Commission notes that under §230.88(2)(b), Stats., it is required to give the arbitrator's award preclusive effect as to those specific matters determined in the arbitration that turn out to be material to this complaint. The existence of the language in §230.88(2)(b), Stats., distinguishes this case from one in which the claims are premised on the Fair Employment Act. See Dohve v. DOT, 84-0200-PC-ER, 11/3/88.

ORDER

Respondent's motion to dismiss on the ground of res judicata is denied.

Dated: November 23, 1988 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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