STATE OF WISCONSIN

PERSONNEL COMMISSION

PATRICIA VAN ROOY,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 87-0117-PC
87-0134-PC-ER

DECISION
AND
ORDER ON
MOTION FOR
PRELIMINARY INJUNCTION

NATURE OF THE CASE

This matter is before the Commission on complainant's motion for preliminary injunction filed September 24, 1987 (a revised or corrected motion was filed September 25, 1987). The undersigned examiner conducted a hearing on said motion on September 25, 1987. The motion was denied on the record, and the parties were advised that this written decision would follow.

DISCUSSION

Case No. 87-0117-PC is an appeal of a decision on a reclassification request which acknowledged that appellant's position should be classified at the higher level requested (Job Service Specialist 3), but that the position standards require that the position be filled at the higher level by competition. The parties originally had agreed to a hearing on September 30, 1987, but on September 23, 1987, appellant's request for a postponement of said hearing was granted.

Case No. 87-0134-PC-ER is a discrimination complaint on the basis of age, handicap, sex and retaliation based on Fair Employment Activities which was filed on September 22, 1987. This complaint focuses on DILHR's decision to appoint someone other than appellant to the position in question. The complaint also refers to certain acts of alleged harassment involving conditions of employment. The complaint asserts that the retaliation is due to three previous complaints which were withdrawn by her attorney without her knowledge in November 1986. Although neither the complaint or the motion alleges "whistleblower" retaliation under Subchapter III of Chapter 230, Stats., it was asserted at the aforesaid motion hearing that appellant was retaliated against because of disclosures under the whistleblower law.

The aforesaid motion recites that a Mr. Jerome Lovick has been appointed to the position in question with an effective date of September 28, 1987, and requests an order temporarily delaying that appointment pending a full hearing. Said motion contains, inter alia, the following argument:

> It is our position that this appointment would constitute an "invalid appointment" under §230.41, Stats., because no real "vacancy" exists to which Mr. Lovick can be appointed.
>
> We are prepared to show the Commission that an abuse of management discretion resulted in the inappropriate identification of Ms. Van Rooy's position at the time of the Job Service Specialist survey. Had that abuse of discretion not occurred, Ms. Van Rooy's position would have been appropriately reallocated to the Job Service Specialist 3 level. As a result, there would not now be a "vacancy" to which Mr. Lovick could be appointed.
>
> We would like the opportunity to show the Commission that Mr. Michael Rosecky, Job Service Supervisor 5 in the Sheboygan Office, submitted a position description dated 3/19/86 which identified Ms. Van Rooy's duties as that of a Placement Specialist. This position description constituted a "demotion" from the duties of Account Executive which Ms. Van Rooy had performed since her last position description dated 10/4/85.
>
> The Job Service Specialist Survey went into effect on 3/30/86. Ms. Van Rooy was notified on 4/11/86 that her position had been

reallocated to the Job Service Specialist 2 level. According to Mr. William Komarek, Chief of the Classification Section in the Department of Industry, Labor and Human Relations, the reallocation decision was based on the 3/19/86 position description.

We can produce performance evaluations for Ms. Van Rooy, signed by Mr. Rosecky, which document that she was expected to continue to perform Account Executive duties from 10/85 through 7/86.

It is our contention that Mr. Rosecky submitted the downgraded 3/19/86 Placement Specialist position description with the sole intent to deny Ms. Van Rooy recognition of her position as a Job Service Specialist 3, which is the level to which Account Executive is assigned.

The current appeal relates to the denial of the reclassification of Ms. Van Rooy's position to the Job Service Specialist 3 level by Mr. Komarek, dated 6/19/87. In that denial he states in part:

> "When the Job Service/Unemployment Compensation Survey was implemented on March 30, 1986, your position (Placement Specialist) position description dated March 19, 1986, was reallocated to a Job Service Specialist 2...
>
> Because an error was not made in the classification of the "Placement Specialist" position description at the time of the JS/UC Survery (sic), reallocation to correct an error would not be appropriate at this time."

It is our contention that an error was made.

We believe that the performance evaluations support that Ms. Van Rooy was expected to perform Account Executive duties from 3/19/86 and that Ms. Van Rooy's position should have been reallocated to the Job Service Specialist 3 level at the time of the survey. As a result, there would have been no subsequent determination that her position should be opened for competition and there would be no "vacancy" to which Mr. Lovick could be appointed.

At the hearing on the motion, complainant reiterated that her theory that no legal vacancy existed is based largely on an analysis of the March 19, 1986, position description, and that had the "correct" position description been analyzed during the course of the survey, appellant's position would have been reallocated to JSS 3 and there would not have been any question about a vacancy. It also was argued that discrimination complaints that were filed in November 9, 1984 and October 1985 constituted disclosures under the whistleblower law, and that the submission of the

March 19, 1986, position description was in retaliation for those disclosures; that there was a further disclosure in the spring of 1986 when appellant contacted Senator Otte's office about her discrimination complaint and subsequently had a discussion with the DILHR deputy secretary, and that the submission of the reclassification request which formed the basis of the appeal in Case No. 87-0117-PC was retaliatory with respect to that disclosure because respondent foresaw the result which in fact ensued.

The Commission must first address the question of its authority to issue a preliminary injunction. The Commission must conclude it lacks such authority with respect to the civil service appeal (§230.44(1)(b), Stats.) and Fair Employment Act (Subch. II, Ch. 111, Stats.) aspects of this case. Neither law by its terms grants such authority to the Commission, while it is note-worthy under the doctrine of "express mention, implied exception" that such authority is explicitly granted to the Commission under the "Whistleblower" law at §230.85(3)(c), Stats., and to the Wisconsin Employment Relations Commission pursuant to §111.07(4), Stats.

Appellant argues the Commission has authority to issue the preliminary injunction under §230.44(4)(d), Stats., which provides:

> The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in §230.43(1).

Appellant asserts there was such an obstruction or falsification with respect to this transaction. However, while the Commission may have the authority to "remove an incumbent or delay the appointment process as a remedy to a successful appeal" (emphasis supplied) where obstruction or falsification has been shown, this is not authority to delay the appointment process prior to a successful appeal. Rather, this statutory language is inconsistent with such authority.

As noted above, the Commission does have the authority, pursuant to §230.85(3)(c), Stats., to enter interlocutory orders in complaints of retaliation under the whistleblower law. Although the complaint was not identified as such when it was filed, she now argues that she has made certain disclosures which has resulted in various acts of retaliation by DILHR.

As a prerequisite to the issuance of a preliminary injunction, the moving party must show:

1) a reasonable probability of ultimate success on the merits,

2) threatened irreparable injury;

3) a favorable balance with respect to relative damages to the interests involved. Hruska v. DATCP, 85-0069, 0070, 0071-PC-ER.

Looking first to the likelihood of success, respondent has questioned whether the purported disclosures would qualify as such under the whistleblower law. In the Commission's view, it is unlikely that they would.

Appellant has referred to her November 1984 and October 1985 discrimination complaints filed with the Commission as disclosures under §230.81(1)(b), Stats. She also asserts that in the spring of 1986 she contacted Senator Carl Otte regarding her discrimination complaint, that this constituted a whistleblowing action under §230.81(3), Stats., and that she further pursued the matter by discussing it with then deputy secretary Toya McCosh.

Section 230.81(1), Stats., provides in part as follows:

> ...However, to obtain protection under §230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:
>
> (a) Disclose the information in writing to the employe's supervisor.

> (b) After asking the Commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the Commission determines is appropriate....

Laying to one side the question of whether these complaints of discrimination cited by complainant would meet the definition of "information" set forth at §230.80(5), Stats., it seems highly unlikely that merely filing a discrimination complaint with the Commission could possibly be construed as an act under §230.81(1)(b), Stats.; i.e., "after asking the Commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the Commission determines is appropriate...."

As to appellant's communication with Senator Otte, all that was asserted at the hearing on the motion is that she contacted him regarding her discrimination complaint. It is questionable whether it would be appropriate on the basis of such a minimal assertion to conclude appellant would have a reasonable probability of success at the hearing of establishing that this was a "disclosure of information" under §230.81(3), Stats. Appellant also asserted she had a discussion with deputy secretary Toya McCosh. Again, it seems questionable whether such an assertion could give use to a conclusion there was a disclosure of information, and, furthermore, in order for a disclosure to a supervisor to be covered by the act, it must be in writing, §230.81(1)(a), Stats. These serious questions on this record about the viability of appellant's asserted disclosures under the whistleblower law obviously have a negative impact on the appellant's probability of success on the merits, since if there were no disclosure of information under the whistleblower act, the act's proscriptions against retaliation would not apply, and there would be no basis for a preliminary injunction under §230.85(3)(c), Stats. Therefore, there is no need for the

Commission to address the substantive issues presented by the purported discrepancies between the March 19, 1986, position description and the other position descriptions and the performance evaluations submitted by the appellant in support of the motion.

With respect to the question of irreparable injury, on this record it can be said that once this position is filled, it is less likely that respondent would be ordered to appoint appellant to the position as a remedy to a successful appeal than it would be if the position were kept vacant. However, it can not be said that this remedy would be completely foreclosed if the appointment of Mr. Lovick is allowed to proceed.

Section 230.44(3)(d), Stats., provides:

> The Commission may not remove an incumbent or delay the appointment process as a remedy to a successful appeal under this section unless there is a showing of obstruction or falsification as enumerated in §230.43(1).

Appellant has alleged such obstruction or falsification, and that Mr. Lovick's appointment was illegal and invalid. If she is able to address successfully this issue at hearing, an order removing the incumbent is a possibility. Also, since the proscription on removal of an incumbent only applies to an appeal "under this section [230.44]," and appellant has claims under other sections (Fair Employment Act, §230.45(1)(b), Stats., and whistleblower retaliation, §230.45(1)(gm), Stats.), such relief presumably would not per se be foreclosed if she were to be successful with those claims. As to the other injury involved, besides appellant's entitlement to this particular position, it appears, based on what respondent said at the September 25, 1987, hearing on the motion, that appellant will remain employed at the Sheboygan Job Service office at her current JSS 2 level for at least the foreseeable future. If it ultimately should be determined that she was improperly denied the JSS 3 appointment, back pay would be a possible remedy.

The last element to be considered on this motion is the balance of convenience or the competing interests that would be affected by the ruling on the motion. The impact on appellant of the denial of the motion has been discussed above under the heading of irreparable injury. While granting the motion would appear to have little immediate adverse impact on respondent, it would adversely affect Mr. Lovick's interests, and it is unclear if or how he could be compensated if it ultimately were determined that appellant was not entitled to the position. Therefore, this element is not completely favorable to appellant.

Based on all the foregoing, the motion for preliminary injunction should be denied. However, as indicated at the hearing on the motion, a hearing on the merits will be scheduled promptly.

ORDER

Appellant's motion for a preliminary injunction filed September 24, 1987, and, as amended, on September 25, 1987, is denied.

Dated: October 1, 1987 STATE PERSONNEL COMMISSION

Dennis P. McGilligan

DENNIS P. McGILLIGAN
Hearing Examiner

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