STATE OF WISCONSIN . PERSONNEL COMMISSION

JEFF HOLUBOWICZ, Complainant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES[1] [DOC], Respondent. Case No. 88-0097-PC-ER	*	DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision and order. The Commission has considered the objections filed by the parties and consulted with the hearing examiner. The Commission adopts the proposed decision and order in this matter with the following additional comments concerning complainant's objections.

In his objections, complainant indicates that he filed a timely complaint under the whistleblower law of the February 5, 1988, threat made by Mr. James Wegner. (See Findings of Fact 10 through 20, and pages 14 through 17 of the proposed decision and order.) Complainant relies on conversations with Personnel Commission staff and a March 28, 1988, letter to the Wisconsin Employment Relations Commission on which the Personnel Commission was "cc'd" as the basis for his argument that he filed a timely complaint.

To be a timely complaint under the whistleblower law, filing must occur within 60 days of when the alleged retaliatory action occurred or complainant became aware of the action whichever is later. On the record, complainant indicated that he discussed this complaint with staff of the Commission sometime in February. In addition, complainant's Exhibit #1 contains a letter dated July 24, 1989, from complainant to the Personnel Commission indicating

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1 Effective January 1, 1990, the Department of Health and Social Services was reorganized and the Division of Corrections was removed from DHSS, creating a separate Department of Corrections. At the time this complaint was filed, the parties involved were employes of the Division of Corrections. As of 1/1/90, all the parties involved in the issues which gave rise to the complaints are employes of the Department of Corrections.

he discussed his complaint with staff of the Commission on May 2, 1988, in preparation for filing of his May 26, 1988 complaint.[2]

As a general proposition, discussions with Commission staff do not preserve the rights of a complainant in terms of timely filing of an appeal or a complaint. Commission rules require that appeals/complaints must be in writing and received within the statutorily specified time period (Chapters PC 2 and 3, Wis. Admin. Code).

In the instant case, the May 2, 1988, conversation with Commission staff does not fall within the 60-day time limit imposed under the Whistleblower Law and would therefore make a complaint about the February 5, 1988, incident untimely even if some basis could be found for arguing that the conversation was, in fact, the "filing" of a complaint. Complainant also argues that he has 300 days to file a Fair Employment Act (FEA) retaliation complaint. This matter is outside the scope of the complaint and the issue for hearing. This matter was clarified in a letter from the Commission to complainant dated June 16, 1988, in which FEA retaliation charges were dropped and issues related to retaliation under the public employe health and safety law and the whistleblower law were retained. Complainant was given seven days to respond to this letter if it was deemed inaccurate (Complainant's Exhibit #3). No response was received by the Commission.

The February, 1988, conversation and the March 28, 1988, memorandum referenced by complainant in his objections and at the hearing fall within the 60-day time period. Complainant contends in his objections that he was told that the Commission was going to review the March 28, 1988, memorandum to the WERC to see if there was any jurisdiction for the Commission. On the record at the hearing, complainant testified that he was unclear after these discussions about which Commission was "appropriate to address this need," and that based on the direction of Commission staff he drafted a letter to the WERC and sent a carbon copy to the Personnel Commission. The letter to the WERC was attached to his reclassification appeal which he filed on March 29, 1988. While some argument could be made that this March 28, 1988, memorandum constitutes the timely filing of a complaint, the issue of timeliness lacks significance because the Commission also addressed the issue

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[2] Complainant's testimony constituted the only evidence of the content of these conversations.

related to the February 5, 1988, incident on the merits. As indicated in the proposed decision and order, even if the complaint was considered timely, there is no probable cause to believe that retaliation occurred because the incident was not a threat of discipline under §230.80(2), Wis. Stats., and the alleged retaliator subsequently offered complainant reinstatement to a supervisory position.

ORDER

The attached proposed decision and order is incorporated by reference and adopted as the Commission's final decision of this matter, and this complaint is dismissed.

Dated: September 5, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

GFH:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

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STATE OF WISCONSIN PERSONNEL COMMISSION

JEFF HOLUBOWICZ,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES[1] [DOC],

Respondent.

Case No. 88-0097-PC-ER

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This case involves complaints filed pursuant to §230.45(1)(g) and (gm) alleging retaliation under §101.055(8), Stats., ("public employe safety and health" law) and §230.83, Stats., ("whistleblower" law). In an Initial Determination dated December 22, 1988, a Commission investigator found that there was no probable cause to believe that complainant was retaliated against for engaging in protected activities.

Complainant appealed the no probable cause initial determination. In an Interim Decision and Order dated April 7, 1989, the following issue was established for the hearing in this case:

> Whether there is probable cause to believe that respondent retaliated against the complainant in violation of the whistleblower law and/or the public safety and health provisions with respect to any or all of the following allegations/actions:

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1 Effective January 1, 1990, the Department of Health and Social Services was reorganized and the Division of Corrections was removed from DHSS, creating a separate Department of Corrections. At the time this complaint was filed, the parties involved were employes of the Division of Corrections. As of 1/1/90, all the parties involved in the issues which gave rise to the complaints are employes of the Department of Corrections.

1) A February 28, 1988[2] threat by James Wegner, complainant's second line supervisor, directed at complainant (whistleblower law);

2) A "minor reorganization" as set forth in an April 21, 1988, memo from Steve Scannell (whistleblower law);

3) A directive dated May 11, 1988, prohibiting complainant's entry into the Waupun Correctional Institution (whistleblower and public employe safety and health laws);

4) A charge dated May 23, 1988, against complainant of violating a work rule (whistleblower and public employe safety and health laws);

This Interim Decision and Order also established certain limitations on the scope of hearing regarding these issues and that certain issues raised by complainant after the Initial Determination, which were not part of his initial complaint, could not now be used to amend his complaint. Specifically, the order determined that the denial of complainant's reclassification request from Industries Specialist 1 to Industries Specialist 3 would not be included as an amendment or as part of the issue for hearing because it was outside the scope of the original complaint. In addition, the order denied further amendment of the complaint and subsequent expansion of the issues for hearing beyond those actions already specifically identified.

After the issue for hearing was established but before the hearing was held, respondent made a jurisdictional motion to dismiss Item #1 identified in the issue for hearing on the basis that the complaint in this matter was untimely filed. This motion was addressed at the onset of the hearing and a decision on the motion is included as a part of this decision.

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2 The original complaint identified the date of this incident as February 5, 1988, and not February 28, 1988. The Initial Determination (ID) and the Interim Decision and Order both identify the alleged incident as occurring on February 28, 1988. The only exception noted is when the original complaint is quoted in Finding #2 of the Interim Decision and Order and the date of the incident is identified as February 5, 1988.

During the hearing conducted in these matters, the parties agreed that the correct date of the incident was February 5, 1988. As such, Item #1 under the issue for hearing is amended to read: "1. A February 5, 1988 threat by James Wegner, complainant's second line supervisor, directed at complainant (whistleblower law);"

FINDINGS OF FACT

General

1. At all times relevant to these matters, the complainant was employed as an Industries Specialist 1 in the Industries Distribution Center (IDC) of Badger State Industries (BSI) located at the Waupun Correctional Institute.

2. Prior to his current position, complainant was employed as an Industries Specialist 3 (IS 3) at Fox Lake Correctional Institute. Complainant voluntarily demoted into this position in 1981 from an Industries Supervisor 2 position at WCI. (Initially when complainant demoted, the position at Fox Lake was classified as an Industries Technician 1. The position was subsequently upgraded to IS 3). On May 26, 1985, complainant voluntarily demoted from his IS 3 position to an IS 1 position at WCI. Complainant had reinstatement eligibility back to the IS 3 and Industries Supervisor 1 level until May 26, 1988, i.e., for 3 years.

3. Badger State Industries (BSI) provides employment experience for inmates and is financed by selling its products, such as metal furniture, to state agencies and non-profit organizations.

4. Badger State Industries (BSI) is a separate organizational unit from the Waupun Correctional Institute (WCI). While the management of WCI has no direct supervisory responsibilities over BSI or complainant, the employes of BSI are subject to the security provisions of WCI because they work with inmates assigned to the production and distribution activities of BSI.

5. Complainant is responsible for delivering raw materials to the institution and delivering finished products to customers. Complainant has contact with inmates and even directs their activities and provides training when they are assigned to help him load and unload materials at the Industries Distribution Center (IDC) or to accompany him on his route.

6. Prior to an April 21, 1988, reorganization, complainant reported to an Industries Supervisor 1. (This position was filled until January, 1988 by Mr. Robert Hoaas. Subsequent to his departure, the position was filled by Mr. Dean Helwig on an interim basis until August, 1988, when he was permanently appointed to the position.) The Industries Supervisor 1 reported to Mr. James Wegner, who was classified as an Industries Superintendent 2. Mr. Wegner was responsible for all shop operations and the Industries Distribution Center (IDC). Mr. Wegner reported to Mr. Steve Scannell, who was

the Director of BSI. Mr. Scannell's position was unclassified and reported to the head of the Division of Corrections, Mr. Stephen Bablitch.

7. Complainant has made numerous health and safety disclosures which are protected activities under the public employe safety and health provisions. At hearing, the parties stipulated that a July 28, 1986, letter to Mr. James Kurtz of the Department of Natural Resources requesting an investigation of a "dumphole" maintained by the state at the Industries Distribution Center where paint and other waste materials were dumped was a request which invoked the protection from retaliation provisions of §101.055(8)(a), Stats.

8. The July 28, 1986, letter referred to in Finding #7 was also identified as a disclosure under the whistleblower law by the complainant which merited further investigation.

9. Mr. Helwig, Mr. Wegner and Mr. Scannell were all aware that complainant had filed complaints and disclosures under the public employe health and safety law and the whistleblower law.

February 5, 1988 Incident

10. On February 5, 1988, a second step grievance hearing was being held by Mr. James Wegner related to a grievance filed by complainant. Present at the meeting were Mr. Wegner, complainant and Mr. Dzroba, an Industries Specialist 1 in the Industries Distribution Center, who was serving as complainant's union representative.

11. At the end of the meting, Mr. Wegner asked complainant to stay to discuss ways to improve working relationships and clear the air. In addition to the persons present at the grievance meeting (See Finding #10), Mr. Dean Helwig was also involved in this discussion.

12. Mr. Wegner discussed what he considered to be game playing by complainant through the constant filing of grievances. Mr. Wegner said some people talked about firing complainant, but he (Mr. Wegner) was not going to be involved in anything other than doing his job. As the conversation progressed, Mr. Wegner commented that he had even considered putting out a contract on complainant. Mr. Wegner made no statement about anyone setting up complainant for disciplinary action.

13. After the meeting with complainant, Mr. Wegner called his supervisor, Mr. Scannell and reported that he had made a comment to complainant about putting out a contract. Mr. Wegner indicated that he thought it was a mistake to make a comment like that.

14. On the Monday following the grievance meeting, Mr. Wegner talked to complainant about his "contract" comment. Mr. Wegner indicated that it was wrong, that he did not mean it, and that he would accept whatever consequences his supervisors thought appropriate. No specific action was taken against Mr. Wegner as a result of the "contract" comment.

15. Approximately one to two weeks later, complainant told Mr. Wegner that he was upset about his "contract" comment.

16. There were no other incidents of this nature involving complainant and Mr. Wegner prior to the February 5, 1988, incident or at any other time relevant to these proceedings.

Timeliness Motion to Dismiss February 5, 1988, Incident As Part of the Issue for Hearing

17. Complainant filed a formal complaint in the instant case on May 26, 1988. (Commission Exhibit #1)

18. On March 29, 1988, complainant filed an appeal of the denial of his request for reclassification from Industries Specialist 1 to Industries Specialist 3. (This appeal was addressed separately as Case No. 88-0039-PC.)

19. Attached to complainant's March 29, 1988, reclassification appeal was a copy of a March 28, 1988, memorandum from complainant to the Wisconsin Employment Relations Commission (WERC). The subject of the memorandum was "ULP Discrimination." There were eleven "cc's" at the end of this memorandum including one to the Personnel Commission. (Complainant's Exhibit #2) The complainant identifies a number of the same matters that are issues in this case. Specifically, the March 28, 1988, memorandum makes a reference to events such as . . . "threat of 'Contract Killing' to eliminate me and 'set-ups' to have me fired and/or discipline" . . . which is a reference to the February 5, 1988, incident involving Mr. Wegner.

20. The March 28, 1988, memorandum contains no specific or implied indication that this attachment to complainant's reclassification appeal is to be construed as a complaint of illegal retaliation under the whistleblower law.

Minor Reorganization - April 21, 1988

21. The position of Industries Superintendent 2 held by Mr. Wegner was created in 1985. Mr. Wegner filled the position on a lateral transfer basis.

22. The organization from 1985 until April 1988 remained as identified in Finding #6. In October, 1987, Mr. Scannell began developing a proposal to reorganize BSI. The major reasons for the reorganization were:

a. The span of control of supervisors, as well as the Director of BSI, was too broad.

b. Supervisors were in charge of multiple areas, such as customer service, production control and quality control, which impacted negatively on communications, accountability and fiscal control.

23. The reorganizational proposal (Respondent's Exhibit #17) was approved on March 15, 1988, by Patricia Goodrich, Secretary of the Department of Health and Social Services. Mr. Scannell put out a memorandum, dated April 21, 1988, identifying the changes resulting from the reorganization. (Respondent's Exhibit #16)

24. The Industries Distribution Center (IDC) remained under the supervision of an Industries Supervisor 1 (Dean Helwig). However, the unit was placed under a newly created materials manager position classified as an Administrative Assistant 5 - Supervisor (PR 1-15) and no longer reported to Mr. Wegner. Mr. Wegner and the new materials manager positions in turn reported to a newly created Operations Manager classified as an Administrative Officer 1 - Supervisor (PR 1-16). The Operations Manager position is supervised by the Director of BSI, which is an unclassified position. Subsequent to the reorganization, a new Director of BSI has been appointed and Mr. Scannell has assumed the position of Operations Manager. At the time of the hearing, the Materials Manager position was vacant, and the IDC continued to be supervised by Mr. Wegner.

25. Prior to the reorganization, the two Installation/Repair Specialist positions (Industries Specialist 3) reported to Mr. Don Hagen, whose position's working title was Quality Manager. As a result of the reorganization, they were removed from Mr. Hagen's unit and were placed in an existing unit headed by a marketing manager position. There was no change in the functions these positions performed as a result of the reorganization.

26. There were no changes made in the duties and responsibilities or classification of complainant or his supervisor. The complainant's August, 1987 position description (Respondent's Exhibit #15) accurately reflects the duties and responsibilities assigned to complainant both before and after the reorganization. There is no mention in the position description of any installation responsibilities. Complainant did installation work while at Fox Lake when he was classified as an IS 3.

27. When Mr. Hoaas left his position as Industries Supervisor 1 at the IDC in January, 1988, complainant was offered the position on a temporary basis until a replacement could be named. Complainant declined the offer and Mr. Helwig was assigned temporarily to fill Mr. Hoaas' vacancy.

28. In a letter dated May 5, 1988, complainant asked the personnel manager for the Divisions of Corrections to be given reinstatement consideration for the Industries Supervisor 1 position vacated by Mr. Hoaas. Complainant was interviewed in August 1988 by Mr. Scannell and Mr. Wegner. Mr. Wegner offered the job to complainant who declined the offer. Subsequent to Mr. Wegner's offer, he (Mr. Wegner) was informed that he did not have the authority to make that decision. A second interview of complainant was conducted by Mr. Kronzer, Director, Bureau of Program Services, and a Mr. Trane, who both work in the central office of the then Division of Corrections. Mr. Kronzer offered the position of Industries Supervisor 1 to complainant. Complainant again declined with the qualification that his reinstatement rights (eligibility) be renewed or extended as a result of his action not to take the position. (Respondent's Exhibit #19) Complainant was subsequently informed by the personnel manager of the Division of Corrections that such an action was not possible. (Respondent's Exhibit #20)

29. One of the functions performed in the Industries Distribution Center is the delivery of laundry. In 1987, after a review of the duties and responsibilities of a vacant Industries Specialist 1 position that delivered laundry, the position was classified at a lower level (Motor Vehicle Operator 3) based on its functions and more limited contact with inmates. No other laundry delivery positions have had their classifications changed since that time. The 1988 reorganization did not change the classification of any filled positions. However, 2 vacant IS 1 positions in the IDC were changed, one to Motor Vehicle Operator and one to Storekeeper.

30. The reorganization did not remove any functions from the IDC. However, as a part of the BSI Business Plan (Respondent's Exhibit 18), the installation/repair specialists now work out of the central office in Madison (instead of Waupun) because that is where most of their work is.

May 11, 1988 Directive and May 23, 1988 Work Rule Violation Charge

31. On May 11, 1988, Mr. Wegner went to the IDC to pick up Mr. Helwig to go to a supervisory meeting at Taycheedah. At about 7:10 a.m., complainant came in and began a conversation with Mr. Wegner and Mr. Helwig. Complainant wanted to discuss the type of uniforms the drivers would get and wanted to have some input. Mr. Wegner indicated that it was too late and that the decision about uniforms had already been made. Complainant also indicated that the decrease in staff and an increase in production (opening of another line) in metal stamping was a problem and he felt that something was going to happen. Complainant then said words to the effect that "I have been telling them to hold off, but I don't know how long I can hold them off." Mr. Wegner told complainant that if he had information about a inmate takeover he should file an incident report using the new procedure that was in place. Complainant said it was an industries problem and not an institution problem. When asked again by Mr. Wegner to file a report, complainant said he would not but that he would go to the press.

32. The new procedure for reporting information was contained in a March 14, 1988, memorandum entitled "Information Control" put out by Darrell Kolb, who was acting superintendent of WCI. (Mr. Kolb was the superintendent at Fox Lake during this period.) This memorandum was posted in the IDC on May 13, 1988. A copy of the memorandum had been sent to Mr. Wegner. (Respondent's Exhibit #1)

33. After complainant's comment, Mr. Wegner called Mr. Sondalle (Treatment Director), who was in charge of the institution that day and reported the incident. Mr. Sondalle directed Mr. Wegner and Mr. Helwig to complete incident reports which they did that day. (Respondent's Exhibits #2 and #3, respectively) Complainant was again advised to complete an incident report.

34. After this meeting, complainant talked to a Captain Jerry Elliott. He informed Captain Elliott that this whole issue was being blown out of

proportion, and that an inmate told him he was going to contact the A.C.L.U., while another inmate said they are trying to kill us with fumes in metal stamping.

35. Complainant knew the inmates in metal stamping because of a health and safety complaint he (complainant) had filed regarding fumes, which the inmates became aware of.

36. On May 11, 1988 at about 2:00 p.m., complainant met in Madison with Mr. Kronzer and Mr. Scannell concerning the incident that had occurred that morning. Complainant was concerned that he did not have a union representative with him, and the parties agreed that nothing from that meeting would be used as discipline. During the meeting complainant stated that at no time did he ever use the word "riot" or "disturbance." Rather, he was concerned about increasing production with the opening of another dip line, and the ventilation problem. He also stated that he mentioned receiving two telephone calls at home about inmate litigation.

37. Complainant was informed in the 2:00 p.m. meeting on May 11, 1988, that an investigation would be conducted and that he would not be allowed into the institution (WCI) until the investigation was completed. This is standard operating procedure for an institution when a staff member provides information about inmates or when an incident involves inmates and staff.

38. On May 11, 1988, a WCI employe, Major Thomas Nickel, sent a standard memorandum (Respondent's Exhibit #12) indicating that complainant would not be allowed into the institution until further notice. Major Nickel was directed to put the memorandum out to acting superintendent Darrell Kolb based on his (Kolb's) concerns about potential inmate problems or situations and the fact that complainant would not fill out an incident report. Neither Mr. Kolb nor Major Nickel were aware that complainant had filed complaints regarding health and safety or whistleblower disclosures because they are not in complainant's chain of command.

39. Under the usual procedure when an employe is barred from the institution, he or she is also put on Leave with Pay pending the completion of the investigation. Since complainant does not regularly work in WCI, he continued to perform his delivery, assembly and repair duties, except that he was not assigned to perform any functions within WCI.

40. An investigation was conducted by Mr. John Luhm at the request of Mr. Phil Kingston, Director, Bureau of Adult Institutions in the Division of Corrections. Mr. Luhm has many years of security experience in both the institution and in the central office as a security consultant. Mr. Luhm did not know complainant prior to the investigation.

41. Mr. Luhm conducted his investigation and sent his written report to Mr. Kingston on May 16, 1988. (Respondent's Exhibit #4) Mr. Luhm in conducting his investigation talked to Mr. Wegner and Mr. Helwig but did not talk to complainant. He also talked to Daryl Miller, a shop supervisor, who overheard an inmate say to complainant that they are trying to kill us with the fumes, and to the investigating lieutenant, Dean Fuller, who had talked with the inmates identified by complainant during his May 11, 1988, meeting with Mr. Kronzer and Mr. Scannell.

42. Mr. Luhm concluded from his investigation that the shop was running smoothly, there was no undue tension, and that no disturbance of any kind was being planned by the inmates. Mr. Luhm did conclude, however, that complainant was insubordinate when he did not report the information to the institution as requested by Mr. Wegner.

43. On May 23, 1988, Mr. Wegner wrote a memo to complainant and said that Mr. Kolb wanted to see the incident report he had asked complainant to write on May 11, 1988. (Respondent's Exhibit #6) Complainant then completed an incident report (Respondent's Exhibit #7) outlining the incident in much the same manner he had during his May 11, 1988, meeting with Mr. Kronzer and Mr. Scannell.

44. On May 23, 1988, Mr. Scannell sent a letter to complainant scheduling a pre-disciplinary hearing to discuss a work rule violation charge. (Respondent's Exhibit #5) Complainant was charged, as a result of Mr. Luhm's report, with violating Work Rule #1, "Disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directions or instructions."

45. The pre-disciplinary hearing was held in the IDC on June 7, 1988. In a memorandum to Mr. Steve Kronzer, dated June 8, 1988, Mr. Scannell concluded that complainant knew about the procedure and policy for filing incident reports, and that he had made statements that at least implied some type of inmate problem. Based on complainant's insubordination in not filing an

incident report, Mr. Scannell recommended a 5-day suspension. After review by the central office, complainant was given a verbal reprimand later in June, 1988, by the administrator of the Division of Corrections, Mr. Bablitch.

46. Complainant was allowed into WCI on June 7, 1988, to attend a health and safety meeting as a union representative. However, on at least one other occasion, he was not allowed into the institution to attend a union/ management meeting. The order not allowing complainant to enter WCI was rescinded on June 29, 1988. (Respondent's Exhibit #13)

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§101.055(8), 230.85(2), 230.45(1)(g) and (gm), Stats.

2. The complainant has the burden of proof as to all matters.

3. The complainant has failed to sustain his burden.

4. There is no probable cause to believe that respondent retaliated against the complainant in violation of the whistleblower law or the public employe safety and health law as to any of the actions that are the subject of these complaints.

DISCUSSION

This case involves a number of allegations by complainant that he has been retaliated against for engaging in protected activities under the public employe health and safety law (s. 101.055(8), Stats.) and/or the employe protection (whistleblower) law (s. 230.83 Stats.). Before addressing respondent's timeliness motion and the specifics of each allegation made by the complainant, the Commission will first discuss the analytical framework used to evaluate cases alleging retaliation under these two laws and whether complainant has engaged in an activity which affords protection from retaliation under the provisions of these laws.

Public Employe Health and Safety

In analyzing claims arising under the public employe health and safety laws, the Commission has applied an analysis similar to that used for claims of retaliation under the Fair Employment Act (FEA) which prohibits

discrimination in employment. (Subch. II, ch. 111, Stats.) Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of retaliation. If complainant meets this burden, the employer may rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its actions, which the complainant may, in turn, attempt to show was a pretext for retaliation. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.CT. 1089, 25 FEP Cases 113 (1981). In a probable cause proceeding, the standard by which the evidence is evaluated is not as demanding as that which is used in a hearing on the merits. The Commission has defined "probable cause" in §PC 1.02(16), Wis. Adm. Code:

> "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation or unfair honesty testing probably has been or is being committed.

In Winters v. DOT, 84-0003, 0199-PC-ER, 9/4/86, the commission held that the probable cause standard requires a degree of proof that is less demanding than the preponderance standard applicable on the merits but more demanding than the substantial evidence test which is applicable on judicial review of administrative findings.

To establish a prima facie case in the retaliation context, there must be evidence that (1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. The causation standard applied by the Commission under the public employe safety and health law is other than that applied by the Commission under the Fair Employment Act (Subch. II, ch. 111, Stats.). In Strupp v. UW-Whitewater, 85-0110-PC-ER, 7/24/86, aff'd by Milwaukee County Circuit Court, Strupp v. Pers. Comm., 715-622, 1/28/87, the Commission held that under §101.55(8)(a), Stats., an adverse employment action

> ". . . may be based in part on [the] protected activity, so long as the protected activity was not a "substantial reason" for the [adverse employment action], or if it can be said that the [adverse employment action], would have taken place "in the absence of" the protected activity. . . ."

The Commission based this holding on the language of §101.055(1), Stats., directing that the rights under the public employe health and safety law are to be the equivalent to those available to private sector employes under the federal Occupational Safety and Health Act (OSHA).

Section 101.055(8)(a), Stats., prohibits retaliation against a public employe who has exercised a right afforded by §101.055, Stats., related to occupational safety and health. Complainant meets the definition of a public employe and respondent is a public employer as those terms are used in that subsection. The parties stipulated that complainant's July 28, 1986, disclosure to James Kurtz of DNR was a protected disclosure, and the only protected disclosure, under §101.055(8)(a), Stats., (See Finding #7).

Whistleblower Law

This complaint was also filed under §230.83(1), Stats., which prohibits retaliation against state employes who have made a disclosure of improper governmental activities. The method of analysis in a whistleblower claim is similar to a public employe safety and health claim except that the first element of the prima facie case is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in §230.81, Stats.; b) whether the disclosed information is of the type defined in §230.80(5), Stats.; and c) whether the alleged retaliator was aware of the disclosure. As to the second and third elements, the definitions of "disciplinary action" in §230.80(2), Stats.[3], replaces the term "adverse

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3 **230.80 Definitions.** In this subchapter:

* * *

(2) "Disciplinary action: means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.

(b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.

(c) Reassignment.

(d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

employment action" when reviewing a whistleblower complaint. Consequently, the second and third element of a prima facie case are: (2) the complainant was subject to a disciplinary action as defined in s 230.80(2), Stats and (3) there is a causal connection between the first two elements. Under the whistleblower law, the Commission has held that a causal connection is shown if there is evidence that a retaliatory motive played a part in the disciplinary action. Morkin v. UW-Madison, 85-0137-PC-ER, 11/23/88.

Section 230.81, Stats., requires that the information be disclosed "in writing to the employe's supervisor" or to "the governmental unit the [Personnel C]ommission determines is appropriate" in order to be protected. The parties stipulated that complainant's July 28, 1986 disclosure to James Kurtz of DNR was a protected disclosure under s. 230.81, Stats. of the whistleblower law and met the definition of information contained in s.230.80(5), Stats.

Pursuant to §230.85(6)(b), Stats., a disclosure must be found to "merit further investigation" in order for a presumption of retaliation to apply. In addition, the presumption only applies to certain types of "disciplinary action" as defined in s. 230.80(2), Stats., and it applies for a maximum period of two years. The parties stipulated that the disclosure to Mr. Kurtz merited further investigation. (See Finding #8)

After addressing respondent's timeliness motion, the remaining elements of the prima facie case analysis as to both the whistleblower and the public employe safety and health claims will be discussed below in terms of each alleged retaliatory action. Where a prima facie case is established, the analysis proceeds with determining whether the employer has rebutted the prima facie case or whether the employer's non-retaliatory reasons were pretextual, all in the context of the probable cause stage in the proceeding.

DISCUSSION

Timeliness with respect to the February 5, 1988, threat by James Wegner (Whistleblower)

The time limit for a whistleblower complaint is "60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last." §230.85(1), Stats. Complainant filed his formal complaint on May 26, 1988 with the Commission. However, complainant also contends that the Commission

should permit his complaint to "relate back" to related claims he filed with the Commission on March 29, 1988.

In previous cases, the Commission has permitted a complaint of discrimination to relate back to a previously filed appeal where the appeal related to the same personnel transaction and where the appeal specifically alleged illegal discrimination. In Saviano v. DP, 79-PC-CS-335, 6/28/82, the appellants, who had filed an appeal of reallocation decisions and had alleged in their appeal that the actions constituted discrimination based on sex, were permitted to perfect a complaint of sex discrimination by filing a notarized complaint as to the matters set forth in the appeal. In Laber v. UW, 79-293-PC, 8/6/81, the appellant, who in 1979 had filed an appeal of his termination and had alleged in his appeal that the termination was "based on religious discrimination," was permitted in 1981 to perfect a complaint of discrimination based on creed and relating to his termination.

In the present matter, the appeal filed by the complainant on March 29, 1988 arose specifically from a reclassification decision. The appeal letter stated, in part:

> I am requesting an appeal of denied reclassification to Industries Specialist 3 within the Department of Health and Social Services, Division of Corrections, Badger State Industries at the Industries Distribution Center in Waupun. The factors which lead to this appeal request are included in my original reclass requests which I have included I am also including a copy of a complaint I am filing with the Wisconsin Employment Relations Commission which relates as consequences to my request for this reclassification and the recent events in hiring positions at the Industries Distribution Center in Waupun.

Attached to the appeal was a letter dated March 28, 1988 from the complainant to the Wisconsin Employment Relations Commission, entitled "U[nfair] L[abor] P[ractice] Discrimination." The complainant distributed 11 copies of the letter to such persons as the governor, various legislators, union officials and agency officials in addition to "OSHA," the Personnel Commission and the addressee. The letter provided, in part:

> I would like to file this complaint with the Wisconsin Employment Relations Commission as an employee of the Department of Health and Social Services, Division of Corrections, Badger State Industries, at the Industries Distribution Center in Waupun, and

> as an officer of the Wisconsin State Employees Union of Waupun Prison AFSCME Local 18, as well as a documented whistleblower. Recent events within the workplace leads me to this request. I have filed grievances and complaints in the areas of health and safety, seniority rights, waste and fraud, abuse of LTE and project positions and recently a reclassification request. As a result, I have been made a target of retaliation and selective discriminatory application of work rules by managers of Division of Corrections, Bureau of Personnel, and Badger State Industries.
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> * * *
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> I ask that your Commission address this request, as the alternatives are the courts or the legislature.

The Complainant's March 28th correspondence caused the Personnel Commission to open a reclassification appeal and, presumably, caused the WERC to process complainant's unfair labor practice allegations. However, this correspondence did not include any request that the Personnel Commission open a file for any matters other than the reclassification denial.

The reclassification appeal made no allegations relating to the whistleblower law, nor did that appeal refer to an alleged February 5th threat by Mr. Wegner. The letter to the WERC made reference to a threat of a "Contract Killing" but that reference must be construed as part of complainant's ULP claim rather than as part of a complaint of illegal retaliation pursuant to §230.85, Stats.

Because the complainant's only pending action before the Personnel Commission was the reclassification appeal, his subsequently identified claim of whistleblower retaliation arising from a threat by Mr. Wegner on February 5, 1988 is untimely where that alleged conduct occurred more than 60 days prior to the date the May 26th complaint was filed.

Even if the Commission were to find that this aspect of the case was timely, there would be no basis for a determination that there is probable cause to believe retaliation occurred. Mr. Wegner's obviously exasperated comment, made to complainant after the February 5, 1988, grievance meeting, was not a threat of disciplinary action as defined under §230.80(2), Stats. Furthermore, it can hardly be contended either that it was a serious threat, that it was intended as such, or that it was perceived as such, notwithstanding that it was an inappropriate statement from a personnel management stand-

point. (See Findings #13 and #14) Finally, Mr. Wegner subsequently offered complainant reinstatement to a higher level position (Industries Supervisor).

Minor Reorganization (Whistleblower Law)

The complainant contends that the BSI reorganization, as reflected in the document prepared by BSI Director Scannell and dated April 21, 1988, had the following effect on him:

a. It upgraded the classification of the complainant's immediate supervisor, thereby preventing the complainant from using his reinstatement eligibility as an Industries Supervisor 1 to be considered for the vacancy.

b. The reorganization reflected a plan to move part of the BSI warehouse function from the Waupun area to the Madison area for furniture deliveries and the increased travel from his residence in Randolph to Madison would make it difficult for complainant to continue in his position.

c. The reorganization downgraded the positions that would remain in Waupun from Industries Specialist 1 to Motor Vehicle Operator, causing employes to get frustrated and to move to other jobs.

The organizational charts attached to the reorganization plan show that neither the classification of the complainant's position nor his supervisor's position would be changed. The plan does show that an existing filled position heading the Metal Furniture unit and an existing vacant position heading up the Sign Shop unit were upgraded from an Industrial Supervisor 2 to Industries Supervisor 3. However, these positions are not in complainant's chain of command, and even if they were he would not have been eligible for reinstatement either before or after the reorganization since he had eligibility only for positions at the Industries Supervisor 1 level.

The reorganization plan does not make any reference to moving part of the BSI warehouse functions from Waupun to Madison. There were no changes in the number of positions staffing the BSI warehouse at Waupun or in the scope of the warehouse operation. The movement of the two Industries Specialist 3 positions (Installation/Repair Specialist) from Waupun to Madison was a part of the Business Plan (Respondent's Exhibit #18) developed by BSI. (See Finding #30). The Business Plan addressed the need for additional

warehouse space and determined that it should be located in Madison to be closer to the majority of their customers. The reorganization plan moved these two positions to a new unit and under a new supervisor, but neither the reorganization or business plan changed the duties of these installation repair specialist positions or required them to move to Madison.

The installation/repair specialists did not work in the IDC either before or after the reorganization. While complainant knew the employes in these two positions and may have worked with them on occasion, he was not assigned the same work as they were. There is no indication on the record that complainant's job functions changed or became more difficult to perform after the reorganization, or that his deliveries had changed significantly in terms of where he delivered items. There also is nothing in the record to show that complainant was asked to change where he reported to work, and, presumably, if he did have to drive to the Madison warehouse location it would be on state time.

The reorganization plan does list one Motor Vehicle Operator position in the Distribution Center, which prior to the reorganization was shown on the organizational chart as a vacant Industries Specialist 1. This change reflects the classification action summarized in Finding #29. The reorganization did not change the classification of any filled positions involved in laundry delivery, although two vacant Industries Specialist 1 positions in IDC were converted to other classifications (Storekeeper and Motor Vehicle Operator). Complainant contends that this has caused employes to be frustrated and move to other jobs. Other than complainant's statement, there is nothing in the record to show that employes were more frustrated and/or turnover was higher in IDC after the reorganization than before. The classification changes made to vacant positions by respondent is within their authority. The reasons for making the changes appear legitimate and have not been shown to be retaliatory or in any way based on complainant's protected activities.

Complainant testified that duties had been removed from his position in retaliation for filing a complaint. The record shows that there was no change in his position description as a result of the reorganization. There were no installation duties (such as might be found in the Industries Specialist 3-Installation/Repair PD's) in complainant's PD before the reorganization. To the extent that he has previously performed these installation/repair func-

tions or on occasion has assisted with them is not relevant to what his currently assigned responsibilities are, and there is nothing on the record to show that they have been changed at all as a result of the reorganization.

The complainant has failed to establish that the reorganization plan constituted a retaliatory disciplinary action as to his own employment.[4] The presumption of retaliation is inapplicable because the reorganization plan does not fit within any of the definitions of disciplinary action in paragraphs (a), (b), (c), or (d) of s. 230.80(2), Stats. Additionally, complainant was considered for a vacant Industries Supervisor 1 position and was offered the job after his complaint had been filed. In light of the job offer, it is difficult to assume even generally, that respondent had a retaliatory animus toward complainant for making a disclosure under the Whistleblower Law. Even if it were concluded that the reorganization had a negative impact on the complainant, nothing indicates that the reorganization plan was promulgated so as to retaliate against the complainant for his protected activities.

May 11, 1988 Directive Prohibiting Entry into WCI (Whistleblower and Public Employe Safety and Health)

Acting Warden Darrell Kolb directed Major Nickel to issue the May 11th memo which barred the entry of the complainant into Waupun Correctional Institution "until further notice." Major Nickel and Acting Warden Kolb were unaware of complainant's protected activity. Major Nickel has issued similar memos in the past whenever someone terminated their employment at WCI as well as when there was an investigation pending which directly affected institution security. Typically, employes who are involved in matters which also involves inmates, they are placed on leave with pay and barred from the institution so as to prevent any contact with the inmates until such time as the investigation has been completed.

The incident reports filed on May 11th by James Wegner and Dean Helwig identifying comments made by complainant about possible problems with inmates provided an appropriate basis for barring the complainant from the institution during the pendency of the investigation. The incident reports

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4 None of these consequences of the reorganization constitute a retaliatory "disciplinary action," which was interpreted by the Commission in Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88, as including a standard of "substantial or potentially substantial negative impact on the employe."

raised an issue of institution security and the possibility that inmates would be questioned as part of the investigation and that the inmates could conceivably be subject to pressures imposed by complainant if complainant were to be allowed in the institution during the investigation. On June 29, 1988, once the investigation had been completed, the complainant was permitted to reenter the institution.

Complainant was treated in the same manner as other persons who were the subject of comparable investigations involving WCI inmates. The denial of entry to WCI did constitute an adverse employment action under the Public Employe Safety and Health Law, even though, as a practical matter, the complainant was able to carry out his responsibilities as to all other institutions. Additionally, the record shows that he was allowed into WCI during the period of May 11, 1988 to June 26, 1988 on one occasion to attend a meeting and was actually barred from entry on only one occasion. Other than this one occasion, the only other impact on complainant is that he could not deliver or pick up items at WCI.

The denial of entry to WCI is not a disciplinary action as defined under the Whistleblower Law (s. 230.80(2)(a), (b), (c), and (d)). Complainant was treated the same as other employes in similar situations, and there is nothing on the record to suggest that this action was taken in order to retaliate against complainant for his protected activities.

Conversely, the record shows that Major Nickels and Acting Warden Kolb were not aware that complainant had engaged in a protective activity. They both responded to the information about the May 11, 1988, incident and investigation involving complainant in the same way they would with any other employe. Namely, the employe is barred from the institution until the investigation is completed.

In light of the fact that the alleged retaliators (Nickels and Kolb) were unaware of complainant's protected activity (July 28, 19486 memorandum to Mr. Kurtz of DNR), the complainant has failed to establish a prima facie case that respondent retaliated against him. However, even if one applied the presumption of retaliation under the Whistleblower and the Public Employe Safety and Health Laws, the respondent has been able to overcome the presumption of retaliation by establishing that its conduct was consistent with the

policy as to how WCI responds when an investigation relating to prison security is undertaken.

Charge of Work Rule Violation (Whistleblower and Public Employe Safety and Health)

Complainant's final contention is that Mr. Scannell's May 23, 1988 memorandum scheduling the complainant for a pre-disciplinary hearing regarding a charge of violating work rule #1 was retaliatory. This memorandum represents an adverse employment action under the Public Employe Safety and Health Law and the alleged retaliator was aware of complainant's protected activity. It is difficult to assess whether there is a causal relationship between the adverse employment action and Mr. Scannell's knowledge of complainant's protected activity. Mr. Scannell had contacts with complainant as a result of grievances and other complaints relating to health and safety. Complainant was active, through his union, in health and safety matters. His aggressive efforts were noted and discussed by Mr. Scannell and Mr. Wegner. Given this scenario, it is plausible that Mr. Scannell's action could be retaliatory.

Support for the proposition that Mr. Scannell had a retaliatory animus may be found in the fact that his recommendation to suspend complainant for 5 days as a result of the work rule violation was reduced to a verbal reprimand. The question then becomes would the adverse action have been taken "in the absence of" the protected activity.

The relevant facts are that Mr. Luhm conducted an investigation of the matter at the request of Mr. Phil Kingston. Complainant was informed that an investigation was going to be conducted during his May 11, 1988 meeting with Mr. Scannell and Mr. Kronzer. Mr. Luhm did not know the complainant prior to the investigation. Mr. Scannell was not involved in the investigation in any way. Mr. Scannell did receive and review the report and set up the pre-disciplinary hearing based on Mr. Luhm's findings that complainant didn't follow institution procedures and file an incident report as requested by his supervisor.

This action of setting up a pre-disciplinary hearing as a result of Mr. Luhm's report is consistent with Mr. Scannell's practice when an employe is found to have possibly violated a work rule. This practice of scheduling a pre-disciplinary hearing, the fact that Mr. Scannell wasn't involved directly

in the investigation, and the fact that Mr. Luhm did not know the complainant or that he had participated in a protected activity, mitigate against a finding that a causal relationship exists.

While complainant argues that the new procedure for him to file incidents reports wasn't posted until May 13, 1988, (Finding #32) which was two days after the incident in Mr. Wegner's office (Finding #31), it is unrefuted that complainant was told twice on the day of the incident to file an incident report by Mr. Wegner. Whether he was aware of the new procedure or not he did not respond until May 23, 1988 (Finding #43) when he finally turned in a report. This is the same day that Mr. Scannell sent the memorandum to complainant scheduling a pre-disciplinary conference. Even if the Commission were to assume that a causal relationship existed, nothing in the record shows that Mr. Scannell's action was inconsistent with how a similarly situated employe would be treated or that complainant's protected activity was the substantial reason for scheduling the pre-disciplinary hearing. Consequently, the pre-disciplinary hearing would have been scheduled regardless of whether or not complainant participated in a protected activity.

In the case of the Whistleblower Law, to establish a prima facie case the complainant must show that he was subjected to a disciplinary action and that there is a causal connection between the discipline and the protected activity. If there is a causal connection, there is a presumption that the discipline was retaliatory. Complainant has failed to establish his prima facie case because the scheduling of a pre-disciplinary hearing is not among those disciplinary actions listed in paragraphs (a), (b), (c) and (d) of s. 230.80(2), Stats.

Even if it were assumed that a causal relationship existed, respondent has rebutted the retaliatory presumption by showing that complainant was not treated any differently than any other similarly situated employe. There is nothing to indicate that this is pretextual or that the investigation conducted by Mr. Luhm that resulted in the identification of the work rule violation was retaliatory.

ORDER

Based on the determination that there is no probable cause to believe that discrimination occurred because complainant engaged in protected activities, this matter is dismissed.

Dated: _____, 1991 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

GFH:rcr:gdt/2

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DONALD R. MURPHY, Commissioner

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