

STATE OF WISCONSIN

PERSONNEL COMMISSION

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JEFF HOLUBOWICZ,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES

Respondent,

Case No. ~~87~~⁸⁸-0097-PC-ER

* * * * *

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on a dispute as to the correct issue for hearing. The parties have been provided an opportunity to file arguments in support of their alternative proposals.

FINDINGS OF FACT

1. On March 29, 1988, the complainant filed an appeal of a decision denying the complainant's request to reclassify his position. That appeal was assigned case no. 88-0039-PC.

2. On May 26, 1988, the complainant filed a complaint of discrimination which read:

Because of my activities in the Union, through grievances, health and safety complaints, and the Whistleblower law, I have been selectively harassed through the work rule disciplinary process, and specifically threatened by James Wegner, BSI manager on 2-5-88 as the target of a contract killing and a set-up of disciplinary procedures by an ex-inmate employee by BSI. I would like a detailed explanation of the contract killing threat and removal of any discriminatory investigations from all personnel files.

The complainant also attached a memo to his complaint which read, in part:

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.

Such events as threats of "Contract Killing" to eliminate me, "set-ups" to have me fired and/or disciplined, and consorted [sic] efforts to downgrade positions in the workplace to undermine efforts of the Union. An example of this, is reflected in my test ranking for supervisor being eliminated by changing the position class through the guise of reorganization. Other examples of carried out threats are the downgrading of positions because of a recent reclass request at IDC and recent investigatory pre-discipline meetings. In the process, LTE and project employees have been hired and have bumped permanent employees out of job assignments while in the same job classification, yet with no permanent seniority.

The complaint was assigned case no. 88-0097-PC-ER.

3. By letter dated June 2, 1988, and as a consequence of the 60 day time limit imposed by §101.055(8)(c), Stats., a member of the Commission's staff directed the complainant to submit, inter alia:

Descriptions of all retaliation alleged to have occurred within 300 days of the date of May 26, 1988, along with the date the retaliation is alleged to have occurred. The description should fully describe the alleged retaliation including the identity of the alleged retaliator(s).

Complainant was also directed to file copies of any written disclosures which served as the basis for his retaliation claims. In response to the above letter, the complainant filed copies of a series of grievances, letter and memos (including some of those documents listed in Finding 5), most of which were either contractual grievances or were disclosures of alleged unsafe conditions.

4. By letter dated June 16, 1988, the investigator assigned to the case informed the complainant:

2. I identified three timely allegations of retaliation from among the materials you supplied to the Commission: 1) the "minor reorganization" as described in Mr. Scannel's memo of April 21, 1988 (whistleblower law, only); 2) the May 11th memo from Major Nickel of Waupun Correctional Institution (WCI) prohibiting your entry into that institution (whistleblower and public employe health and safety laws) and 3) the May 23rd memo from Mr. Scannel charging you with a violation of work rule #1 (whistleblower and public employe health and safety laws).

3. You contended that a March 28, 1988 letter you sent to the Wisconsin Employment Relations Commission, with a copy to the Personnel Commission, constituted a charge of illegal retaliation under the whistleblower law and the public employe safety and

health law in regard to Mr. Wagner's conduct on February 5, 1988. You alleged that on that date, Mr. Wagner threatened to have you killed or to have someone set you up for disciplinary action. Please note that even if the Commission agrees with your contention, the March 28th document would still appear to be untimely for a public employe safety and health claim based on an incident on February 5th.

* * *

Absent some indication from you within the next seven days that the above summary inaccurately describes the scope of your allegations of retaliation and protected activities, you should assume that the above allegations will be construed as establishing the scope of your complaint.

During our conversation, you contended that conduct subsequent to your May 26, 1988 complaint was also retaliatory. I directed you to file another complaint if you in fact wish to pursue those allegations.

The complainant did not indicate that the summary inaccurately described the scope of his allegations.

5. On July 13, 1988, the complainant filed his answers to interrogatories propounded by the respondent on June 24th. Interrogatory #9 read:

Identify each and every instance of retaliation that occurred as a result of the filing of any of the disclosures, grievances and/or complaints listed in Interrogatory 6 and 8 and specify the date the retaliation occurred.

Complainant's response to Interrogatory #9 was simply to attach copies of the following documents:

- a. The May 23, 1988 letter from Mr. Scannell charging complainant with violation of Work Rule #1.
- b. The May 11, 1988 memo prohibiting the complainant from entering Waupun Correctional Institution.
- c. A March 2, 1988 decision denying complainant's request for reclassification of his position from Industries Specialist 1 to IS 2 or 3.
- d. A written comment on complainant's performance evaluation, allegedly made on May 12, 1988.
- e. The April 21, 1988 memo from Mr. Scannell to all BSI staff informing them of a "relatively minor reorganization."

- f. A February 16, 1988 memo to complainant scheduling an investigatory interview relating to complainant's alleged violation of a work rule.
 - g. A written reprimand issued to the complainant on October 1, 1986.
 - h. A January 12, 1988 memo scheduling an investigatory interview relating to a traffic accident.
 - i. A September 2, 1986 letter charging the complainant with a violation of Work Rule #1.
 - j. A summary of an investigation completed on October 1, 1986 relating to charges of work rule violation filed against the complainant.
 - k. A March 26, 1987 letter charging the complainant with a violation of Work Rule #5.
 - l. A September 23, 1986 letter from the Division of Corrections Administrator in response to a complaint originating with the complainant.
 - m. A third step grievance filed on April 27, 1987, regarding the discharge of Dennis McCarthy.
 - n. A third step grievance filed on April 10, 1987, alleging the reassignment of certain duties from a permanent employe to a LTE, generating overtime to the LTE.
 - o. A third step grievance filed on August 18, 1987, alleging that overtime work was not being properly assigned.
 - p. A third step grievance filed on December 10, 1986, alleging that overtime work was not being properly assigned.
 - q. A second step grievance filed by the complainant on April 18, 1988, alleging the failure to assign overtime work to the complainant rather than to a LTE.
 - r. A second step grievance filed on April 18, 1988 alleging the reassignment of certain duties from a permanent employe to a LTE.
 - s. A third step grievance filed by complainant on September 28, 1987, alleging the failure to post vacancy for transfer.
6. On December 22, 1988, the investigator assigned to investigate the complaint issued an initial determination finding no probable cause to believe that the complainant had been retaliated against for engaging in protected activities. The initial determination described the complainant's allegations as follows:

Specifically, complainant alleges that the following actions constitute illegal retaliation: 1) a February 28, 1988 threat by James Wegner, complainant's second line supervisor, directed at the complainant (whistleblower law); 2) a "minor reorganization" (whistleblower law); 3) a directive prohibiting complainant's entry into the Waupun Correctional Institution (whistleblower and public employe safety and health laws); 4) a charge [described in Mr. Scannell's memo of Jay 23, 1988] against complainant of violating a work rule (whistleblower and public employe health and safety laws).

As to the reorganization, the initial determination addressed the following contentions:

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 for being 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 to 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.

7. Complainant filed a timely appeal from the initial determination, and contended that certain matters were not addressed by the initial determination.

OPINION

During a prehearing conference held in this matter on February 13, 1989, the complainant proposed the following issue for hearing:

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:

- 1) A February 28, 1988 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);
- 5) Denial of complainant's reclassification from Industries Specialist 1 to Industries Specialist 3 (whistleblower and public employe safety and health laws).

The respondent proposed an issue comprised of all of the complainant's proposal less 5). The complainant was provided an opportunity to "more specifically set forth what matters/allegations are encompassed within his initial proposal" in light of his contention that the initial determination had failed to deal with certain allegations. The parties were then provided an opportunity to file arguments in support of their proposed issues.

The complainant offered the following "specifics" relative to proposed subissue #1:

Continued threats of my life by BSI-management up to today, as it relates to the 2-28-88 "Contract Killing" threat by Mr. Wegner.

The complainant has failed to provide any "specifics" as to when these alleged threats occurred, who made them or what was threatened. Complainant has made no allegations that any such threats were made during the 60 day period immediately preceding the filing of his complaint on May 26, 1988.

§§101.055(8)(b) and 230.85(1).

To the extent that the complainant is now seeking to amend his May, 1988 complaint to include conduct occurring subsequent to that date, the Commission must apply § PC 2.02(3), Wis. Adm Code, which provides:

A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

Here, the complainant was specifically directed by letter dated June 16, 1988, to file another complaint of retaliation if he wished to pursue allegations of retaliation relating to conduct subsequent to his May 26th complaint. Complainant apparently chose not to do so, and will not be permitted to avoid the effect of the June 16th letter now by adding allegations to his previously filed complaint.

The complainant offered the following "specifics" relating to his proposed issue #2:

That the "minor reorganization" includes my duties elimination, downgrading positions at IDC, and the creation of positions in a higher classification by taking my formerly assigned duties and reassigning to newly created positions. Also, this issue includes my contention that I was never offered any supervisor position at IDC, because of Mr. Wegner's continued retaliation in denying offer.

Again, the complainant has not provided true specifics of these allegations, despite repeated opportunities to do so. Without these specifics, it is extremely difficult to make a comparison between complainant's current allegations and those three contentions relating to the reorganization that were addressed in the initial determination (Finding 6).

When the complainant filed his complaint he chose to file a general claim with few specifics. As a result, the complainant was sent a letter asking him for those specifics. He responded by attaching copies of a set of documents, but without an explanation. The investigator then drafted a letter setting forth his understanding of the allegations and asked the complainant to indicate if that understanding was incorrect. The complainant did not respond. The initial determination expanded upon the issue relating to the reorganization by addressing three specific allegations that were made during the course of the investigation. Now, the complainant wants additional contentions addressed, although precisely what they are and how they differ from the allegations addressed in the initial determination is unclear.

Given this history, the Commission declines to grant the complainant an opportunity to amend or clarify his complaint at this time. The complainant was provided such an opportunity earlier and failed to exercise it. To renew that opportunity now would require the Commission to conduct an investigation of any new allegations, unless the parties both agreed to waive that in-

vestigation. Adams v. DNR & DER, 80-PC-ER-22, 1/8/82. The potential for delay and the specific prior requests for the complainant to clarify his complaint militate against permitting a widening of the scope of this proceeding at this time.

The complainant offered the following "specifics" relative to proposed issue #3:

The denied entry to WCI was direct retaliation on WCI disclosure of formaldehyde fumes I made and that by denying access to Union-Management meetings (grievances filed) prevented the further disclosures of Health and Safety violations and also caused contractual violations.

For the same reasons as those described in the discussion regarding proposed issue #2, the complainant may not now allege that the decision(s) to deny complainant access to union-management meetings is also retaliatory. The Commission will consider the issue of whether the May 11, 1988 memo from Major Nickel barring the complainant from WCI was retaliatory. However, this issue does not extend to consideration of whether subsequent actions regarding complainant's access to WCI and which may or may not have been taken in reliance on the May 11th memo, were retaliatory.

The complainant offered the following "specifics" relating to proposed issue #4:

The work rule charge of 5-23-88 was ensued by respondent as discipline and is retaliation. Further disciplinary action without just cause and due process hearings have been taken against me since the original complaint, and that other employees I have represented have been unjustly disciplined as retaliation for their association with myself and as retaliation to me, for continued health and safety disclosures.

The work rule charge was an issue identified in the June 16, 1988 letter from the investigator and was addressed in the initial determination. The question of whether that charge, as represented by the May 23, 1988 memo from Mr. Scannell, was retaliatory, is an appropriate issue for inclusion in the issue for hearing. However, subsequent disciplinary investigations of the complainant's conduct and of other employees is clearly outside of the scope of the May 23rd memo. The complainant will not be allowed to amend his existing complaint to incorporate such allegations now.

The complainant offered the following "specifics" relating to his proposed issue #5:


As stated in my 5-24-88 letter to the Personnel Commission, I indicated all the above and the denial of reclassification as retaliation based on my disclosures of health and safety, and through whistleblower. I have also presented evidence in this complaint and at the reclass hearing, that actions taken by respondent, have eroded my job duties to justify the reclass denial, while assigning previous duties of mine to higher class employees in BSI (Industries Specialist 3) created to prevent my reclassification.

While it is true that the complainant did mention a reclass denial in the attachment to his complaint, he did not do so in a way which indicated that he was claiming that the denial of his reclassification constituted retaliation under the whistleblower law and the public employe safety and health law. The complainant was provided opportunities to clarify his claims but agreed to a statement of the scope of the claim which made no mention at all of a reclassification decision. For the same reasons as outlined above, the complainant's allegations relating to a denial of a reclassification request are found to be outside the scope of his original complaint and amendment of the original complaint to include such allegations will not be permitted.

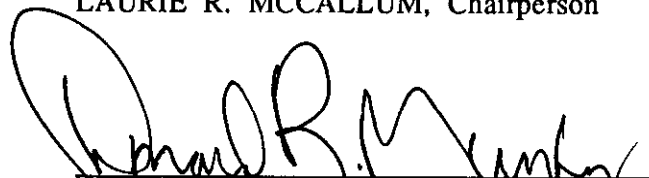
ORDER


The issue for hearing in this matter shall be that issue proposed by the respondent at the prehearing conference on February 13, 1989. The discussion set forth in the body of this decision shall establish further limitations on the scope of the hearing.

Dated: April 7, 1989 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner