STATE OF WISCONSIN PERSONNEL COMMISSION

VERNON E. SEAY,

Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Chancellor, UNIVERSITY OF WISCONSIN-MADISON

Respondents.

Case No. 89-0082-PC-ER

ORDER

After having reviewed the Proposed Decision and Order and the objections thereto and after having consulted with the hearing examiner, the Commission adopts the Proposed Decision and Order and adds the following for purposes of further explanation and clarification:

> Complainant has argued that Mr. Vetter's testimony at hearing that he was aware of a complaint filed by complainant "early in 1989" should control in regard to the question of when Mr. Vetter first became aware of the charge of retaliation filed by complainant. However, Mr. Vetter could not have become aware of such charge "early in 1989" since it was not filed until July 12, 1989. This apparent inconsistently, coupled with Mr. Vetter's obvious confusion when he was being questioned about complainant's filing of a contract grievance, a civil service appeal, and a charge of retaliation were factors in the hearing examiner's ruling that further testimony would be permitted for purposes of clarification. This testimony, rendered after Mr. Vetter had an opportunity to review certain of complainant's various filings, clarified that Mr. Vetter had knowledge of the contract grievance early in 1989 but did not have knowledge of the complaint until November of 1989 when he received a copy of a memo prepared by UW legal counsel. As discussed in the Proposed Decision and Order, complainant offered no evidence to rebut this, i.e., there is no evidence in the record that complainant or his union representative or any other individual provided this information orally or through documents to Mr. Vetter prior to November of 1989.

Dated: March 31, 1994 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

LRM:lrm

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or

within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

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Respondents.

Case No. 89-0082-PC-ER

PROPOSED DECISION AND ORDER

Nature of the Case

This is a complaint of whistleblower retaliation. A hearing was held on August 26 and 27 and October 7 and 8, 1993, before Laurie R. McCallum, Chairperson. The parties were permitted to file briefs and the briefing schedule was completed on January 5, 1994.

Findings of Fact

1. In August of 1987, complainant was appointed to a Facilities Repair Worker 1 (FRW 1) position at the University of Wisconsin-Madison, College of Agriculture and Life Sciences (CALS), Arlington Research Station (Station). The Station is a major agricultural research facility, located 40 miles from the City of Madison, at which animal and crop research is conducted, graduate and undergraduate students are educated, and outreach and extension services are provided. The Station receives more than 3,000 visitors each year; employs approximately 60 full-time staff members; includes more than 211 buildings at 14 sites within its 2,000 acres; and requires that construction, remodelling, and maintenance meet the high standards dictated by research protocols and rigid research specifications.

2. As an FRW 1 at the Station, complainant was responsible for painting and staining surfaces; maintaining and repairing wood, metal, and masonry;

maintaining, repairing, and constructing fences; and for general clean-up, proper tool and equipment handling, and proper driving practices. Complainant's first-line supervisor was Robert Vetter, a Craftsworker Supervisor; Mr. Vetter's first-line supervisor was Dale Schlough, the Associate Director of Research Stations and the Superintendent of the Station; the Assistant Superintendent of the Station was Dwight Mueller whose first-line supervisor was Mr. Schlough; and Mr. Schlough's first-line supervisor was Marsh Finner, the Director of the Research Stations. Mr. Finner was headquartered in Madison and generally was not present at the Station; Mr. Schlough was generally present at the Station for one to two hours at the beginning of each work day for a planning session; Mr. Mueller was generally present at the Station each work day but was primarily involved in supervising the activities of the farm crew; and Mr. Vetter was generally present at the Station each work day and was primarily involved in supervising the activities of the carpentry/maintenance crew to which complainant was assigned.

3. At all times relevant to this matter, the carpentry/maintenance crew was composed of 2 permanent Carpenter positions; 3 permanent FRW positions, including complainant's; and 1 summer Limited Term Employee (LTE) position. The carpentry/maintenance crew and the farm crew shared a building adjacent to the central headquarters building.

4. Mr. Vetter had substantial experience in building construction in both the public and private sectors; had worked as a FRW 3 at the Station from 1981 to 1985; had been appointed to the Craftsworker Supervisor position at the Station in 1985; was generally regarded by his superiors and subordinates as an excellent and fair-minded supervisor who held each of his subordinates to the same high standards, who freely offered and accepted suggestions, who trusted his subordinates to independently alter his instructions or project drawings if they thought the assignment could be accomplished in a better way, and who encouraged his subordinates to request reclassifications of their positions and to compete for higher level positions.

5. Charles Wibralski had held one of the Carpenter positions on the carpentry/maintenance crew since approximately 1983 and had extensive prior building construction experience. Mr. Wibralski felt that, during complainant's entire tenure at the Station, he was generally in a foul mood; he had a chip on his shoulder; he was unfriendly, uncommunicative, and

temperamental; he was careless in completing his assignments; he drove carelessly; and he used unsafe practices with power tools in the shop, e.g., cut rags on a band saw, used a joiner when he had loose strings dangling from his shirt, and ran boards backward through a router. On more than one occasion, complainant called Mr. Wibralski an obscene name. At one point, Mr. Wibralski told Mr. Vetter that he preferred not to work with complainant because complainant blew up so easily that he didn't feel safe. Mr. Wibralski was aware, during complainant's tenure at the Station, that complainant had filed a request for the reclassification of his position and that this request had been denied. The record does not show that Mr. Wibralski was aware, during this period of time, that complainant had filed a complaint of retaliation or had alleged that he was being retaliated against.

6. Robert Lytle was appointed to a FRW 1 position at the Station some time in 1987 prior to complainant's appointment. Mr. Lytle felt that, from the beginning of complainant's tenure at the Station, he was angry and unfriendly; and he displayed unsafe work practices such as cutting rags on a band saw, wearing loose-fitting clothes around power tools, backing a truck up too fast and too far, and running another driver off the road into a ditch as the result of inattentive driving. Mr. Lytle tried to avoid complainant at the work site. Mr. Lytle was not aware during complainant's tenure at the Station that complainant had filed a request for the reclassification of his position, an appeal of the denial of this reclassification request, or a complaint of retaliation, or had alleged that he was being retaliated against.

7. Cyril Bohne had been appointed to one of the Carpenter positions on the carpentry/maintenance crew some time in or around 1979 and had considerable prior experience in building construction. From the beginning of complainant's tenure at the Station, Mr. Bohne felt that complainant did not accept help or advice; that he would continue to perform a task incorrectly even when the correct way was explained or demonstrated to him; and that he did not always use power tools safely, e.g., he observed complainant cutting rags using a band saw. During complainant's tenure at the Station, Mr. Bohne was aware that complainant had filed a request for the reclassification of his position but was not aware that complainant had filed a retaliation complaint or had alleged that he was being retaliated against.

8. Charles Letsinger occupied an LTE Carpenter position at the Station each summer beginning in the summer of 1980. During the first summer he

worked with complainant, i.e., the summer of 1988, Mr. Letsinger observed that complainant and the other members of the carpentry/maintenance crew did not appear to like each other and that complainant would not talk to the other crew members. Mr. Letsinger attempted to greet complainant each morning of the first week of the summer and to engage complainant in conversation, but complainant refused to respond to him. Mr. Letsinger felt that the quality of complainant's work did not meet the standards expected by Mr. Vetter or the quality level of the work completed by other crew members. During complainant's tenure at the Station, Mr. Letsinger was aware that complainant had filed a request for the reclassification of his position but was not aware that complainant had filed a complaint of retaliation or had alleged that he was being retaliated against.

9. Kenneth Barclay was appointed to a FRW 2 position at the Station in November of 1988. Mr. Barclay had previous experience as a FRW at the UW-Madison Wisconsin Union and the UW-Center Richland Center and previous building construction experience. When he first started working at the Station, Mr. Barclay and complainant got along but, by the summer of 1989, they had developed a mutually antagonistic relationship and Mr. Barclay requested of Mr. Vetter that he not be assigned to work with complainant. Some time in 1989, Mr. Barclay was assigned to repair roof shingles on a tall tobacco shed building. Mr. Barclay completed this assignment by himself using scaffolding. Complainant had originally been assigned this project but had refused to do it because he felt it was was unsafe to work so high off the ground and because he felt that he couldn't handle a 40-foot ladder by himself. During complainant's tenure at the Station, Mr. Barclay was aware that complainant had filed a request for the reclassification of his position and that this request had been denied and became aware, on or after November 15, 1989, that complainant had filed a complaint of retaliation. During his tenure at the UW-Madison, Mr. Barclay had progressed, through reclassification, from the FRW 1 level to the FRW 3 level.

10. Mr. Vetter would assign members of the carpentry/maintenance crew to work alone or as a team of two depending on the workload at the time and the type of task to be completed. It was more common for crew members to be assigned to work alone. Mr. Lytle was assigned to hang gutters on a building by himself. This assignment took approximately two weeks to complete, required Mr. Lytle to work 18-20 feet from the ground and to install

the gutters in 20 foot sections. Mr. Lytle utilized scaffolding to complete this assignment. This scaffolding was available to all members of the carpentry/maintenance crew, consisted of 30-40 sections, and was used about 3 or 4 times a year. Mr. Lytle did not consider this to be an unusual assignment.

11. Mr. Vetter would assign members of the carpentry/maintenance crew to outside work during the winter, including digging post holes in frozen ground.

12. The carpentry/maintenance crew was assigned 3 trucks: one truck was used by Mr. Vetter, one truck generally contained fencing materials and tools and was used by the crew member(s) assigned fencing tasks, and one truck generally contained carpentry materials and tools and was used by the crew member(s) assigned carpentry tasks. If a carpentry/maintenance crew truck was not available, it was the practice to borrow a truck from the farm crew if they had one available.

13. It was Mr. Vetter's practice to pick up the paychecks of the crew members from the headquarters building, to distribute them to the crew members present in the carpentry/maintenance crew building when he returned to his office there, and to place the remaining paychecks under the blotter on his desk or in his desk drawer. It was the general practice for these remaining employees to go into Mr. Vetter's office upon their return to the building and to request their paychecks from him or to retrieve them from his desk or, if their check was not in Mr. Vetter's office, to go to the headquarters building and request it.

14. Tools were not assigned to individual crew members but were shared by crew members. It was the general practice to take a tool if no one else was using it or to ask a crew member who was using a tool if he was done with it.

15. During his entire tenure at the Station, complainant had a small painting business. This was common knowledge among his co-workers. It was the general practice for members of the carpentry/maintenance crew to share with each other information relating to opportunities for outside employment.

16. During complainant's 6-month probationary period, Mr. Vetter came to the conclusion that complainant was not as skilled in carpentry/maintenance as he had anticipated. As a result of this conclusion as well as complainant's expressed interests, Mr. Vetter began to assign him to perform painting tasks the majority of the time. Complainant's position

description called for him to perform painting tasks only 30% of the time. Painting assignments were generally performed by a single member of the carpentry/maintenance crew rather than by a team. In a performance evaluation completed by Mr. Vetter on February 25, 1988, he rated complainant's performance as satisfactory or more than satisfactory on all five rated factors and stated, "Vern has exhibited a good all around knowledge of work assigned to him, a willingness to learn more and an excellent attitude about all projects he has been involved in."

17. In January of 1989, complainant contacted Thomas Kiesgen, an organizer for Painter's Union Local 802, for assistance in obtaining a reclassification of his position to the Painter classification. At this point in time, both complainant and Mr. Kiesgen were unfamiliar with requirements for obtaining a change in the classification of a state civil service position.

18. Some time in late January or early February of 1989, a meeting was held at which Mr. Kiesgen, Mr. Vetter, Mr. Mueller, and Mr. Schlough were present. The purpose of this meeting was to discuss complainant's painting assignments and the effect of these assignments on the classification of his position. Once Mr. Schlough confirmed with Mr. Vetter that, in contradiction of complainant's position description, Mr. Vetter was assigning complainant to perform painting duties more than 30% of the time, Mr. Schlough directed Mr. Vetter to abide by the provisions of complainant's position description and to limit the percentage of time complainant spent on painting tasks to 30%. Mr. Vetter carried out this directive.

19. At or around this same period of time, Mr. Kiesgen filed a policy grievance relating to the classification of complainant's position on behalf of the Painter's Union. When complainant returned from vacation some time in February of 1989, Mr. Barclay told him his grievance had been denied. Mr. Barclay had learned this from Mr. Vetter who had been so advised by Mr. Kiesgen.

20. In a letter dated February 20, 1989, to David Prucha of the UW-Madison Classified Personnel Office, complainant stated as follows, in pertinent part:

> So that there can be no mistake, this letter will serve as my written request for an audit of my position and classification.
>
> Since on or about September 18, 1987, I have been working as a craft painter at the Arlington Research Station (UW College

> of Agriculture and Life Sciences). During this time I have been improperly compensated for my work and I have been classified as a Facility Repair Worker.
>
> Shortly after the issue of my classification was raised with my employer my job duties were changed and I was taken off painting completely. In spite of threats against my continued employment, I believe that it is only just that an audit be conducted and that I be properly classified and made whole for my past performance as a painter.

21. In a letter to Mr. Prucha dated March 2, 1989, Mr. Kiesgen stated as follows, in pertinent part:

> Please notify me of the status of your investigation into Vernon E. Seay's job as a painter and his improper classification. It is my understanding that you are conducting an audit, but I would like to be informed about the steps that are being taken and when a decision will be reached.
>
> Mr. Seay has been in touch with me continuously concerning this matter and he has been discussing it with fellow employees who verify that he is the painter at the Arlington Research Station. Mr. Seay has also engaged in other protected activities and it is our firm belief that the Employer has retaliated against him as a result. I am also aware that Mr. Seay has written you in a letter dated February 20, 1989 (copy enclosed for your convenience) and his supervisor, Bob Vetter, has informed me that he is aware that an audit is being conducted and that Vern Seay is involved in this matter. Because of our concern about retaliation, and for other reasons, please advise us of the identity of the persons with whom you have been in contact regarding this matter.

22. In a letter to Mr. Prucha dated March 14, 1989, complainant indicated that it was his understanding that Mr. Prucha had begun an investigation relating to the classification of complainant's position some time in the latter part of January of 1989, and stated as follows, in pertinent part:

> Quite frankly, not hearing from you during this entire time and having been constructively terminated as a painter within about 24 hours of the classification audit being initiated and known about by my supervisor and other employer representatives, leaves me feeling more than just a little uneasy about the process.
>
> Therefore, I am requesting a report on the status of your investigation.

23. On or around March 22, 1989, it came to Mr. Vetter's attention that complainant and Mr. Barclay had engaged in a verbal dispute which occurred when Mr. Barclay's personal tool box had fallen out of a truck which

complainant had been driving. It was Mr. Barclay's opinion that this would not have happened if complainant had not been driving carelessly. It was complainant's opinion that this would not have happened if Mr. Barclay would have properly secured his tool box in the truck. During their dispute, Mr. Barclay told complainant that he was going to "kick your ass." Mr. Vetter had a meeting with both complainant and Mr. Barclay and advised them that they were both responsible and that each of them could have acted to prevent the incident. During this same period of time, Mr. Barclay told complainant, while they were working together constructing a wall, that complainant had better do his part of the construction properly or he would "beat your ass."

24. In a letter to the Commission dated March 29, 1989, complainant stated as follows, in pertinent part:

> This letter will serve as notice of appeal in a matter involving a request for an audit of my position and classification.
>
> The audit was supposed to have started shortly after a request was made in the latter part of January 1989. However, after numerous telephone calls and letters I have not been contacted regarding this matter and I have no direct indication that anything is being done by the University of Wisconsin Classified Personnel Office. . . .
>
> At this time it appears that I will not get an impartial investigation from UW Classified Personnel and must now allege that the lack of an impartial investigation and the lack of a decision amounts to a constructive denial of the request for a classification correction.
>
> * * * * *
>
> I will also use this letter to allege and file a complaint that my employer has retaliated against me and continues to retaliate against me because of my lawful disclosures regarding my employment and because of my known involvement in the classification audit proceedings. I ask that this matter be taken up also during the course of your investigation of the above. If a more formal charge of discrimination is necessary, please so advise.

25. The Commission logged this letter in as a civil service appeal and assigned it Case No. 89-0032-PC. A copy of this letter was sent to Mr. Prucha and he received it on April 6, 1989, and did not forward or provide a copy to Mr. Vetter, Mr. Schlough, Mr. Finner,or Mr. Mueller or advise any of them of its contents. In accordance with its procedures, the Commission scheduled a prehearing conference in regard to this appeal. This prehearing conference

was conducted by Anthony Theodore, the Commission's General Counsel, on April 27, 1989, and present were complainant; Mr. Kiesgen; Mr. Prucha; David Ghilardi, a staff attorney for the Department of Employment Relations; and Cornell Johnson, a classification specialist for the Department of Employment Relations. The report prepared by Mr. Theodore states as follows, under the heading "Further Proceedings:"

> The prehearing conference was adjourned pending further proceedings with respect to the reclassification request and a possible meeting between management and appellant regarding the retaliation-type issues raised in appellant's March 29, 1989, appeal letter. Mr. Prucha will discuss this with management and they will advise Mr. Kiesgen whether a meeting will be arranged.
>
> It will be up to Mr. Kiesgen to notify the Commission is he wishes to pursue the constructive denial claim. He should file another appeal if he wishes to contest the final decision on the reclassification denial, or he should advise if this matter has been satisfactorily resolved.

The Commission sent a copy of this report only to those present at the conference. During the conference, it was explained to complainant and Mr. Kiesgen that reallocation of complainant's position to the Painter classification could result in the abolishment of complainant's position or could result in complainant having to compete for the position. Complainant and Mr. Kiesgen interpreted this information as a threat that complainant could lose his job if he continued to seek a change in the classification of his position.

26. Mr. Kiesgen had assisted complainant in drafting his letter of appeal. It was Mr. Kiesgen's understanding that the retaliation alleged by complainant consisted of removal of painting duties, assignment to work alone rather than as a member of a team, assignment of onerous tasks such as hanging gutters on a building by himself and moving a 40-foot ladder by himself, being isolated by his co-workers, and being the target of threatening statements made to him by Mr. Barclay when Mr. Barclay's personal tool box fell from a truck that complainant was driving and when he and Mr. Barclay were constructing a wall together.

27. Some time during April of 1989, Mr. Barclay proposed to Mr. Vetter that the summer work schedule for the carpentry/maintenance crew be modified to start and end an hour earlier each day. Mr. Vetter mentioned this proposal individually to members of the crew. At some point, complainant

became aware of this proposal and initiated a conversation with Mr. Vetter in which complainant indicated that such a change would interfere with his child care arrangements. This proposed schedule change was never approved or implemented.

28. It was common for members of the carpentry/maintenance crew to gather in the area outside Mr. Vetter's office. Some time during May of 1989, Mr. Barclay interfered with complainant's entry into Mr. Vetter's office by placing his leg in complainant's path. Mr. Vetter did not notice this interaction. When complainant eventually entered Mr. Vetter's office, he asked Mr. Vetter "what's going on here--what's this all about?" Complainant did not explain to Mr. Vetter what the cause for his concern was because he had assumed that Mr. Vetter had seen or heard the incident.

29. In a memo to Mr. Cornell Johnson of DER dated May 25, 1989, Mr. Prucha stated as follows, in pertinent part:

> Under cover of this memo I am forwarding to you the summary and conclusions of the classification review of the Facilities Repair Worker 1 position occupied by Vernon Seay.
>
> While it appears that Mr. Seay did function as a Painter for a time in order to catch up on a back log of painting work at Arlington, it is clear from discussions with CALS managers that there is no intention to maintain a Painter position at Arlington. Therefore, it would appear that even if it were decided that the position in question must be allocated to the Painter classification, it would immediately be abolished and the FTE would be identified as a Facilities Repair Worker.
>
> Although things are moving slowly, we are steadily working toward a meeting with CALS management and Mr. Seay and his representative T. Kiesgen. The purpose of the meeting will be to discuss the employe's allegations of retaliation as well as our classification review findings and conclusions.

30. A meeting was conducted on June 13, 1989, which was attended by Mr. Finner; Greg Jagodinski, personnel manager for the College of Agriculture and Life Sciences (CALS); Mr. Prucha; Mr. Schlough; Mr. Kiesgen; and complainant. Mr. Kiesgen began the meeting by initiating a discussion of the reclassification and work assignment issues. Mr. Prucha explained, as had been explained during the Commission's prehearing conference, that it was possible that, if complainant were successful in obtaining a change in the classification of his position to the Painter series, he could be laid off or required to compete for this position. Complainant and Mr. Kiesgen expressed

their unhappiness with this information. During the course of the meeting, Mr. Prucha asked complainant and Mr. Kiesgen to provide information relating to the allegation of retaliation but was advised by Mr. Kiesgen that he and complainant were not interested in discussing the details of the retaliation allegation at that time. Neither Mr. Kiesgen nor complainant ever provided this information to Mr. Prucha. Neither Mr. Mueller nor Mr. Vetter nor anyone from DER was advised what was discussed at this meeting.

31. In a letter dated June 15, 1989, to Daniel Wallock, Administrator of DER's Division of Merit Recruitment and Selection, complainant stated as follows, in pertinent part:

> In a meeting on June 13, 1989 I was informed by a spokesperson for my employer, the University of Wisconsin-Madison College of Agricultural Life Sciences (Agricultural Research Station, 620 Babcock Drive, Madison, WI 53706-1210), that I have been working outside of my classification. Further I was told that a Facilities Repair person can not logically and gradually evolve into the painter classification in which I have been working. My employer informs me that he doubts I have rights to such job.
>
> A classification audit of my position has been conducted by UW Classified Personnel and I am told that Classified Personnel's recommendation regarding this audit is now being reviewed by the Department of Employment Relations Classification Analyst, Cornell A. Johnson. However, I was informed on June 13th by my employer and his representatives that if DER or the Personnel Commission insist on a painter position the employer will abolish the job. The impact of this, I am told, would be that I would be out of a job. I view this as an attempt to interfere with, restrain and coerce me in the exercise of my legal rights, and it is part of an effort to retaliate against me for disclosing information which is protected under 230.83, Wis. Stats., and other applicable law.
>
> I do not choose to have prejudice interfere with legal proceedings that are being conducted on my behalf, but since my employment began primarily with painting operations in mind and since the former incumbent in the position I took was classified as a painter and for other reasons, it appears that my employer has and is raising the issue that my appointment was invalid.
>
> Assuming for the sake of argument that I was employed or appointed contrary to Wis. Stats., State Employment Relations, Chapter 230, Subchapter 11 Civil Service hiring then I should be entitled to be made whole by the appointing authority for all lost compensation and expenses. For that reason I am requesting that the appropriate State of Wisconsin Agency make a determination regarding my rights to compensation and expenses in connection

with my job appointment and Wis. Stats., 230.41 Invalid Appointments.

This letter indicates that copies had been sent to Mr. Kiesgen, Mr. Prucha, Mr. Finner, Mr. Jagodinski, Mr. Schlough, Ed Corcoran, Constance Beck, Mr. Theodore, Mr. Ghilardi, Mr. Johnson, and Chad Spawr.

32. Mr. Wallock responded to this letter in a letter to Mr. Kiesgen dated June 29, 1989, in which he wrote as follows, in pertinent part:

> Mr. Seay's letter indicates that it appears that his employer has raised the issue that his appointment was invalid. In fact, the UW Madison has not indicated this. UW Classified Personnel conducted a classification audit of Mr. Seay's position and in doing so, determined that Mr. Seay had been assigned painting duties which constituted more than 50% of his work assignments. When this error was discovered, it was corrected by assigning duties to Mr. Seay that were more appropriately performed by a Facilities Repair Worker since that was Mr. Seay's correct classification title. The issue of an invalid appointment would only arise if Mr. Seay had been appointed to a Painter position based on his employment eligibility as a result of taking the Facilities Repair Worker examination. Furthermore, s. 230.41, Stats., Invalid appointments, deals only with pay issues relating to invalid appointments and operates only when a person has performed work in a position that is determined to have been filled contrary to Chapter 230, Stats. No such determination has been made in Mr. Seay's case.
>
> Finally, if Mr. Seay views any personnel actions taken by UW Classified Personnel to be retaliation, he should contact the State Personnel Commission, which, under s. 230.85, Stats., has enforcement authority for s. 230.83, Stats., Retaliatory action prohibited.

This letter indicates that copies were sent to Constance Beck, Mr. Ghilardi, Mr. Johnson, Mr. Prucha, Chad Spawr, Mr. Theodore, and complainant.

33. On July 12, 1989, complainant filed a charge with the Commission alleging whistleblower retaliation which stated as follows, in pertinent part:

> This charge will amend and supplement my initial charge which was sent to the Personnel Commission in a letter dated March 29, 1989.
>
> Beginning on or about January 23, 1989, my Employer became aware that I was involved in matters pertaining to an investigation of my job classification and appointment. Subsequent to that time and continuing to date my Employer has attempted to interfere with, restrain and coerce me in the exercise of my legal rights by threatening to penalize me and penalizing me because I made lawful disclosures, continue to assist in making lawful disclosures, and because I filed a

> retaliation complaint. My Employer has engaged in a pattern of conduct towards me that is designed to curtail my involvement in classification audit proceedings and to keep these proceedings from reaching a logical conclusion.
>
> On or about June 13, 1989 the Employer, through its representatives David Prucha, Greg Jagodinski, Marsh Findley (sic) and Dale Schlough, made definite and certain its purpose to retaliate against me for exercising rights as a State employee by disclosing improper employment practices and a possible and probable violation of Chapter 230, Wis. Stats. On this date the Employer threatened to abolish my position and cause my layoff. This threat was in addition to previous threats of layoff connected with lawful protected activities.
>
> My employer has also retaliated against me over a period of time through the means of having my supervisor, Robert Vetter, alter my job duties, demote me, make my work assignments onerous, attempt to have me constructively terminated from my job classification, threaten me with complete termination if my audit request is unsuccessful, refuse to become involved when I received physical threats from a fellow employee, discuss my activities with other employees, and by other means. My potential for layoff was also brought to my attention by employer representative Ed Corcoran.

34. In a letter dated July 19, 1989, Barbara Wedel, the Commission's Equal Rights Assistant, sent a copy of this charge to Gail Snowden, a member of the UW-Madison's legal staff. This was received by the Office of Administrative Legal Services of the UW-Madison on July 20, 1989.

35. Some time in July of 1989, complainant was working on a fencing project in the sheep unit. After complainant had hung the fence gate, Mr. Barclay drove toward complainant at an excessive rate of speed, drove up to the gate, removed it, threw it to the side, and drove off, through the opening created by the removal of the gate, toward the headquarters building. A short time later, Mr. Vetter came by in his truck from the direction of the headquarters building and directed complainant to pick up and hang the gate. Complainant did not advise Mr. Vetter of Mr. Barclay's actions and Mr. Vetter was not aware of them through any other source.

36. Some time in August of 1989, complainant discovered pictures of Eugene Parks, an individual who had received attention in the Madison media as the result of his civil rights activities and his employment action against the City of Madison, taped to his locker. Complainant took these pictures and

placed them on Mr. Vetter's desk with a description of where complainant had found them. Mr. Vetter did not understand the significance of these pictures.

37. Some time in August of 1989, complainant discovered ads for painting services taped to his truck. Complainant took these pictures and placed them on Mr. Vetter's desk with a description of where he had found them.

38. Some time in August of 1989, complainant discovered that red paint had been poured into his lunch box. Complainant advised one or more of his union representatives of this fact but this information was not brought to the attention of any of his supervisors or co-workers.

39. In a letter to Mr. Vetter dated September 8, 1989, complainant's physician stated as follows:

> Mr. Vern Seay will be requiring a leave of absence for medical reasons from employment beginning September 11, 1989. He will require a seven to 10 day period of absence for a medical illness which will require initiation of some medical therapy.

40. On a Leave Without Pay Request/Authorization form dated September 25, 1989, complainant's physician stated that "Mr. Seay will need some additional time away from his work place about 3-4 weeks. However it is possible for him to return earlier without restrictions." This request was approved by Mr. Finner on September 26, 1989.

41. In a letter to Mr. Finner and to Mr. Jagodinski dated October 20, 1989, complainant confirmed his understanding that his leave of absence had been extended to November 15, 1989, and added that his "extended leave of absence from my work at the Arlington Research Station is necessary and is being taken under the advice of my medical doctor."

42. On a prescription form dated November 15, 1989, complainant's physician indicated that "Mr. Seay may return to full-time work today without limitations." Complainant's supervisors were never made aware of the specific medical basis for complainant's medical leave.

43. In a memo dated November 15, 1989, Ms. Snowden advised Mr. Prucha, Mr. Jagodinsky, and Ed Corcoran that complainant had filed two cases with the Commission, i.e., the appeal of the denial of his reclassification request and the charge of whistleblower retaliation, and stated as follows, in pertinent part:

> I am handling the case which alleges retaliation in violation of the whistleblowing law. I will file a motion to dismiss that case for failure to state a cause of action. The complaint alleges that Greg Jagodinsky, Marsh Findley, Dale Schlough and Robert Vetter retaliated against Mr. Seay for exercising his rights as a state employe to disclose improper employment practices. I may need to contact them in preparation for the motion to dismiss. Note that the investigation of this case will not take place before March, due to the backlog of cases before the Commission.

Mr. Vetter received a copy of this memo some time after November 15, 1989.

44. A copy of complainant's charge of whistleblower retaliation was served on respondent DER by the Commission on July 10, 1991.

45. On December 4, 1989, complainant was assigned to dig post holes by Mr. Vetter. There was approximately 11 inches of frost in the ground that day; the high temperature was 36° and the overnight low temperature had been 20°; other crew members were assigned to work outside that day; Mr. Vetter assisted complainant in digging these post holes and did not find the weather too cold or the ground too frozen; and other crew members had been assigned to dig post holes in frozen ground on colder days than this one.

46. On December 7, 1989, complainant was assigned by Mr. Vetter to build shelves in a closet in the headquarters building. After reviewing the construction plans prepared by Mr. Vetter, complainant concluded that the project could not be completed as specified by Mr. Vetter in his plans and completed the project in a different manner. Mr. Vetter did not object to complainant's approach but was of the opinion that the project could have been completed in accordance with his plans.

47. Members of the construction/maintenance crew sometimes attended a trade show held annually in Milwaukee. In 1988, Mr. Vetter inquired of complainant whether he wanted to go and complainant declined. Complainant was on vacation in 1989 during the trade show. Mr. Vetter did not ask complainant whether he wanted to go to the trade show in January of 1990 based on complainant's lack of interest in 1988. It was not Mr. Vetter's practice to ask the members of the crew whether they wanted to attend the trade show. Once an individual attended the trade show, an invitation was sent directly to that individual from the trade show thereafter. It was the practice of crew members, once they received their invitation, to ask Mr. Vetter for permission to attend. It was Mr. Vetter's policy to permit a crew member to use leave time to attend the show (approximately two hours on a Friday afternoon) and not to reimburse any expenses associated with attendance at the show.

48. On January 12, 1989, complainant discovered that manure had been placed around the rim of his coffee cup. Complainant did not bring this to the attention of any of his supervisors or co-workers.

49. On February 10, 1989, complainant had been assigned to use a particular truck. When he reached the truck, he discovered that the keys to the truck had been locked inside. Complainant did not bring this to the attention of any of his supervisors of co-workers.

50. On February 16, 1990, complainant was using a particular drill in the shop. When he set it down, Mr. Barclay took the drill and began using it himself without asking complainant if he was finished with it. Mr. Vetter was on vacation on February 16, 1990. Mr. Barclay had a habit of taking other crew members' tools without asking.

51. Mr. Barclay and Mr. Vetter rode to and from work together. Complainant followed much of the same route because he lived close to them. On May 17, 1990, complainant was driving home from work and was behind Mr. Barclay's vehicle on Pflaum Road in Monona. Mr. Vetter was a passenger in Mr. Barclay's vehicle. When Mr. Barclay signalled that he was going to turn left, complainant began pulling into the parking lane before reaching the intersection in order to pass Mr. Barclay's vehicle on the right. Mr. Barclay moved his car over to the right to prevent complainant from passing. Complainant had to slow down and move to the right and his tire hit the curb. Mr. Vetter was not aware that this had occurred at the time but complainant asked him about it at work the next day. Mr. Vetter advised complainant that he hadn't observed the incident and hadn't been aware that it had occurred.

52. Some time in May of 1990, Mr. Barclay had parked the truck he was using in the garage used for crew trucks in such a way that complainant did not have room to park his truck there. Complainant reported this to Mr. Vetter but Mr. Vetter did not consider this an incident of any consequence, particularly when there was ample room for parking in the general area.

53. In June of 1990, complainant made a comment to Mr. Barclay that he didn't like the fact that Mr. Barclay had failed to use a directional signal when the two of them had approached an intersection in their vehicles. Mr. Barclay responded by saying to complainant, "If I wanted any shit from you, I'd squeeze your head." Complainant did not report this to Mr. Vetter and Mr. Vetter did not become aware of this incident through any other source.

54. In July or August of 1990, complainant brought to the attention of Roger Quam, one of his union representatives, that he had not obtained his paycheck from Mr. Vetter on more than one occasion. On one pay day, Mr. Vetter had mistakenly left complainant's paycheck in the basket in the headquarters building. Mr. Vetter had mistakenly left materials in this basket on other occasions. Mr. Vetter did not fail to hand complainant his paycheck if complainant was present when Mr. Vetter returned from the headquarters building to his office. Complainant did not ask Mr. Vetter for his check or go into Mr. Vetter's office to locate his check. When Mr. Quam asked for complainant's paycheck, it was given to him.

55. On or around May 25, 1990, complainant was interviewed for another position by Steve Patterson, of the UW-Madison Housing Department. In Mr. Patterson's opinion, complainant was one of the top candidates, so he checked his references as well as those of the other top candidates. Mr. Patterson contacted Mr. Vetter who gave complainant a very positive reference although he did indicate, in response to a question relating to working as a member of a team, that complainant had developed a personality conflict with one of his co-workers. Mr. Vetter did not mention to Mr. Patterson that complainant had any "legal problems" or that he had filed legal actions. Mr. Patterson did not hire complainant for the position. Mr. Patterson never indicated to complainant during any point in the recruitment process that he would be the successful candidate.

56. On October 8, 1990, complainant discovered that his hat, which he kept in his locker, had been torn. Complainant reported this to one of his union representatives who reported it to Mr. Vetter. Mr. Vetter replaced the hat. Mr. Vetter was not aware who had done this but reported it to the members of the carpentry/maintenance crew, told them it was immature, and advised them that he didn't want to see similar incidents occur in the future.

57. After complainant provided notice to Mr. Vetter that he was leaving to take another job, Mr. Vetter did not place any marks on his calendar signifying the number of days complainant had left to work on the crew and did not mark a "smiley face" on his calendar for October 11, 1990, complainant's last day of employment on the carpentry/maintenance crew.

58. In October of 1990, complainant began employment as a FRW 2 for the Department of Military Affairs.

59. Mr. Vetter, during complainant's tenure on the carpentry/maintenance crew, was aware that complainant had filed a request for the reclassification of his position and that this request had been denied but was not aware that complainant had filed an appeal of this denial with the Commission. Mr. Vetter was aware of complainant's filing of a retaliation complaint solely through his receipt of a copy of the memo of November 15, 1989 (See Finding of Fact 43, above).

60. Mr. Quam was a union steward who was employed as an equipment operator at the Station. Mr. Schlough saw and spoke to Mr. Quam on nearly a daily basis during the relevant time period and Mr. Quam spoke freely and often to Mr. Schlough regarding Station employee concerns. During the relevant time period, neither Mr. Quam nor complainant nor anyone else at the Station mentioned to Mr. Schlough that complainant had any concerns that he was being treated unfairly or was being retaliated against. During the relevant time period, Mr. Schlough was aware that complainant had filed a request for the reclassification of his position and that this request had been denied and this denial appealed by appellant; and was aware generally that complainant had alleged that he had been retaliated against but was not aware of the nature of the incidents specifically alleged nor that complainant had filed a whistleblower complaint or a complaint of retaliation with the Commission.

61. In the late fall of 1989, as the result of discussions with Mr. Quam, Mr. Vetter, and members of the farm and carpentry/maintenance crew, it came to Mr. Mueller's attention that complainant and Mr. Barclay were frequently in conflict. In their discussions, Mr. Quam never attributed the conflict to complainant's request for a reclassification of his position and never mentioned that complainant felt that he was being retaliated against. Mr. Mueller scheduled two meetings: one with complainant and one with Mr. Barclay. Mr. Mueller discussed with complainant (Mr. Quam and Mr. Vetter were also present) both the conflict with Mr. Barclay and the complaints that he had received from members of the carpentry/maintenance crew and the farm crew that complainant engaged in unsafe driving practices. Mr. Mueller discussed with Mr. Barclay (Mr. Vetter was also present) the conflict with complainant and indicated to him that he wanted certain behaviors to cease. After these meetings, no further similar concerns were brought to Mr. Mueller's attention. During the relevant time period, Mr. Mueller was aware

that complainant had filed a request for the reclassification of his position and this request was denied and this denial appealed by complainant, but was not aware that complainant had alleged retaliation or had filed a complaint of retaliation. Also beginning in the late fall of 1989, Mr. Mueller received complaints from members of the farm crew that complainant was abrasive and from other employees relating to the quality of complainant's work.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(gm), Stats.

2. Complainant has the burden of proof as to all matters except those which give rise to the presumption, set forth at §230.85(6), Stats., that certain alleged actions were retaliatory.

3. Complainant has failed to sustain this burden.

4. Respondent has the burden, pursuant to §230.85(6), Stats., of rebutting, by a preponderance of the evidence, the presumption that certain alleged actions were retaliatory.

5. Respondent has sustained this burden.

6. The respondent did not retaliate against complainant in violation of Subch. III of Ch. 230, Stats., in regard to any of the incidents of alleged retaliation.

Opinion

The whistleblower law prohibits retaliation against state employees who have made a protected disclosure of improper governmental activities. The method of analysis is described in Morkin v. UW-Madison, 85-0137-PC-ER (11/23/88); aff'd Dane Co. Cir. Ct., Morkin v. Wis. Pers. Comm., 89-CV-0423 (9/27/89; and Sadlier v. DHSS, 87-0046, 0055-PC-ER (3/30/89); as follows:

> The method of analysis applied in prior Whistleblower retaliation cases is similar to that applied in the context of a retaliation claim filed under the Fair Employment Act (FEA). Under the FEA, the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.W. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.W. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981). This analysis is modified where the complainant

is entitled to a presumption of retaliation pursuant to §230.85(6), Stats.

> To establish a prima facie case for a claim of retaliation under the Fair Employment Act, 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. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. See Jacobson v. DILHR, Case no. 79-28-PC (4/10/81) at pp. 17-18, and Smith v. University of Wisconsin-Madison, Case No. 79-PC-ER-95 (6/25/82) at p. 5. Similar standards apply to a claim of retaliation under the whistleblower law except that the first element is typically comprised of three components: a) whether the complainant disclosed information using a procedure described in s. 230.81, Stats.; b) whether the disclosed information is of the type defined in s. 230.85(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 s. 230.80(2), Stats., replaces the term "adverse employment action" when reviewing a whistleblower complaint.

The Commission has already concluded that complainant has filed a protected disclosure. In an Interim Decision and Order issued November 25, 1992, the Commission ruled that both the March 29, 1989, letter from complainant to the Commission (See Finding of Fact 24, above) and the complaint filed by the complainant with the Commission on July 12, 1989 (See Finding of Fact 33, above), constituted protected disclosures within the meaning of the whistleblower law.

The second showing that complainant must make in regard to this element of the prima facie case is that the alleged retaliator(s) was aware of the protected disclosure(s). Here, the alleged retaliators, i.e., the individuals who allegedly carried out the acts of retaliation, are the members of the carpentry/maintenance crew and Mr. Vetter. The record does not show that any of the crew members, other than Mr. Barclay, knew or had reason to know that complainant had filed either of the protected disclosures or had alleged that he had been retaliated against as a result. The record shows that Mr. Vetter and Mr. Barclay first became aware of the general nature of complainant's retaliation allegations on or after November 15, 1989. Although complainant argues that Mr. Vetter's testimony relating to this issue was not credible, it is apparent to the Commission, in reviewing such testimony as a whole, that Mr. Vetter was confused by the number and variety of the actions

filed by complainant and, as a result, his testimony in regard to which of complainant's filings he was aware of was confused and inconsistent. The most plausible interpretation of Mr. Vetter's testimony was that he was aware of the grievance filed by Mr. Kiesgen on complainant's behalf (See Finding of Fact 19, above) because Mr. Kiesgen had told him about it, but that he was unaware of complainant's March 29 and July 12, 1989, filings with the Commission or that complainant had alleged that he had been retaliated against as the result of such filings until some time on or after November 15, 1989. Complainant does not show that Mr. Vetter had any reason to be aware of these filings or allegations at an earlier time, i.e., the record does not show that complainant or any of his union representatives provided this information to Mr. Vetter or that Mr. Prucha, Mr. Jagodinski, Mr. Schlough, Mr. Finner, or anyone else provided this information to him prior to November 15, 1989. The Commission concludes that complainant has failed to establish a prima facie case of whistleblower retaliation in regard to those incidents occurring prior to November 15, 1989, due to the failure to show that the alleged retaliators were aware of the protected disclosures prior to that date.

If complainant had satisfied the first element of the prima facie case, he would next have to show that the alleged acts of retaliation constitute "disciplinary action" within the meaning of §230.80(2), Stats., which states as follows, in pertinent part:

> (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. (emphasis added)

The Commission interpreted this language in Vander Zanden v. DILHR, 84-0069-PC-ER (8/24/88) as follows:

> The general term "penalty" [used in the §230.80(2) (intro), Stats.] must be interpreted in the context of the specific terms used within the definition, each of which has a substantial or potentially substantial negative impact on an employe.

It is apparent that complainant is arguing that the acts of retaliation he alleges (See A through W, beginning on page 23, below) constitute verbal or

physical harassment within this definition. It is apparent that most of the incidents, if viewed in isolation, would not meet the test set out in Vander Zanden. In view, however, of the requirement that the statutory language be liberally construed and in view of the impact the cumulative effect the alleged incidents could have on an employee, it is concluded, for purposes of this analysis, that complainant has satisfied this element of the prima facie case.

The final element of the prima facie case is the requirement that complainant establish a causal connection between the protected disclosure and the disciplinary action. Section 230.85(6), Stats., states as follows, in pertinent part:

> (a) If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.
>
> (b) Paragraph (a) applies to a disciplinary action under s. 230.80(2)(a) which occurs or is threatened within 2 years . . . after an employe discloses information under s. 230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

The net effect of the presumption was explained by the Commission in Morkin v. UW-Madison, 85-0137-PC-ER (11/23/88), as follows:

> The §230.85(6) presumption operates to shift the burden to the respondent to rebut the presumption that the disciplinary action was retaliatory by a preponderance of the evidence. This appears to short-circuit part of the McDonnell-Douglas-type analysis. Once the presumption is present, it supplies not only what is in effect a prima facie case, but also a presumption that the disciplinary action was retaliatory--i.e., the analysis moves directly to what is in effect the pretext stage. At this point, the respondent is required to rebut the presumption by a preponderance of the evidence. In considering whether the presumption has been rebutted, the Commission looks to all the evidence, including any evidence of pretext or retaliatory intent adduced by the complainant.

As a result, the facts here give rise to a rebuttable presumption that the incidents cited by complainant in support of this charge which are alleged to have occurred within two years of March 29, 1989, constitute retaliatory actions within the meaning of the Whistleblower law. The following is a recitation of the acts of alleged retaliation, as stated by complainant, with an

accompanying discussion of how and whether respondent met its burden to rebut the presumption created by §230.85(6), Stats. (Note that, although complainant failed to make out a prima facie case of retaliation in regard to those incidents pre-dating November 15, 1989, the following analysis discusses each of the incidents of alleged retaliation).

A. In January, 1989, in response to my request to have my position reclassified from a Facilities Repair Worker to a Painter, Mr. Vetter removed me from painting duties. In January, 1989, I discussed my classification problems with Vetter, Barclay, and others that I worked with.

As concluded by the Commission in the Interim Decision and Order referenced above, this occurred prior to March 29, 1989, and, therefore, could not have been in response to the protected disclosures filed by complainant.

B. In March, 1989, Barclay threatened to "beat my ass", or words to that effect on several occasions. I informed Vetter of Barclay's threats. Vetter declined to intervene in any way.

Since these incidents occurred prior to March 29, 1989, they could not have occurred in response to complainant's protected disclosures. In addition, Mr. Vetter did investigate the one incident which complainant brought to his attention (See Finding of Fact 23, above); concluded that both complainant and Mr. Barclay were at fault: complainant by driving too fast and Mr. Barclay for not properly securing his tool box in the truck; and counselled each of them that they could have acted to prevent the incident. The record does not show that only Mr. Barclay was at fault, i.e., the record shows that complainant had a practice of driving carelessly and with excessive speed; does not successfully rebut the testimony that complainant was driving too fast when the incident occurred; and does not establish that Mr. Vetter's handling of this incident was unreasonable or otherwise consistent with an intent to retaliate against complainant.

C. In April, 1989, there was a change in work schedules. Vetter discussed these changes with other co-workers, but not with me.

Since, as concluded above, Mr. Vetter did not become aware of complainant's protected disclosures until November 15, 1989, or thereafter, this action could not have been taken in retaliation for such disclosures. Even if Mr. Vetter had been aware of these disclosures at this time, the record shows that a proposal was presented to Mr. Vetter that the summer work schedule be

changed but the record does not substantiate complainant's contention that Mr. Vetter had discussed this proposal with all of the other crew members before it came to complainant's attention and he initiated a conversation with Mr. Vetter to express his concerns. In addition, the record shows that the schedule change was never approved or implemented. (See Finding of Fact 27, above)

D. In May, 1989, I was standing at Vetter's office door. Barclay attempted to trip me, and otherwise tried to provoke a fight. I objected to Barclay's actions. Mr. Vetter did not look up from his desk and ignored my objections.

The record does not show that Mr. Vetter was aware of the specifics of this incident or should have been so aware. It was common for the crew members to congregate and talk and joke and move around just outside Mr. Vetter's office door. Therefore, it would not be unusual for the sounds of movement and the sounds of loud conversation to occur and for Mr. Vetter to tune them out. The record shows that, when complainant entered Mr. Vetter's office after the incident occurred, he did not describe the incident to Mr. Vetter but simply asked Mr. Vetter what was going on. As concluded above, this incident could not have occurred in response to complainant's protected disclosures, because neither Mr. Barclay nor Mr. Vetter was aware of them at this point in time. In addition, even if Mr. Vetter was so aware, the record does not show that he was aware of the incident or should have been aware of it. (See Finding of Fact 28, above).

E. In July, 1989, Barclay attempted to run me down with a truck. He then pulled the truck up to a gate. Barclay removed the gate and threw it down on the ground. Barclay then drove away. A few minutes later Vetter appeared and told me to pick up the gate.

As concluded above, this incident could not have occurred in response to complainant's protected disclosures, because neither Mr. Barclay nor Mr. Vetter was aware of them at this point in time. However, even if Mr. Vetter had been aware of the disclosures, the record does not show that he was ever made aware of this incident or that he colluded with Mr. Barclay in regard to this incident. (See Finding of Fact 35, above).

F. In August, 1989, on at least two (2) occasions, there were pictures of Eugene Parks taped to my locker. I placed these pictures on Vetter's desk with a description of where I had found them. Vetter took no action.

As concluded above, these actions could not have been in response to complainant's protected disclosures, because the record does not show that any of the crew members or Mr. Vetter was aware of them at this point in time. In addition, even if Mr. Vetter was aware of the disclosures, the record does not show that Mr. Vetter understood the intent of these pictures to be derogatory or threatening to complainant; or that complainant explained to Mr. Vetter the significance he attributed to these pictures or the action he wanted Mr. Vetter to take in response to them. (See Finding of Fact 36, above).

G. In August, 1989, on at least three (3) occasions, there were newspaper advertisements stating "Painter wanted," or words to that effect, taped to the outside of my truck. I placed these ads on Vetter's desk with a description of where I had found them. Vetter took no action.

As concluded above, these actions could not have been in response to complainant's protected disclosures, because the record does not show that any of the crew members or Mr. Vetter was aware of them at this point in time. In addition, even if Mr. Vetter was aware of the disclosures, the record does not show that he understood the intent of these ads to be derogatory or threatening to complainant, particularly in view of the fact that crew members frequently exchanged information among themselves about outside employment opportunities; and the record does not show that complainant explained to Mr. Vetter the significance he attributed to these ads or the action he wanted Mr. Vetter to take in response to them. (See Findings of Fact 15 and 37, above).

H. In August, 1989, on at least one (1) occasion, I found red paint had been poured into my lunch box. Because of this harassment and the other harassment described above, I was told to take eight (8) weeks off by my doctor.

The record shows that this action could not have been taken in response to complainant's protected disclosures, because neither the crew members nor Mr. Vetter were aware of the disclosures at this point in time. Even if Mr. Vetter was so aware, the record does not show that Mr. Vetter was ever told of this incident or ever became aware of this incident. In addition, the record does not show that Mr. Vetter was ever made aware of the basis for complainant's medical leave. (See Findings of Fact 38-42, above).

I. On December 4, 1989, Vetter assigned me to dig a post hole alone. There was 11" of frost in the ground, and the temperature

was -5 degrees with the wind chill. I was the only employee assigned to work outside.

The record shows that other crew members received similar if not more onerous assignments in cold weather; that the temperature that day actually ranged from 20° to 36°F; that other crew members were assigned to work outside that day; and that Mr. Vetter actually assisted complainant in carrying out the assignment that day. (See Findings of Fact 11 and 45, above).

J. On December 7, 1989, Vetter assigned me a shelving project. Based on my experience in carpentry, I knew from the specifications Vetter gave me that the project could not be accomplished. When I told Vetter this, he just shrugged and smiled.

The record shows that the project could have been completed in the designated way; that Mr. Vetter expected crew members to modify his plans within their discretion without obtaining his prior permission; and that other crew members understood this and practiced this. (See Findings of Fact 4 and 46, above).

K. In January, 1990, my co-workers attended a trade show in Milwaukee. I was not invited. When I asked Vetter if this was an oversight he said, "No, it was my doing."

The record shows that Mr. Vetter brought the trade show to complainant's attention in 1988 but complainant expressed no interest in going; and that Mr. Vetter did not "invite" a member of the crew to attend but approved leave for him if he decided to go in response to an invitation he had received from the sponsors of the trade show. The record does not show that Mr. Vetter treated complainant in a manner different than he treated the other members of the crew in this regard or that his assumption that complainant did not have an interest in attending the trade show was unreasonable. (See Finding of Fact 47, above).

L. On January 12, 1990, I found that manure had been placed around the side of my coffee cup.

The record does not show that Mr. Vetter was ever told of this incident or ever became aware of this incident. (See Finding of Fact 48, above).

M. On February 10, 1990, I was assigned to use a particular truck. Someone had locked the keys inside the truck.

The record does not show that Mr. Vetter was ever told of this incident or ever became aware of this incident. (See Finding of Fact 49, above). In

addition, February 10, 1990, was a Saturday, not a work day for the carpentry crew.

N. On February 16, 1990, I was using a drill in the presence of Barclay and Vetter. Barclay knew I was using the drill, but nonetheless took it away so I could no longer use it. Vetter watched this occur and simply walked away.

The record shows that Mr. Barclay had done this to other crew members; that tools were not assigned to individual crew members but were shared among the crew; that Mr. Vetter was on vacation on February 16, 1990; and, that, even if Mr. Vetter had been present, the record does not show that he was aware that Mr. Barclay took a drill that complainant had been using and that complainant objected to it. (See Findings of Fact 14 and 50, above).

O. On May 17, 1990, I was driving my station wagon on Pflaum Road. Barclay and Vetter were in another vehicle, with Barclay driving. Barclay cut me off sharply in traffic. I was forced to drive up on to the curb to avoid a crash. When I questioned Vetter the next day he shrugged, smiled, and said, "I wasn't driving."

The record shows that Mr. Vetter was not aware of the incident when it occurred and, as a consequence, did not attribute much credence or significance to complainant's relation of it to him at the work site the next day. It should also be noted that, by this time, it was apparent to Mr. Vetter that Mr. Barclay and complainant had developed a very antagonistic personal relationship; that Mr. Vetter attributed this primarily to a personality conflict, and, as a result, did not investigate every disagreement or allegation; and that Mr. Vetter was justified in attributing this to the attitudes and behaviors of both complainant and Mr. Barclay. (See Finding of Fact 51, above).

P. In May, 1990, Barclay would not allow me to park in the garage with other trucks. I informed Vetter. Vetter smiled and took no further action.

As with O., above, Mr. Vetter did not attribute much significance to this dispute in view of the fact that there was ample room for complainant to park his truck in the area and in view of the fact that he attributed this to the ongoing personality conflict between complainant and Mr. Barclay. (See Finding of Fact 52, above)

Q. On June 25, 1990, Barclay stated that he was going to "squeeze my head until shit comes out."

The record shows that the confrontation resulted from another disagreement about driving practices; and that what Mr. Barclay actually stated was, "If I wanted any shit from you, I'd squeeze your head." The record does not indicate that information about this incident was ever provided to Mr. Vetter. (See Finding of Fact 53, above).

R. In July and August, 1990, Vetter stopped giving me my check with the other men. I asked Steward Roger Quam for assistance. Quam had to go to Vetter's office specifically to ask for my check.

The record does not show that Mr. Vetter treated complainant in a different manner than he treated other crew members in this regard, i.e., the record does not show that complainant was present but passed over when Mr. Vetter handed paychecks to other crew members or that Mr. Vetter failed or refused to give complainant his check when he requested it; the record shows that, although Mr. Vetter did leave complainant's paycheck in his basket in the headquarters building on one occasion, he had left materials in this basket before and other crew members had gone to the headquarters building on occasion to request their paychecks; and the record shows that other crew members, if not present when complainant handed out checks, made it a practice to retrieve their checks from Mr. Vetter's office or the headquarters building and none of them thought that it was a big deal. (See Finding of Fact 54, above).

S. In August, 1990, I was interviewed for another position at UW Housing by Steve Patterson. Patterson told me he contacted Vetter for a reference, and that Vetter told him that I had legal problems and a conflict with some of my co-workers. Patterson told me he didn't hire me based on what Vetter said.

The record shows that complainant had developed conflicts with other crew members and that these pre-dated his protected disclosures; and that Mr. Vetter did not mention any "legal problems" or complaints to Mr. Patterson. (See Finding of Fact 55, above). It should also be pointed out that this interview took place in May of 1990, not August.

T. On October 8, 1990, I found that someone had destroyed my hat. I told Mike Pearson, Chief Steward for Local 171, AFSCME. Later that week Vetter brought me a new hat.

The record shows that Mr. Vetter advised the crew members that this was immature and inappropriate and obtained a new hat for complainant.

U. On October 11, 1990, was my last day of work at the Agricultural Research Station. I observed that Vetter had drawn an 'X' on his calendar for each day between the time I gave notice of leaving and the time I left. Vetter had drawn a smiling fact (sic) on his calendar on the first day after I left.

The record indicates that there were no such markings on Mr. Vetter's calendar. (See Finding of Fact 57, above).

V. Throughout the period January, 1989, to October, 1990, I had continuing problems with . . . work assignments . . . Regarding work assignments, Vetter often gave me no work to do despite numerous requests. When work was assigned, I was always assigned to do it alone. This was not the practice prior to the time I requested reclassification. These work assignment difficulties are in addition to the specific onerous or impossible work assignments described above.

The record shows that the crew did not always have enough work to do and many crew members were occasionally not busy; that complainant worked alone and as a member of a team, as did the other crew members, depending on the nature of the task and the qualifications of the crew members; and that complainant had always worked alone when he had been assigned painting duties the majority of time prior to January of 1989. Complainant offered as examples of unusually onerous assignments the assignment to hang gutters alone on a tall building but the record indicates that Mr. Lytle carried out a similar assignment; and the roofing of a tobacco shed which complainant refused to do but which Mr. Barclay completed by himself.

W. Throughout the period January, 1989, to October, 1990, I had continuing problems with. . . transportation. . . . Regarding transportation, I lost the use of a truck which had regularly been assigned to me prior to my request for reclassification. Subsequent to my request for reclassification, the truck was assigned to Barclay and I had continual difficulty obtaining the use of a vehicle. On a number of occasions I was unable to do my work in outlying areas because I had no vehicle.

The record shows that there were more members of the carpentry/maintenance crew than there were trucks assigned to this crew; that Mr. Schlough had told the crew members that there was a truck shortage and they would have to work around it; that, as a result, it was unreasonable for complainant to expect and to request that he be permanently assigned to use the "blue Chevy," the truck that he preferred to use; that other crew members, when a truck was not available, asked the farm crew to use a truck and it was, as a result, not unreasonable to expect complainant to follow the

same procedure. The record does not show that the "blue Chevy" was assigned to Mr. Barclay or to any crew members exclusively or permanently at any time.

In order to rebut the presumption of retaliation created here, the respondent would have to show that an incident was not a retaliatory action of physical or verbal harassment, or that the respondent did not have actual or constructive knowledge of the incident.

The record shows that neither Mr. Vetter nor any other supervisor had knowledge of the incidents described in paragraphs **D** (tripping), **E** (gate), **H** (red paint in lunchbox), **L** (manure on coffee cup), **M** (keys locked in truck), **N** (drill), **Q** (squeezing head statement), **and U** (smiling face on calendar), above.

The record shows that Mr. Vetter was aware of the incidents described in paragraphs **C, F, G, I, J, K, R, S, V, and W.** However, in regard to **C** (proposed schedule change), the record does not substantiate complainant's version of the incident, does not show that complainant was treated differently than other crew members in regard to this scheduling proposal, and, as a result, fails to show that an act of retaliatory harassment occurred here. In regard to **F** (Eugene Parks pictures) **and G** (painter ads), the record does not show that Mr. Vetter had any reason to consider the pictures of Eugene Parks or the painter ads which were taped to complainant's locker as an act of harassment requiring or deserving of investigation or intervention, or that complainant communicated to Mr. Vetter that he believed the taping of the pictures or ads to his locker was an act of harassment or that he wanted Mr. Vetter to investigate or intervene. The Commission concludes, as a result, that, even if this incident constituted an act of harassment, it would not be attributable to respondent. It should also be noted that, as concluded above, these incidents occurred prior to November 15, 1989, i.e, the date on or after which Mr. Vetter became aware that complainant had filed the protected disclosures.

In regard to **I** (post hole digging assignment), the record shows that complainant was not treated differently than any of the other crew members in regard to this assignment and that, in fact, Mr. Vetter performed the same work for at least part of that day. As a result, the record does not show that the incident constituted an act of retaliatory harassment. In regard to **J** (shelving project assignment), the record shows that, in assigning and monitoring this

project, Mr. Vetter followed his standard practice of expecting crew members to modify the plans he draws for them at their discretion; and that, contrary to complainant's contention, the project could have been completed in accordance with the plans originally drawn by Mr. Vetter. As a result, the record does not show that the incident constituted an act of retaliatory harassment. In regard to **K** (trade show), the record shows that it was not unreasonable for Mr. Vetter to conclude that complainant had no interest in attending the trade show in Milwaukee; and that, contrary to complainant's contention, the practice was not for crew members to be "invited" by Mr. Vetter to attend the trade show but for crew members to request and receive permission from Mr. Vetter to take a few hours' leave on a Friday afternoon in order to attend the show. The record does not show that this incident constituted an act of retaliatory harassment. In regard to **R** (paycheck distribution), the record does not show that Mr. Vetter either failed or refused to give complainant his check or that complainant was treated differently than other crew members in this regard. As a result, the record does not show that this incident constituted an act of retaliatory harassment. In regard to **S** (UW interview), the record shows that, contrary to complainant's contention, Mr. Vetter did not refer to "legal problems" in his conversation with Mr. Patterson, and that Mr. Vetter's reference to a "personality conflict" between complainant and a co-employee was an accurate reflection of the relationship which had developed between complainant and Mr. Barclay as the result of behavior exhibited by both of them both preceding and subsequent to the protected disclosures. As a result, the record does not show that Mr. Vetter's statements to Mr. Patterson constituted an act of retaliatory harassment. In regard to **V** (work assignments) **and W** (truck assignments), the record does not show that Mr. Vetter treated complainant differently in this regard than other crew members and, as a result, the record does not show that these incidents constituted acts of retaliatory harassment.

In regard to **B** ("beat my ass" statement), the record shows not only that the alleged incidents occurred prior to March 29, 1989, and, therefore, could not have occurred in retaliation for complainant's filing of the protected disclosures; but also that Mr. Vetter did investigate the one incident that complainant brought to his attention, concluded that both complainant and Mr. Barclay were at fault, and counselled both of them that they could have acted to prevent the incident. As a result, even if it were concluded that this

incident constituted an act of retaliatory harassment, the respondent took appropriate action to address it.

In regard to **T** (hat), when this incident was brought to Mr. Vetter's attention, he not only counselled the other members of the crew that this was inappropriate but also replaced complainant's hat. As a result, the record shows that respondent took appropriate action to address this incident.

In regard to **O** (driving on Pflaum Road) and **P** (truck parking in garage), the record shows that the incidents occurred and Findings of Fact 51 and 52, above, describe how the incidents occurred; and the record shows that Mr. Vetter was made aware of these incidents. However, the record also shows that Mr. Vetter did not conclude that either of these incidents was serious enough to warrant investigation or intervention; and that Mr. Vetter did conclude that these incidents were consistent with the long-standing problems, attributable to both complainant and Mr. Barclay, that had marked the working relationship of these two crew members and, to a more limited extent, the working relationship complainant had with other crew members, for a period of years. The Commission concludes that neither of these incidents, as represented in the record, rises to the level of "verbal or physical harassment" within the meaning of the §230.80(2), Stats., even when considered in conjunction with the other incidents of which respondent was aware; and that it was reasonable for Mr. Vetter to conclude that these incidents were further minor skirmishes in the ongoing and long-standing mutual conflict between complainant and Mr. Barclay and not deserving of intervention or further investigation.

So far, the Commission has discussed each of the subject incidents vis-a-vis Mr. Vetter's involvement or knowledge Complainant also argues that these incidents should be attributed to respondent through the actions or knowledge of Mr. Schlough, Mr. Finner, Mr. Mueller, Mr. Prucha, and Mr. Jagodinski.

The record shows that a meeting was conducted on June 13, 1989, at which Mr. Schlough, Mr. Finner, Mr. Jagodinski, and Mr. Prucha were present as a follow-up to the prehearing conference held by the Commission. (See Findings of Fact 24, 25, and 30, above). However, the record also shows that, when asked by Mr. Prucha at this meeting to provide information relating to his allegation of retaliation, complainant and his union representative declined to do so at that time and failed to provide this information to any of those present at the meeting at any time in the future. It would be

incongruous for the Commission to hold an employer accountable for acts of alleged retaliation when the complainant, given the opportunity to provide information relating to these allegations to representatives of the employer, declines to do so at that time and fails to do so, with limited exception, in the future. Although complainant argues that certain of this information, e.g., the "hat" incident (See T, above) was brought to Mr. Jagodinski's attention, the record is not clear in this regard and does not show which incidents other than T were brought to Mr. Jagodinski's attention and when.

In regard to Mr. Mueller's role, the record shows that Mr. Mueller had no reason to be aware of complainant's allegation of retaliation although he was aware that complainant had appealed the denial of his reclassification request. The record shows further that Mr. Mueller, once he became aware of the conflicts between complainant and Mr. Barclay and between complainant and other members of the carpentry and farm crews, investigated these matters, scheduled meetings with both complainant and Mr. Barclay, counselled both of them to change their behaviors, and did not taken any further action because no future similar concerns were brought to Mr. Mueller's attention.

The Commission concludes that respondent UW has successfully rebutted the presumption of retaliation in regard to the alleged incidents; and that respondent UW did not retaliate against complainant as alleged.

Complainant also contends that respondent DER should be liable under the Whistleblower Law due to its "obligation to investigate an employee's allegations of whistleblower retaliation which are brought to the agency's attention." Complainant's sole basis for this argument is the language of §230.01(2), Stats., to wit, "It is the policy of this state to encourage disclosure of information under subch. III and to ensure that any employe employed by a governmental unit is protected from retaliatory action for disclosing information under subch. III." Complainant argues that, since DER is the leading state agency in regard to employment relations, this policy statement invests DER with the affirmative statutory obligation to investigate any allegations of whistleblower retaliation brought to its attention and its failure to do so makes it liable for such retaliation. The flaws with this argument are that a statement of policy does not in and of itself confer liability or authority on a state agency, and complainant cites no authority for his argument to the contrary. The Whistleblower Law clearly defines the entities responsible for

receiving and investigating protected disclosures, and for receiving and deciding complaints of whistleblower retaliation, and complainant fails to show how these provisions confer liability or authority on DER here. The only communication specifically directed to respondent DER by complainant was the June 15, 1989, letter to Mr. Wallock and, in responding to this letter, Mr. Wallock referred complainant to the Commission, an agency specified in the Whistleblower Law as having particular responsibilities for receiving and deciding complaints of whistleblower retaliation. The Commission concludes that respondent DER met its obligations under the Whistleblower Law and, even if it had been concluded that complainant had been the victim here of whistleblower retaliation, would not be liable for such retaliation.

The number and scope of the allegations here enhance the possibility that the details of the case will obscure the big picture. What the record as a whole presents is the picture of an employee who was alienated from his fellow crew members at least as early as the summer of 1988; who exhausted every avenue to have his position reclassified to the Painter classification; who was so caught up in this effort and so focused on this goal that he considered any obstacle, even the accurate advice given to him by personnel experts at the UW and DER, as "threatening;" and who attributed his poor relationship with his co-workers and his dissatisfaction with his job to "retaliation" when, in reality, some of his fellow crew members were not even aware of these efforts and others, including Mr. Barclay, had no reason to resent them since they, too, had utilized position reclassification to advance in state government.

The Legislature has provided a powerful tool for those attempting to protect the public interest by pointing a finger at government waste and abuse and the Commission is very cognizant of the Legislature's message and intent in this regard. However, the Commission also recognizes that it has an obligation to make sure that this protection is not trivialized by those who attempt to utilize it to shield themselves from the consequences of their own actions or to punish others with whom they disagree. In the instant case, the record shows that complainant had a poor relationship with his co-workers and that both he and they engaged in inappropriate behavior as a result. However, the record also shows that this relationship and this behavior was not the result of whistleblower activities engaged in by complainant.

Order

This complaint is dismissed.

Dated:_____, 1994 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

LRM:lrm

_____
DONALD R. MURPHY, Commissioner

_____
JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served

and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.