STAE OF WISCONSIN PERSONNEL COMMISSION

JOE HARRIS,

Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Respondent.

Case No. 89-0151-PC-ER

DECISION AND ORDER

Nature of the Case

This is a complaint alleging retaliation for engaging in fair employment activities. On August 7, 1992, one of the Commission's equal rights officers issued an Initial Determination finding Probable Cause to believe that retaliation had occurred as alleged. The parties agreed to submit the case to the Commission on a stipulation of facts in lieu of a hearing. The parties were permitted to file briefs and the final brief was filed March 31, 1993.

Findings of Fact

The following are the facts to which the parties stipulated:

1. The complainant is currently employed by the respondent as a Job Service Counselor 3. He has also held the position of Unemployment Benefits Specialist and several other positions with the respondent.

2. Before the year of 1989, the complainant had filed a number of discrimination complaints against the respondent with the Personnel Commission.

3. In October or November of 1989, William Komarek and Katherine Jaggers of the DILHR Bureau of Personnel attempted to compute the impact on the complainant's salary of a potential settlement in a personnel appeal case filed by the complainant that was pending before the Personnel Commission. They discovered that they could not reproduce the figures that the DILHR

payroll office was using for the complainant's salary. When this happened, they notified the DILHR payroll office.

4. The DILHR payroll office reviewed the complainant's salary and discovered that in September 1986 a probationary increase had been added twice to the complainant's salary instead of once. As a result, the complainant's salary had been erroneously high since that time.

5. In a letter of November 30, 1989, the respondent notified the complainant that he had been overpaid $2,260.18, that his salary would be reduced to the correct amount, and that the overpayment would be recovered in accordance with the policy of the State Department of Employment Relations (DER). A copy of the letter of November 30, 1989, is attached as Stipulation Exhibit 1. A copy of the DER policy, Bulletin P-131, is attached as Stipulation Exhibit 2.

6. The overpayment was recovered by means of a series of deductions from the complainant's paychecks.

7. The respondent has required its employes to return salary overpayments on numerous other occasions, including (but not limited to) the following:

(a) In 1992, retroactive reclassifications for plumbing inspectors were calculated using an incorrect percentage, resulting in salaries that were too high. When the mistake was discovered, the employes were notified, their salaries were reduced to the correct amounts, and the overpayments were collected by deductions from the employes' paychecks.

(b) On many occasions, employes have used paid vacation time before earning the time and have then left the agency or gone on leave without pay without earning back the vacation time taken. The respondent has always recovered the value of the unearned paid vacation in these cases.

(c) Overpayments have been caused by timekeeping errors, such as the payment of overtime pay to an employe who is not entitled to it. These overpayments have always been corrected through recovery of the amount overpaid.

(d) There have been times when a retroactive reclassification has moved an employe out of a position entitled to receive "time-and-one-half" for overtime. In these cases, the extra half-time paid after the retroactive effective date of the reclassification has always been recovered.

8. None of the examples given in paragraph 7 involves an amount as large as the overpayment received by the complainant. All of the examples in paragraph 7 involve errors that were discovered after a shorter period than the three years that elapsed in the complainant's situation.

9. In December of 1991, the respondent discovered another salary overpayment. In this case, the error occurred in 1987, and the total amount of the overpayment is $10,945.05. The salary of the affected employe was immediately reduced to the correct amount. The manner [for] collecting the overpayment was referred from the respondent to DER for determination, because DER had begun a revision of Bulletin P-131. The issue under consideration by DER (the matter is still pending) is not whether repayment should be made, but what methods may appropriately be used by the state to collect the overpayment.

The following Finding of Fact is based upon a document attached to the stipulation of fact and incorporated by reference into the stipulation:

10. DER Bulletin P-131 was promulgated effective March 30, 1982, and states as follows, in pertinent part:

> When an employe accepts an overpayment without creating a financial detriment to himself or herself, the pay rate must be corrected and the employe will be required to make repayment of any overpayments. If an employe did not make an employment decision financially adverse to himself or herself in reliance on the higher rate of pay, such as the employe did not give up a higher salaried position for a lesser salaried position, we will consider that the overpayment did not create a financial detriment to the employe. In such cases, after the pay rate is corrected and any overpayments collected, the employe will be in the same financial place he or she would have been had the error in pay never existed. The employing agency will be expected to develop a reasonable repayment schedule.

Conclusions of Law

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

2. Complainant has the burden to prove that he was retaliated against as alleged.

3. Complainant has failed to sustain this burden.

Opinion

The analytical framework for discrimination/retaliation cases alleging disparate treatment, as this one alleges, was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). This framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut this showing by articulating a legitimate, non-discriminatory reason for its action; and that the burden the shifts back to the complainant to show that this reason is a pretext for discrimination.

In the instant case, respondent appears to concede that complainant has established a prima facie case of retaliation by showing that he engaged in fair employment activities and, subsequent to this, respondent took action to collect a salary overpayment.

Respondent has offered as its reasons for this collection action the requirement imposed by DER for such collections and respondent's consistent practice of effecting such collections when overpayments have been discovered. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to complainant to demonstrate pretext. Complainant points to the fact that the other instances of overpayment collections referenced in the stipulation of fact do not present a situation identical or similar to his, i.e, they involve a group of employees, involve a smaller amount of overpayment, involve a shorter period of elapsed time between error and discovery of the overpayment, or involve a situation in which over a year has passed but repayment has not yet been effected. However, complainant has the burden of proof here, not respondent, and complainant has failed to show that a situation identical to or similar to his has arisen and has been resolved by respondent in a manner different than complainant's situation was resolved. What the examples cited in the stipulation show is that respondent has moved to collect overpayments when such overpayments have been discovered and this has been accomplished in

all but one situation. In that one situation, respondent has determined that overpayment will be effected but is waiting for DER to determine the method of repayment. Complainant has failed to introduce evidence of situations where overpayments were discovered but not effected by respondent and his pretext argument in this regard fails.

Complainant also argues that respondent's collection action constituted retaliation based on fair employment activities because it was discovered in the course of an attempt to resolve other FEA complaints filed by complainant. However, the record indicates that the overpayment was actually discovered in the course of an attempt to resolve a civil service appeal filed by complainant. Although complainant appears to be arguing that he was singled out for a salary calculation, and this appears to be the case, this singling out was not due to complainant's filing of an equal rights complaint, but a civil service appeal, and was due to a situation that complainant brought to respondent's attention through the filing of the appeal and respondent's attempt to resolve the matter prior to hearing. This situation does not constitute fair employment retaliation and complainant's pretext argument in this regard fails.

It is apparent from the facts of this case that respondent was following an overpayment collection policy developed by DER and did so consistently in practice. The Commission concludes that this fact situation does not evidence retaliation on respondent's part.

Order

This complaint is dismissed.

Dated: June 23, 1993

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

dkd

Parties:

Joe Harris
1830 Chatham Street
Racine, WI 53402

Carol Skornicka
Secretary, DILHR
201 East Washington Avenue
P.O. Box 7946
Madison, WI 53707-7946

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.