STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT FLANNERY,

Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 90-0157-PC-ER

DECISION AND ORDER

ROBERT FLANNERY,

Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 91-0047-PC

INTERIM DECISION AND ORDER

These matters are before the Commission on separate motions. Both cases relate to petitioner's employment as Assistant Superintendent at the McNaughton Correctional Camp and appear to arise from conflict between the petitioner and another employe, James Somers. The older case, 90-0157-PC-ER, was filed as a complaint of whistleblower retaliation. The more recent case, 91-0047-PC, is before the Commission at the fourth step in the non-contractual grievance procedure. Both cases were the subject of an interim decision and order issued by the Commission on July 25, 1991, addressing respondent's motions to dismiss for failure to state a claim on which relief may be granted. Those motions were granted in part and denied in part. The two cases are treated separately, below.

Case No. 91-0047-PC

In its July 25th Interim Decision and Order, the Commission examined each of five allegations[1] identified by the petitioner in his brief in terms of whether there was a written policy which, at least arguably, prohibited the alleged conduct.[2] The Commission dismissed one aspect of one of the allegations but concluded the other allegations could be viewed as falling within statutes, rules or written policies or procedures.

On October 1, 1991, the respondent filed another motion to dismiss. In this motion, the respondent contends that the various allegations being raised by the petitioner raise "issues not raised at the first, second and third step grievance as required by ER 46.06 of the Wisconsin Administrative Code." The Commission set a schedule for submitting briefs on the motion but on October

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[1]The Commission summarized petitioner's allegations as follows:

> 1. That Mr. Somer's and respondent's conduct violated respondent's written policy prohibiting harassment and hazing of employes.
> 2. That by initiating a second investigation in August of 1989 of petitioner's conduct in April of 1989, respondent violated §264.2(a) of the "Personnel and Employment Relations Directive" which states, in part: "When a possible infraction of a work rule occurs, the supervisor or other designated management representative will immediately investigate the situation to establish the facts."
> 3. That respondent improperly applied "state policy regarding lateral transfers for positions of promotion:"
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> The Division of Corrections had adopted a policy regarding requests for permissive employment consideration to vacant positions. Nevertheless, the Division promoted James Boorman as Superintendent of McNaughton Correctional Center via a lateral transfer in violation of the existing Division policies on that subject. Mr. Boorman took the position which Mr. Flannery had applied for and was on promotional list for at the time.
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> 4. That respondent violated §230.12(7), Stats., by failing to adjust petitioner's compensation despite granting him an exceptional performance award effective July 1, 1990.
> 5. That respondent violated §230.19, Stats., when it refused to promote him to the position of Superintendent, McNaughton Correctional Center.

[2]Pursuant to §ER 46.07(1), Wis. Adm. Code, a fourth step grievant must allege "that the employer abused its discretion in applying subch. II, Ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs I and II, ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures...."

24, 1991, the petitioner filed a "Motion to Strike" the respondent's motion. The Motion to Strike reads, in pertinent part, as follows:

> The motion to dismiss constitutes the third consecutive different Motion to Dismiss that has been raised by the respondent in this and a companion case. Furthermore, the claim contained in the motion is categorically and absolutely false in that all issues raised in the Amended Complaint were in fact raised at the first, second and third step grievances. Furthermore, the Motion to Dismiss should be striken [sic] because it is vague and ambiguous since respondent cites absolutely no authority or proof as to what issues are raised in the Amended Complaint that were not raised in the grievance process.
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> The claim in the Motion to Dismiss is in bad faith unless counsel can establish that the people present at the [grievance] hearing believed that the issues raised were not presented.

It is this motion of the petitioner which is now before the Commission.

The petitioner's motion appears to raise two issues. The first is whether the respondent is barred from pursuing its October 1st motion to dismiss because it had failed to raise these arguments in its previous motion to dismiss for failure to state a claim, which was the subject of the Commission's July 25th Interim Decision and Order. The argument that is the basis of the respondent's October 1st motion, that the petitioner cannot raise allegations at the fourth step of the grievance process which were not raised at the first, second or third step, is a jurisdictional objection to the grievance before the Commission.[3] The Commission's rules specifically provide that "[a]ny party may move *at any time* to dismiss a case on the ground the commission does not have subject matter jurisdiction." §PC 1.08(3), Wis. Adm. Code. It would have been preferable if the respondent had made this argument at the same time as its original motion to dismiss. However, the respondent is not barred from raising it now.

The second issue raised by petitioner's Motion to Strike is whether, in determining what issues were raised during the first three steps of the grievance process, the Commission is restricted to the information found on

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[3]Pursuant to §ER 46.07(1), Wis. Adm. Code: "If the grievant is dissatisfied with the decision received... at the third step... the *decision* may be grieved to the commission...." Therefore, an allegation that the third step grievance and decision did not address a specific personnel action is a contention relating to the Commission's subject matter jurisdiction at the fourth step.

the grievance forms or whether the Commission can consider comments made during the first, second and third step meetings. The petitioner contends that during these meetings he specifically raised the issues which he now seeks to have addressed by the Commission at the fourth step.[4] Petitioner contends that what was said during these meetings is an issue of fact which can only be resolved by hearing testimony from the participants at the first, second and third steps.

The relevant administrative rules support a conclusion that in determining the subject of allegations raised during the first three steps of the non-contractual grievance process, the Commission is properly restricted to the face of the grievance forms themselves. Pursuant to §ER 46.02(4), Wis. Adm. Code:

> "Grievance" means a *written* complaint by an employe requesting relief in a matter which is of concern or dissatisfaction relating to conditions of employment and which is subject to the control of the employer and within the limitations of this chapter. [emphasis added]

Other rules provide that each grievance may relate to no more than one subject and that informal discussions may relate to other topics. According to §ER 46.05:

> (1) Grievances shall be submitted to the designated employer representative on the forms provided by the employer.
> (2) *Only one subject matter shall be covered in any one grievance.*
> (3) A grievance *shall* describe:
> (a) The condition of employment which is the subject of the grievance.
> (b) The facts upon which the grievance is based.
> (c) The relief sought by the employe. [emphasis added]

Once the grievance has been filed, the rules call for the employer's representative to meet with the "grievant and representative to hear *the grievance* and deliver a written decision *on the grievance.*" §ER 46.06(2)(a). According to §ER 46.13:

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[4]The respondent acknowledges that at least some of the allegations now proffered by the petitioner were raised at the first step grievance hearing but also contends that these allegations were not set forth on the written grievance report form.

> Nothing in this chapter precludes an employe from informally discussing with the employer any matter of concern, whether grievable or not.

These rules, when read together, support the conclusion that the subject of the grievance must be found on the face of the grievance form and not merely described verbally by the grievant during the course of the grievance meeting. This requirement allows the parties to the dispute to know the scope of the matter at issue. Here, the third step grievance form described the grievance as arising from harassment and retaliatory conduct which was explained in an attachment set forth in full in finding 1 in Case No. 90-0157-PC-ER, below. The petitioner's current allegations, summarized in footnote 1, above, describe various personnel actions which are not specifically mentioned in the description of the grievance at the third step nor in the employer's decision at the third step. Based both on these facts and the language of the administrative rules, the petitioner's motion to strike must be denied.

Case No. 90-0157-PC-ER

This matter is before the Commission on the respondent's motion to dismiss for untimely filing. The following facts appear to be undisputed.

1. On October 3, 1990, the petitioner filed a charge of whistleblower retaliation with the Commission. The charge indicated that the respondent had most recently retaliated on August 16, 1990, and described the retaliation as follows:

> Harassment--from the time of my first contact with Officer Somers at McNaughton CC, I have been subject to harassment by him. This harassment includes, but is not limited to, officer Somers soliciting statements from others on the subject of whether I have been harassing him. Officer Somer's attempts in this regard have been reported to me, and I have passed them on to all levels of personnel in the Department. However, no action has been taken to eliminate this problem, and although the Department has recognized the need to instruct Officer Somers [to] desist, it has neglected to do so. This is in violation of the Division/Department of Corrections Policy on harassment. The Department has also engaged in groundless investigation of me on repeated occasions. The Department has withheld from me information it has obtained in the course of its investigations, despite my requests and my representative's requests to be provided with the same, in violation of my due process rights to confront

> my accusers and adequately prepare an answer to them. Furthermore, the Department's investigation continues in the form of interviews of third parties, at which I have not been allowed to be present or cross-examine. This investigation is allegedly in response to a complaint by Officer Somers against the Department of Corrections for racial discrimination; the contents of the file partially revealed to me are primarily unsupported allegations of misconduct on my part, unrelated to either my relationship with Officer Somers or his complaint. The above actions suggest that the true purpose of Officer Somers and the investigation is the harassment of your grievant and the destruction of his career.
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> Retaliation--Your grievant reported and imposed a recommended discipline against Officer Somers for having failed with another, to complete a timely and effective search of an escaped inmate's belongings as instructed. Ultimately, this discipline resulted in no action taken against either of the officers involved. However, from that moment, Officer Somers has undertaken the activities outlined in the paragraph above. Statements reported to me by others are that Officer Somers intends to have me fired. The Department later investigated an incident regarding inmate urine samples. This investigation has been satisfactorily concluded. However, some three months following this conclusion, the Department reopened its investigation without disclosing why or by what authority it did so. In its investigation of the discrimination claim by Officer Somers, the Department's activities, rather than being fair and impartial investigation, show every appearance of being retaliation against your grievant for having dared to attempt to perform a supervisory function by disciplining his officers. The above actions, and other similar to it, constitute a violation of Wisconsin whistle blower's statute, Section 230.80, et. sec., Wis. Stats., in that these actions are an arbitrary and capricious exercise of departmental power.

2. By letter dated October 5, 1990, the Commission summarized a conversation between petitioner's counsel and a member of the Commission's staff during which petitioner's counsel "agreed to provide the Commission with additional information as to the specifics of Mr. Flannery's protected activity, the dates of his disclosures, copies of any written disclosures and a list of all alleged retaliatory conduct including the dates thereof."

3. On February 20, 1991, the petitioner responded to the October 5th letter. That response was refiled on May 22, 1991, at which time it was identified as an "Amended Complaint." It included the following description of "alleged retaliatory and/or harassment actions":

5. Mr. Flannery was denied a wage increase. In January, 1990, Mr. Flannery filed a grievance with Mr. Kingston because he received a 2.5% salary increase rather than a 3.75% increase which was given to other similarly situated state employees. In March, 1990, in a formal hearing with Ken Sondalle by telephone, Mr. Sondalle, Assistant Administrator of Division of Adult Institutions, advised that effective July 1, 1990, Robert Flannery would receive a 6% increase with consisted of the 4.5% increase all employees got at that time, together with a 1.75% increase to correct the previous wrongdoing on his earlier raise. This commitment made in March, 1990 was never complied with and to this date Mr. Flannery has not received the agreed-upon salary increase.

6. Mr. Flannery was denied a promotion to Camp Superintendent, McNaughton Correctional Center. In June, 1988, Mr. Flannery transferred to McNaughton Correctional Center. In January, 1989 he became acting Superintendent of the Center. At that time the state had a policy against lateral transfers by center directors. In May, 1989 James Boorman was appointed Superintendent of the McNaughton Correctional Center. This was a lateral transfer for Mr. Boorman. Mr. Flannery was never interviewed, even though he had indicated interest in the position. He was the only candidate on the list who was from northern Wisconsin and a likely choice to take the position.

7. Improper investigation has been conducted of Mr. Flannery's activities. The Department of Corrections has filed informal Answers to Interrogatories in a case pending before the Personnel Commission as Case Number 89-0133 and 90-0095 indicated that William Schmidt, Field Representative, AFCSME Council 24, obtained statements from inmates, former inmates, and state employees which relate to Mr. Flannery and his work performance. Such statement gathering and information collection techniques are clearly improper when there are specific statutory rules and guidelines governing investigations into employee disciplinary matters. Further, inmates are not to be interviewed for such purposes. Moreover, these investigations were ongoing long after Mr. Flannery's disciplinary matter had been disposed of. Specifically, inmate Troy Virch made a complaint against Officer Flannery on April 8, 1989. Flannery dismissed the complaint on April 13, 1989. The matter was fully investigated and acting Superintendent Lori Boardman approved the recommendation by Flannery on June 15, 1989. Her approval was conditioned upon one modification which was: "A clarification (of internal management procedures) will be sought from Department of Corrections management." No appeal was ever made from that decision by any party and as such it should have stood as the final decision.

8. Notwithstanding the foregoing allegation, the Department, for some unknown reason to your complainant, dispatched Bill Grosshans, Unit 103 Supervisor, to conduct a "fact-finding assignment" with regard to certain activities at the McNaughton

Correctional Center. Specifically, in a letter to Stephen Bablitch from Phil Kingston, he attaches a memo from Bill Grosshans relating to allegations concerning Assistant Superintendent Flannery. On page 2 of the letter to Bablitch.... Kingston states: "There are reports furnished by the union, and Mr. Grosshans' report, that indicate inappropriate measures were taken during an inmate strip search. These charges against Assistant Superintendent Flannery need to be fully investigated." In fact, that investigation had already occurred and as referenced by the Grosshans memo itself on page 5, paragraph 3, he states; "The inmate complaint was heard by Lori Boardman or reviewed by her and she affirmed Mr. Flannery's position that this was a strip search." Subsequently on 9-27-89 an investigatory hearing was held relating to the actions of Robert Flannery by investigatory Sandra Sweeney. This investigatory process began on that date and concluded in December of 1989 when an oral reprimand was made to Mr. Flannery by Mr. Phil Kingston. During all hearings and official proceedings on this second investigatory hearing, the complaints of Mr. Flannery that he was being subjected to double jeopardy and a deprivation of his due process rights were made at the outset of the hearings. In addition, the Department was made aware at all times that their activities constituted administrative harassment of Mr. Flannery and furthermore, that their activities were causing him incredible stress, embarrassment, anxiety and physical discomfort.

9. The stress, embarrassment, anxiety and discomfort referred to in the preceding paragraphs, culminated in severe stomach problems for Mr. Flannery in October-December, 1989, and January, February and March, 1990. In addition, he was hospitalized in October of 1989 for one week as a result of these problems.

10. William Schmidt contacted three local employers to discuss their interactions with Mr. Flannery in the work release program at McNaughton Correctional Center. Not only was this action by a union representative not criticized or ordered to be curtailed, in fact the statements taken by Mr. Schmidt were used by the state's own investigator, Mr. Grosshans, as evidenced by the memorandum to Stephen Bablitch dated August 31, 1989 and prepared by Mr. Grosshans. Those statements are set forth in detail in that memorandum and they serve to seriously damage Mr. Flannery's work reputation. No attempt was made by Mr. Grosshans to determine the veracity of those statements.

11. Mr. Flannery has in his possession several pages of complaints, all of which groundless, filed by Mr. Somers against Mr. Flannery. Those complaints did not receive an appropriate response from the Department and have in fact permitted the activities of Mr. Somers to continue and escalate....

12. Attorney Sheila C. Ellefson, Assistant Legal Counsel for the Department of Corrections, was somehow appointed to represent Officer Flannery at a deposition which was scheduled in mid-

> August, 1990. Ms. Ellefson did not prepare Mr. Flannery at all for the deposition. The first time that she met with him was within 10 to 15 minutes prior to his deposition being taken. It was apparent that the principal focus of the deposition was Mr. Flannery, yet she had not taken the time to notify Mr. Flannery of any of the complaints that had been filed by Mr. Somers against him. In effect, Mr. Flannery was "thrown to the wolves".

4. In its July 25th Interim Decision, the Commission held that the petitioner's allegations that methods used by the respondent in carrying out an investigation of the petitioner's work performance and the decision to permit Mr. Schmidt to carry out an investigation of petitioner's conduct were not "disciplinary actions" as defined in the whistleblower law and dismissed that particular claim.

CONCLUSION OF LAW

Those allegations made in the petitioner's amended complaint in Case No. 90-0157-PC-ER dated May 20, 1991, do not relate back to the original complaint filed on October 3, 1990, and, as such, are untimely.

OPINION

The time period for filing a claim of whistleblower retaliation with the Commission is established in §230.85(1), Stats:

> An employe who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employe in violation of s. 230.83 may file a written complaint with the commission, specifying the nature of the retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employe learned of the retaliatory action or threat thereof, whichever occurs last.

The language of §230.85(1) establishing a 60 day time limit is in the nature of a statute of limitations rather than a statute conferring subject matter jurisdiction. There is no comparable reference in §230.85(1) to the language of §230.44(3) which provides: "Any appeal filed under this section [i.e., §230.44] *may not be heard* unless the appeal is filed within 30 days...." (Emphasis added) It is this phrase which the Commission has relied upon in

concluding that §230.44(3) confers subject matter jurisdiction. Richter v. DP, 78-261-PC, 1/30/79. In contrast, in Milwaukee County v. LIRC, 113 Wis. 2d 199, 335 N.W. 2d 412 (Ct. of App., 1983), the court held that the 300 day filing period provided by the Fair Employment Act was a statute of limitations rather than a statute concerning subject matter jurisdiction. The FEA provision in question, now found in §111.39(1), reads: "The department may receive and investigate a complaint charging discrimination... in a particular case if the complaint is filed with the department no more than 300 days after the alleged discrimination... occurred." The 60 day period for filing a whistleblower complaint is comparable to the FEA statute of limitations in that the provisions have similar language and neither suggests that the Commission lacks the authority to proceed in the absence of a timely complaint.

The next question to be addressed by respondent's motion is the petitioner's assertion that the respondent has waived any timeliness objection by failing to have raised it at the same time as its original motion to dismiss for failure to state a claim. As was noted in the Milwaukee County case, the affirmative defense of statue of limitations can be waived. 113 Wis. 2d 199, 206. In that case, the court concluded that because the County did not plead the defense in its petition for judicial review of the Labor, Industry Review Commission's administrative decision, it had waived it. The court also noted that the County had specifically waived the timeliness defense in a stipulation reached before the hearing examiner. The fact that the respondent in the instant case failed to raise it in an answer to the initial complaint does not constitute a waiver. The Commission's rules[5] do not require a respondent to file an answer to a complaint and the original complaint in this case lacked sufficient specificity to have permitted a timeliness objection. See, Pugh v. DNR, 86-0059-PC-ER, 6/10/88. In Kaufman v. UW-Eau Claire, 85-0010-PC-ER, 1/9/86, the Commission addressed a timeliness objection filed on November 7, 1985, where the complaint had been filed on January 28, 1985. The complainant contended that the respondent had waived its defense by failing to assert it within a "reasonable time after receipt of [a] copy of the complaint." The Commission held that there had been no waiver because the affirmative defense had been raised prior to the investigation and initial determination.

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[5]§PC 2.04, Wis. Adm. Code

The facts in the instant case are comparable to those in Kaufman: there has been no investigation of the complaint by the Commission and no initial determination has been issued. While the respondent presumably could have raised the issue at the same time as it filed its motion to dismiss for failure to state a claim, the cases cited above suggest that waiver should not apply where a timeliness objection is raised during the investigation stage, as long as there has been no previous stipulation as to that issue. The Commission also notes that the complainant did not file his amendment to his complaint until after the respondent had filed its motion to dismiss for failure to state a claim. By letter dated May 22, 1991, the parties were advised that in ruling on the respondent's motion, the Commission would consider the complainant's May 20th materials "as setting forth allegations underlying the petitioner's claims, either as an amendment to the original filing or merely as clarification thereof." Once the Commission issued its Interim Decision and Order on the first motion to dismiss, the respondent raised its timeliness objection to the allegations in the May 20th materials. Therefore, the respondent cannot be said to have waived its objection.

The respondent's motion also raises an issue as to when the time period for filing should commence, i.e., whether it commences on the date of the retaliatory action, the date the employe should have realized the action was retaliatory or on the date the employe first realized the action was retaliatory. The Commission does not need to address this issue because even if the Commission uses the date most favorable to the petitioner, i.e. the date the petitioner first realized the respondent's actions were retaliatory, petitioner's claims are untimely.

As an attachment to a brief he filed with respect to the respondent's motion to dismiss, the petitioner submitted an affidavit which stated, in part:

> 9. On or about August 20, 1990 I was called as a witness to give testimony in the case of James P. Somers, Complainant vs. State of Wisconsin Department of Corrections, Respondent, Case No. 90-0095-PC-ER. At the time of that deposition Attorney Sheila C. Ellefson was present at the McNaughton Correctional Center to presumably represent me. However, she made absolutely no attempt whatsoever to help prepare me for the deposition; she did not provide me any documentation which I had previously requested until approximately two hours before the deposition, and then only after my attorney made a formal request for those documents; and she told me during that conversation that she was

> representing the Department. I thought she would represent me since I was part of the Department but she told me I should get an attorney. The charges leveled against me by Officer Somers had never been disclosed to me by Attorney Ellefson prior to that date. On that date I had my first chance to review the charges by Somers which included approximately 226 pages of typewritten claims. Appointed counsel should have known that those charges would constitute a significant portion of the deposition questions propounded by Attorney Fox and that they related to my job performance and could result in demotion, or other disciplinary action against me, if proven to be true. Generally speaking, the overall attitude of Ms. Ellefson left me with a conclusion that no one in the Department had any concern for protecting me, and in fact I was being used as a scapegoat by the Complainant in that case, James P. Somers, supposedly in order to place all of the blame for Mr. Somers' complaints upon me personally and not upon the Department that I worked for.
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> 10. It was not until the deposition of myself on August 20, 1990, that it became apparent to me that I was the subject of numerous and repeated retaliatory actions by the Department and this was not just a random occurrence. I believe that the Department's actions toward me commencing in January 1989 constituted an ongoing, continuing violation of retaliatory acts against me which form the basis for my complaint in this action.

For the purpose of ruling on the respondent's motion, the Commission must accept the petitioner's statement that he first became aware that he was being retaliated against on August 20, 1990, and that on that date he knew that he had been the subject of numerous and repeated retaliatory actions by the respondent.

Even though the complainant states he didn't learn the respondent's conduct was retaliatory until August 20th, he didn't seek to amend his complaint to identify the specific retaliatory conduct until May 22, 1991, nine months later. Clearly, had the complainant not filed his initial complaint with the Commission until May of 1991, it would have been untimely. The key issue is whether the May 20, 1991 allegations can "relate back" to the original filing date of October 3, 1990, which was within 60 days of the August 20th date.

The Commission's rules describe circumstances in which allegations set forth in an amendment may relate back to the original filing date. Pursuant to §PC 2.02(3), Wis. Adm. Code:

> (3) Amendment. A complaint may be amended by the complainant, subject to approval by the commission, to cure technical defects or omissions, or to clarify or amplify allegations made

> in the complaint or to set forth additional facts or allegations related to the subject matter of the original charge, and those amendments shall relate back to the original filing date.

In most of its previous decisions on the relation back topic, the Commission has been asked to permit an amendment for an additional basis of discrimination arising from the same personnel transaction that was the subject of the original complaint. The key factors in the Commission's decisions have been whether the amendment was filed before or after an initial determination had been issued, whether there is some indication that the complainant could have filed the amendment significantly earlier and whether the amendment would cause a significant delay in the proceeding. See, Kloehn v. DHSS, 86-0009-PC-ER, 1/10/90; Ferrill v. DHSS, 87-0096-PC-ER, 8/24/89; Holubowicz v. DHSS, 87-0097-PC-ER, 4/7/89.

Here, the petitioner seeks application of the relation back concept where his amendment specifies various incidents of whistleblower retaliation that were, for the most part, not mentioned in the original complaint. (See findings 1 and 3, above) This scenario is comparable to that addressed by the Commission in Kimble v. DILHR, 87-0061-PC-ER, 2/19/88. There, the original complaint referred to an inaccurate and retaliatory performance evaluation that was received in 1985. The complainant sought to amend his complaint to include allegations that decisions to deny him pay raises for each of the fiscal years ending June 30, 1985, 1986 and 1987 were also retaliatory. The Commission held:

> The original charge alleged that an unsatisfactory performance evaluation was retaliatory. There was no mention of having been denied pay increases. The matter set forth in the new or amended charge, which concerns the denial of pay increases, cannot be characterized as clarifying or amplifying allegations set forth in the original charge. Rather, the new charge sets forth additional transactions alleged to have been discriminatorily motivated. Similarly, the matters set forth in the new or amended charge are *not* "additional facts or allegations related to the subject matter of the original charge...." An example of such things would be the addition of an allegation of retaliation to what originally had been a charge of race discrimination, or the addition of factual information that supports the original charge. Again, what is alleged here are new and separate salary transactions. Therefore, the new charge does not constitute an amendment under §PC [2].02(2), Wis. Adm. Code, which would relate back to the date of the original charge.

The Commission reached a similar conclusion in Pugh v. DNR, 86-0059-PC-ER, 6/10/88.

Here, some of the allegations in the amendment can properly be said to "clarify or amplify" the allegations made in the original complaint. This is true of the allegations regarding the various investigations carried out by the respondent of the petitioner's conduct as a supervisor. However, these allegations were previously dismissed by the Commission as not falling within the definition of "disciplinary action." The other allegations in the amendment, relating to denial of promotion, denial of a wage increase, an oral reprimand and conduct of DOC counsel during a deposition, arise from discrete personnel actions that are *not* related to the subject matter of the original charge. In reaching this conclusion, the Commission notes that the petitioner's affidavit indicates that by August 20, 1990, it had become "apparent to me that I was the subject of numerous and repeated retaliatory actions by the Department and this was not just a random occurrence." The petitioner clearly was aware by August 20th of the decisions not to promote him, not to increase his wages and to orally reprimand him and of the conduct of DOC counsel during the August 20th deposition. Therefore, these claims, first formally identified as allegations by correspondence dated May 20, 1991, cannot relate back to the original complaint filed on October 3, 1990.

All of the claims listed in the petitioner's "amended complaint" (set forth in finding of fact 3) were either dismissed pursuant to the Commission's July 25th Interim Order or are not related to the subject matter of the petitioner's October 3, 1990 complaint:

> ¶5 (of the amended complaint): The denial of a wage increase is not related to the original charge, so it does not relate back to the October 3, 1990 filing date.[6]
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> ¶6: The May, 1989 denial of promotion is not related to the original charge so it does not relate back.
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> ¶7: Allegations of improper investigative procedures were dismissed in the Commission's July 25th Interim Order.

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[6]In his brief, the petitioner notes that the first time he became aware of the fact that he was not going to receive the wage increase was on August 9, 1990.

> ¶8: Allegations of improper investigative procedures were dismissed in the Commission's July 25th Interim Order. The claim arising from the December, 1989 oral reprimand does not relate back.
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> ¶9: This paragraph alleges the petitioner suffered various consequences from respondent's improper conduct but does not include any allegations of retaliation.
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> ¶10: Allegations of improper investigative procedures by Mr. Schmidt were dismissed in the Commission's July 25th Interim Order.
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> ¶11: This paragraph fails to allege any conduct by the respondent which could be considered "disciplinary action" under the whistleblower law.
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> ¶12: Allegations arising from the conduct by respondent's counsel during a deposition held in August of 1990 do not relate back to the subject of the petitioner's original complaint.

The petitioner's final theory in support of his contention that that his allegations should be considered timely is that they are a continuing violation of the whistleblower law. Specifically, the petitioner argues that the respondent's failure to pay him the wage increase (the allegation in ¶5 of the amended complaint) and the promotion denial constitute "ongoing" violations. In Pelikan v. DNR & DETF, 87-0043-PC-ER, 6/24/87, a Fair Employment Act claim arising from the level of retirement benefits, the Commission discussed the continuing violation concept as follows:

> A great many personnel transactions have adverse economic impacts on employes that continue over time. For example, an employe who is involuntarily demoted for disciplinary reasons will continually be paid less than if he or she had not been demoted. These are the employe's monetary damages or loss, and the fact that they continue to accrue indefinitely obviously does not mean that the employe has an indefinite period in which to appeal. The difference between this hypothetical and a true continuing violation is that the reduction in salary in each paycheck following the demotion is essentially a neutral act. If the demotion has not been shown to have been improper, either because the employer demonstrated just cause following a hearing, or because the employe failed to contest it in a timely manner, there is no basis on which to contend that each paycheck constitutes a separate act of discrimination.
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> A true continuing violation typically involves an employer's ongoing policy that affects that employe continually. For example,

> an employer may have a salary schedule which calls for a higher salary range for stock clerks, a male-dominated job classification, than for cashiers, a female-dominated classification. A woman hired into the latter classification presumably would not be limited to the 300 days after her hiring in which to file a sex discrimination charge, because there is an ongoing policy that continues to affect her over the course of her employment, so long as the employer continues to maintain the structural salary differential between the two classifications.

In the more recent case of Herrbold v. DOC, 91-0003-PC-ER, the Commission dismissed as untimely a claim of sex discrimination with respect to salary where the complainant, a female, was being paid less than a male colleague performing the same kind of work but where the basis for the discrepancy was that the male employe's greater seniority rested on certain discrete personnel transactions which occurred over 10 years before the complaint was filed.

In the present case, the petitioner alleges that his paychecks still do not reflect the salary increase which he was promised in March of 1990 and again at the end of July of 1990. However, the petitioner failed to file a complaint setting forth that allegation within 60 days of those dates or within 60 days of August 9, 1990, which, according to his September 17, 1991 affidavit, was when he "first became aware of all facts necessary to indicate to me that I was not going to be receiving the increase that had been promised to me and upon which I had relied." A continuing violation theory does not provide the petitioner with an indefinite period of time in which to file where, as here, the pay dispute arises from specific conduct rather than an ongoing policy such as the policy discussed in Pelikan, *supra*. Likewise, the decision not to promote the petitioner in 1989 was a specific, adverse personnel action and the no continuing violation theory applies.

Because the 60 day period for filing petitioner's whistleblower claims commenced no later than August 20, 1990, the date he states he first knew he had been subjected to repeated retaliatory actions by the respondent, the petitioner's allegations that respondent took disciplinary actions against him, first identified in his "amendment" filed on May 2, 1991, are outside the 60 day period. Petitioner's May 22nd amendment does not relate back to his original complaint, nor do his allegations constitute continuing violations so as to make them timely.

ORDER

Petitioner's motion to strike in case number 91-0047-PC is denied. The respondent's motion to dismiss case number 90-0157-PC-ER is granted, and that case is dismissed.

Dated: December 19, 1991 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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