

RALPH O'CONNOR,

Appellant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 90-0381-PC

INTERIM
DECISION
AND
ORDER

This matter is before the Commission on a dispute as to the appropriate issue for hearing. The parties have been provided an opportunity to file written arguments.

In his letter of appeal, filed on October 11, 1990, the appellant states, in part, as follows:

I am joining two actions in submitting this matter to you for redress. The latest incident is a transaction changing my classification from Personnel Manager 2 to Personnel Assistant 3, a change from professional to clerk.... Applying the reasonable man test, two people have supported my belief, based on similarity, that there is a connection between this action and the fact that I filed a discrimination complaint against my employing unit, Northern Wisconsin Center for the Developmentally Disabled.... This is my second action submitted. I appealed the change of classification to Ken DePrey, Director, Bureau of Personnel and Employment Relations, Department of Health and Social Services.... His response is not satisfactory to me since it only attempts to excuse his initiation of the action.

The nature and manner of handling of the classification downgrading and the management actions I complained of in my discrimination complaint are so similar and parallel that I believe they are definitely related and may have a common source. These were acts of supreme arrogance. The suppression and neutralization of long-term management staff was too common at Northern Center not to be recognized when encountered at a higher level. This abuse of authority involved: Business Manager "persuaded" to retire early; Superintendent of Building and Grounds 5 "persuaded" to retire early; Personnel Manager 5, "persuaded" to retire early; Royal Roberts terminated (suicide); institution Treatment Director 3, neutralized (heart attack); Power Plant Sup't 3, harassed for "whistle blowing" (heart attack).

Looking at these actions from another perspective, one can perceive a possible violation of Section 230.83 Wis. stats, in which case this becomes a complaint of retaliation under Section 230.85 Wis. stats.. I disclosed in-

formation in my discrimination complaint and follow-up investigation, by Robin Kite, DCTF Affirmative Action Designee, that would warrant further investigation of possible misconduct.

In a letter to the appellant dated November 2, 1990, the Commission acknowledged receipt of his recent appeal, informed him of a prehearing conference scheduled for November 26, 1990 and enclosed a form for filing a claim of retaliation under either the Fair Employment Act (subch. II, ch. 111, Stats.) or the whistleblower law (subch. III, ch. 230, Stats.). The Commission's letter stated, in part:

To the extent you may also wish to pursue an allegation that you have been retaliated against for having engaged in an activity protected under §111.322(3), Stats., you must file a charge of discrimination form with the Commission. A complaint form and instructions are enclosed.

After the matter was held in abeyance for more than a year at the appellant's request,¹ a prehearing conference was finally held December 17, 1991. During the conference, the respondent proposed the following statement of issue:

Whether the respondents' action of reallocating the appellant's position from Personnel Manager 2 to Personnel Assistant 3 was correct.

A schedule was established for the appellant to submit "a list of classifications which he feels better [describe] his position than Personnel Assistant 3" and then to file his proposed statement of issue.

In a letter dated December 21, 1991, the appellant stated that he "would find the Administrative Assistant 4-Management classification appropriate and acceptable." Then, in a letter dated January 14, 1992, the appellant proposed the following issue for hearing:

Was the downgrading of Ralph O'Connor from professional to non-professional status by changing his classification, by Certification Request for his position, from Personnel Manager 2 to Personnel Assistant 3 and the concurrent removal of duties and authority from him an incorrect personnel action in that it constituted disciplinary action, under Sec. 230,80(2), Wis. Stats., and was therefore a violation of Sec. 230,83 stemming from an ac-

¹The prehearing conference initially scheduled for November of 1990 was postponed until January and then until February of 1991, with both delays requested by the appellant so that he could obtain counsel. Then after the appellant telephoned the Commission on March 6, 1991 and made a statement which was interpreted by a member of the Commission's staff as a request to withdraw his appeal, he wrote the Commission and said he had not decided whether to pursue the matter before the Commission or to follow other avenues of obtaining relief. In July of 1991, the Commission again wrote the appellant and asked if he was ready to have a prehearing conference scheduled. The appellant responded in August and made reference to efforts he had made to obtain certain materials from the respondent. In his letter he again referred in very general terms to retaining a lawyer. On December 4th, after hearing nothing further from the appellant, the Commission scheduled a prehearing conference for December 17th.

cusation of abuse of authority---by forced resignation or constructive discharge of certain employees and harassment of other certain employees in violation of their constitutional rights under the 5th Amendment---against the Superintendent and Deputy Superintendent of Northern Wisconsin Center for the Developmentally Disabled?

The appellant's proposed issue is phrased in terms of an alleged violation of §230.83(1), Stats., which protects whistleblowers from retaliatory action. However, the instant matter arises from the letter of appeal filed on October 11, 1990 which was processed by the Commission as an appeal filed under §230.44, Stats. The Commission specifically advised the appellant of the requirement that he had to file a complaint if he wished to pursue claims of retaliation and provided him with a complaint form and instructions for doing so.² Because the appellant filed an appeal rather than a complaint, this matter must be processed as an appeal. Of the various categories of appeals described in §230.44(1), Stats., the one which applies to the appellant's October 11th letter is §230.44(1)(b), Stats., which provides the Commission with the authority to hear appeals "a personnel decision under s. 230.09(2)(a) or (d)... made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m)." Section 230.09(2)(a), Stats., references reallocating positions in the classified service. The appellant has identified the Administrative Assistant 4-Management classification as being appropriate for his position. The respondent has not argued that this classification was not considered, either explicitly or implicitly, during the review of the appellant's position. Therefore, the Administrative Assistant 4-Management classification will be added to the issue for hearing.

To the extent that the appellant's January 14, 1992 letter can be construed as a request to amend his original appeal in order to add a claim of whistleblower retaliation, that request is denied because of the substantial delay in making such a request and because of the appellant's failure to follow the procedure outlined in the Commission's letter of November 2, 1990.

²Nothing in the file suggests the appellant ever completed the complaint form and filed it with the Commission

ORDER

The issue for hearing in this matter shall read as follows:

Whether the respondents' action of reallocating the appellant's position from Personnel Manager 2 to Personnel Assistant 3 was correct or whether the appellant's position was more appropriately classified at the Administrative Assistant 4-Management level.

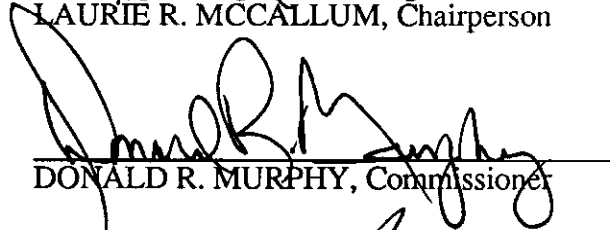
Dated: February 21, 1992

STATE PERSONNEL COMMISSION

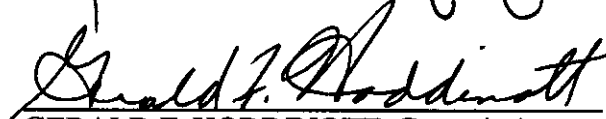


LAURIE R. MCCALLUM, Chairperson

KMS:kms



DONALD R. MURPHY, Commissioner



GERALD F. HODDINOTT, Commissioner