STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 91-0044-PC-ER

DECISION AND ORDER

Nature of the Case

On April 8, 1991, complainant filed a charge of discrimination with the Commission alleging respondent discriminated/retaliated against him on the basis of his marital status, handicap, activities under the Family Leave/Medical Leave Act (FMLA), activities under the Fair Employment Act (FEA), and whistleblower activities in its determination of complainant's starting rate of pay upon appointment to a Resident Care Technician (RCT 1) position at the Central Wisconsin Center for the Developmentally Disabled (CWC). One of the Commission's Equal Rights Officers issued an Initial Determination on June 6, 1991, concluding that there was No Probable Cause to believe that complainant had been discriminated/ retaliated against as alleged. Complainant filed an appeal of this No Probable Cause finding. A hearing on the issue of probable cause was held on March 3 and April 10, 1992, before Laurie R. McCallum, Chairperson. At the second day of hearing, complainant withdrew his charge of handicap discrimination. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on July 20, 1992

Findings of Fact

1. From some time in 1984, until July of 1989, complainant was employed as a Security Officer (SO) at the University of Wisconsin-Madison and had achieved the level of SO 3. In January of 1990, complainant was reinstated to a Security Officer 3 (SO 3) position at Mendota Mental Health Institute (MMHI). In May of 1990, prior to completing his probationary period in this SO 3 posi-

tion, complainant was terminated by MMHI. Security Officer positions are responsible for maintaining security and protecting property and person at state facilities.

2. In May of 1990, complainant applied for a Resident Care Technician 1 (RCT 1) position at respondent's Central Wisconsin Center (CWC). The RCT 1 classification is in a lower pay range than the SO 3 classification. RCT positions are responsible for providing care and implementing treatment programs for residents of state institutions. He was interviewed for this position by Bonnie Maier, a Resident Care Supervisor at CWC. After the structured part of this interview was completed, complainant told Ms. Maier that he had had problems with his supervisor while employed at MMHI, that he had been terminated from MMHI because he had had to take time off to care for a sick child, that he had requested family/medical leave while employed at MMHI but these request(s) had been denied, that he was married, that he and his wife had experienced problems finding child care for their children, and that he had filed a complaint under the FMLA with the Commission. Ms. Maier included this information in the notes she kept of the interview. During this part of the interview, complainant did not tell Ms. Maier that he would be requesting medical leave or family leave if he were to be hired for the position. After her interview of complainant was completed, Ms Maier contacted Donna Nelson, another Nursing Supervisor at CWC, to discuss whether to hire complainant or another candidate. Ms. Maier mentioned to Ms. Nelson that complainant had been terminated from a position at MMHI. Ms. Nelson did not discuss complainant's termination or anything else about complainant or his candidacy for the subject RCT 1 position with anyone at CWC's personnel office, including Brian Fancher, the Personnel Manager, or Eileen Slaney-Bartels, the Personnel Assistant After her interview of complainant, Ms. Maier also contacted Marion Weber, a Program Assistant 3 at CWC who was responsible for setting up the interviews with RCT candidates and forwarding the hiring recommendations to CWC's personnel office, and recommended complainant for hire if his references checked out satisfactorily. Ms. Maier then forwarded her notes of the interview and complainant's application materials to CWC's personnel office. Ms. Maier did not discuss her interview notes or complainant or his candidacy with anyone at the personnel office, including Mr. Fancher or Ms. Slaney-Bartels. Neither Ms. Maier nor Ms. Weber nor

Ms. Nelson was involved in the computation of complainant's starting rate of pay upon his appointment to the subject RCT 1 position at CWC.

3. The record does not show that anyone at CWC contacted MMHI to obtain information relating to complainant's employment there, including his termination or his requests for family/medical leave. It would have been standard practice for MMHI to forward complainant's personnel file to CWC after the effective date of complainant's appointment to a position at CWC. This personnel file would have included information relating to complainant's termination and his requests for family/medical leave.

4. After complainant was offered appointment to the RCT 1 position by CWC, his wife had a phone conversation with Ms. Slaney-Bartels in which Ms. Slaney-Bartels indicated that, in her opinion, complainant would receive $9.66 per hour, which was his ending rate of pay at the UW-Madison, plus intervening increases to which he would have been entitled had he remained in his position at the UW-Madison after July of 1989. Ms. Slaney-Bartels indicated, however, that she would have to check this computation with her supervisor.

5. Nancy Hoskins had served as a Personnel Assistant at CWC for five years, ending in March of 1990. Ms Slaney-Bartels had been appointed to this position subsequent to Ms. Hoskins' resignation. Ms. Hoskins had been delegated authority by Mr. Fancher to determine the starting rate of pay of RCT 1's upon reinstatement. Ms. Hoskins understood that, upon reinstatement to an RCT 1 position, an employee's rate of pay was determined by their ending rate of pay in the position upon which their reinstatement eligibility was based plus intervening pay increases to which that position would have been entitled. Ms. Hoskins understood that the only exception to this would occur if the resulting rate of pay created a disparity between the reinstated employee's rate of pay and that of other RCT 1's. Ms. Hoskins instructed Ms. Slaney-Bartels to follow this procedure.

6. In November of 1989, Ms. Hoskins determined the starting rate of pay of Stuart Coogan, who was reinstated to an RCT 1 position at CWC after his employment as a Security Officer 2 at UW-Madison for 10 years. Ms. Hoskins applied the procedure outlined in Finding of Fact 5, above, to Ms. Coogan's reinstatement. Ms. Hoskins did not verify with Mr. Fancher that she had applied the correct procedure in determining Ms. Coogan's starting rate of pay.

Mr. Fancher was not involved in determining Mr. Coogan's starting rate of pay. Mr. Coogan was unmarried at the time this determination was made.

7. Based on her understanding of the procedure to follow in determining the starting rate of pay of an RCT 1 upon reinstatement, Ms. Slaney-Bartels calculated a starting rate of pay for complainant based upon his ending rate of pay in the SO 3 ($9.662 per hour) position at the UW-Madison plus applicable intervening increases. Ms. Slaney-Bartels calculated this starting rate of pay to be $10.286. Since it was the first such calculation she had completed, Ms. Slaney-Bartels checked with Mr. Fancher to verify that her calculation was correct. Ms. Slaney-Bartels did this by providing Mr. Fancher with a single sheet of paper on which she had written her calculations. In addition to the calculations, Ms. Slaney-Bartels indicated on this paper that the two classifications involved were RCT 1 in pay range 06-07 and Security Officer 3 at the UW in pay range 05-08 and that the applicable separation date from the UW was 7/16/89. There was no other information on this paper relating to the identity of the subject employee. Ms. Slaney-Bartels did not review the information forwarded to the personnel office by Ms. Maier prior to making this calculation. Ms. Slaney-Bartels did not review complainant's personnel file prior to making this calculation. Ms. Slaney-Bartels did not provide any information to Mr. Fancher relating to complainant's marital status, family/ medical leave requests, or FMLA complaint prior to Mr. Fancher's calculation of complainant's starting rate of pay.

8. After reviewing Ms. Slaney-Bartels' calculations, Mr. Fancher returned the sheet of paper to her with the following notation at the bottom:

> No - This is a voluntary demotion.
> Pay rate about $1 over minimum of RCT 1 to allow for his prior service.

9. After reviewing Mr. Fancher's notation, Ms. Slaney-Bartels calculated that the minimum rate of pay for the RCT 1 classification plus $1 equalled $8.937 per hour.

10. In a letter to complainant dated August 31, 1990, Mr. Fancher stated as follows, in pertinent part:

> We are pleased to confirm your reinstatement to State service as a Resident Care Technician 1 at Central Wisconsin Center effective September 10, 1990. . . .
>
> Your pay will be $8.937 per hour and you will not receive a probationary increase. . . .

11. Mr. Fancher has been the Personnel Manager at CWC for 22 years. In calculating starting rate of pay upon reinstatement, i.e., appointment to a position in a counterpart pay range to that of the position upon which reinstatement eligibility is based, Mr. Fancher uses the ending rate of pay in the former position as a base and adds to that any applicable intervening increases. However, in calculating starting rate of pay when appointment is to a position in a pay range which is lower than that of the position upon which reinstatement eligibility is based, Mr. Fancher uses the minimum of the pay range of the new position and adds to that an amount based on total state seniority and directly relevant work experience. Since the pay range of an RCT 1 position is lower than that of an SO 3 position, Mr. Fancher used as the basis for his calculation of complainant's starting rate of pay the minimum of the pay range of the RCT 1 classification and added $1 to that based on complainant's seniority in state service. Mr. Fancher did not feel that complainant's experience in an SO 3 position at the UW-Madison was directly relevant to the duties and responsibilities of an RCT 1 position, i.e., Mr. Fancher did not feel that the safety and security work of an SO 3 position was directly relevant to the patient care work of an RCT 1 position.. Mr. Fancher did not use any information other than the sheet of paper given to him by Ms. Slaney-Bartels in reaching this conclusion. Mr. Fancher did not have any information relating to complainant's identity, marital status, family or medical leave requests, or FMLA complaint at the time he calculated complainant's starting rate of pay. The only individuals involved in determining complainant's starting rate of pay in the subject RCT 1 position were Ms. Slaney-Bartels and Mr. Fancher.

12. The standard procedure used by administrators delegated appointing authority by the Secretary of DHSS is to calculate the starting rate of pay upon reinstatement, whether to a position in a counterpart or lower pay range, as the ending rate of pay in the former position upon which reinstatement eligibility is based plus any applicable intervening increases. However, this

procedure is not required and the procedure followed by Mr. Fancher in determining complainant's starting rate of pay in the subject position is considered by DHSS's Bureau of Personnel and Employment Relations to fall within the range of allowable discretion of an appointing authority.

13. Some time after his termination from MMHI, complainant telephoned Al Kohlman, an Administrative Assistant 4 at CWC and requested information relating to complaints that may have been filed against complainant's former supervisor at MMHI. Complainant did not request copies of these complaints. Mr. Kohlman did not discuss this request for information with Mr. Fancher.

14. Complainant began employment with CWC as an RCT 1 on September 10, 1990. Complainant subsequently learned that his starting rate of pay was not the maximum of the pay range for the RCT 1 classification and brought this to the attention of Mr. Fancher. This situation also came to the attention of Gerald Dymond, the Director of CWC. In a letter to complainant dated March 6, 1991, Mr. Dymond stated as follows, in pertinent part:

> In your appointment letter of 08/31/90 it was clearly stated that your starting salary would be $8.937 per hour; . . .
>
> The decision on your pay was based on ER 29.03(8)(b), "An employee who voluntarily demotes may receive any base pay rate within the new pay range which is not greater than the last rate received . . ." and Pers s. 29.03 par 6(c) a which states "Employees placed on probation when reinstated shall be paid not less than the minimum of the pay range to which the class is assigned."
>
> Central Center gave you $1 over the minimum of the pay range to compensate you for your prior state service.

15 Complainant also brought this matter to the attention of the Department of Employment Relations (DER). In a letter to complainant dated March 7, 1991, Kathy Kopp, a Compensation Analyst with DER stated as follows, in pertinent part:

> Your letter of February 27, 1991 to Eileen Kellor has been referred to me for response. In your letter you requested assistance in determining whether the rate of pay established upon your reinstatement to Central Wisconsin Center (CWC) in September, 1990 was appropriate.

> Based on the information you provided, rules of the Department of Employment Relations regarding pay on reinstatement would apply. ER 29.03(6), Wis. Adm. Code states:
>
> > When an employe is reinstated, the base pay may be at any rate which is not greater than the last rate received plus intervening compensation plan adjustments or contractual adjustments. Employes placed on probation when reinstated shall be paid not less than the minimum of the pay range and employes not placed on probation when reinstated shall be paid not less than the PSICM of the pay range.
>
> This is interpreted to mean that CWC had discretion in setting your rate of pay upon reinstatement. The rate could not have been set at less than the minimum ($7.937) or PSICM ($8.716) of the pay range (depending upon whether or not you are serving a probationary period) nor could it be more than the rate you were receiving when you terminated state service in May, 1990 plus the July, 1990 percentage increase. Upon review of payroll records, it appears that the rate of pay you are currently receiving is within this range and, therefore, based on the rules, is appropriate.

16 On June 15, 1990, complainant filed with the Commission a charge of discrimination under the Family Leave/Medical Leave Act (FMLA).

Conclusions of Law

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

2. The complainant has the burden to show that probable cause exists to believe that complainant has been discriminated/retaliated against as alleged.

3. The complainant has failed to sustain this burden.

Opinion

The issue under consideration is one of probable cause. Probable cause is defined in §PC 1.02(16), Wis. Adm. Code, as a reasonable ground for belief, supported by facts and circumstances, strong enough in themselves to warrant a prudent person to believe that discrimination has been or is being committed. Although the Commission recognizes that the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination, it is useful in the context of a probable cause proceeding such as the instant

one to utilize the analytical frameworks and guidance provided by decisions on the merits in discrimination cases to assist the Commission in reaching a decision on probable cause. The Commission will follow this course in reaching a decision here on probable cause.

In analyzing a claim such as the one under consideration here, the Commission generally uses the method of analysis set forth in McDonnel-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

Complainant alleges that respondent, in determining his starting rate of pay upon reinstatement to an RCT 1 position at CWC, discriminated against him on the basis of his marital status, violated the Family Leave/Medical Leave Act, retaliated against him because he had engaged in protected FEA activities, and retaliated against him because he had engaged in protected whistleblower activities.

Section 230.31, Stats., states as follows, in pertinent part:

> 230.31 Restoration of employment and reinstatement privileges.
>
> (1) Any person who has held a position and obtained permanent status in class under the civil service law and rules and who has separated from the service without any delinquency or misconduct on his or her part but owing to reasons of economy or otherwise shall be granted the following considerations for a 3-year period from the date of such separation:
>
> (a) Such person shall be eligible for reinstatement in a position having a comparable or lower pay rate or range for which such person is qualified.

Section ER 29.03(6)(c), Wis. Adm. Code, states as follows, in pertinent part:

> ER 29.03 (6)(c) Pay on reinstatement.
>
> (c)1. . . . when an employee is reinstated, the base pay may be at any rate not greater than the last rate received plus intervening compensation plan adjustments . . .

a. Employes placed on probation when reinstated shall be paid not less than the minimum of the pay range to which the class if assigned.

b. Employes not placed on probation when reinstated shall be paid not less than the PSICM (permanent status in class minimum) of the pay range to which the class is assigned.

c. Employes shall not be paid more than the maximum of the pay range to which the class is assigned.

These citations make it clear that respondent had the discretion to set complainant's starting rate of pay at any point between the minimum and the maximum of the pay range to which the RCT 1 classification is assigned, i.e., between $7.937 and $10.887 per hour. The question then is whether, in exercising this discretion, respondent discriminated or retaliated against complainant as alleged.

Marital Status

In order to establish a prima facie case of marital status discrimination, complainant would have to show: (1) that he was a member of a protected group and the decision-maker was aware of this membership at the time the subject action occurred, (2) that he suffered an adverse term or condition of employment, and (3) that the adverse term or condition of employment arose under circumstances which give rise to an inference of discrimination.

In regard to the second element, the fact that complainant's starting rate of pay was set at a level lower than that of at least one other reinstated employee would show that complainant suffered an adverse term or condition of employment. In regard to the third element, the fact that the starting rate of pay of complainant, a married person, was set at a level lower than that of Mr. Coogan, an unmarried person, would give rise to an inference of discrimination. In regard to the first element, complainant, as a married person, is a member of a group protected by the FEA. However, the record shows that Mr. Fancher, at the time he determined complainant's starting rate of pay, had no knowledge of complainant's identity, much less his marital status or other characteristics. As a result, complainant has failed to show a prima facie case of marital status discrimination.

If complainant had shown a prima facie case of marital status discrimination, the burden would then shift to respondent to articulate a legitimate, nondiscriminatory reason for setting complainant's starting rate of pay at a lower level than Mr. Coogan's. Respondent offers in this regard that CWC had the authority to set the starting rates of pay at any level within the applicable pay range and both of these determinations fell within this range; that two different people made the Coogan and Butzlaff determinations and neither had knowledge of the other's determination; and that Mr. Fancher followed his standard practice in setting complainant's starting rate of pay, i.e., add-ons to the minimum of the pay range based on seniority in state service and directly relevant work experience. On their face, these reasons are both legitimate and non-discriminatory.

The burden would then shift to complainant to show pretext. Complainant argues that Mr. Fancher did not follow respondent's usual practice in determining complainant's starting rate of pay and that this demonstrates pretext. However, although the record does show that Mr. Fancher did not follow the practice generally followed by others within DHSS to whom similar authority has been delegated by the Secretary, the record also shows that the Secretary delegates to such authorities the discretion to establish a practice within the limits of the applicable statutes and administrative rules. The record shows that Mr. Fancher's practice in determining complainant's starting rate of pay fell within such limits. The more crucial question for this analysis is whether Mr. Fancher followed his usual practice in determining complainant's rate of pay. Mr. Fancher, through his testimony at hearing, outlined his practice and complainant has failed to show that he did not follow it in determining his starting rate of pay.

Complainant further argues that, even though two different employees were involved in determining Mr. Coogan's starting rate of pay and complainant's, Mr. Fancher was ultimately responsible for both and, as a result, he should be held accountable for both determinations and for the difference between the two determinations. From the standpoint of staff accountability, complainant is probably correct. However, in analyzing a complaint of discrimination alleging disparate treatment, the knowledge, actions and intent of the decision-maker, not his place in the decision-making hierarchy, are the relevant factors. In the instant case, Mr. Fancher was not involved in making

the Coogan determination and had no knowledge of it at the time he determined complainant's starting rate of pay. Complainant has failed to show pretext in this regard.

Complainant contends that the fact that Mr. Fancher failed to take into account his directly relevant work experience in determining his starting rate of pay demonstrates pretext. In this regard, complainant asserts that the experience he had as a Security Officer was directly relevant to the duties and responsibilities of an RCT 1. Although the record shows that there is some overlap in the duties of an SO 3 and an RCT 1 at an institution for the developmentally disabled, the overlap is minimal and the emphases of the two jobs are very different. In addition, Mr. Fancher was not aware that complainant had been employed as an SO 3 at MMHI, a mental health institute. The information available to Mr. Fancher when he determined complainant's starting rate of pay indicated only complainant's employment as an SO 3 at the UW-Madison, a position with even less overlap in duties and responsibilities with those of the subject position. Complainant further contends that his experience caring for his two children and assisting his mother with her child care business, as detailed in his application materials and during his interview for the RCT 1 position, demonstrates that he had directly relevant experience. Although they may so demonstrate, the record shows that Mr. Fancher did not see this information at or prior to the time that he determined complainant's rate of pay.

Complainant has failed to show that the reasons offered by respondent for the subject action were a pretext for marital status discrimination.

Family Leave/ Medical Leave

Complainant contends that because he needed to care for ill family members, he had requested and been denied medical leave from his former supervisor at MMHI. The record shows that complainant informed Ms. Maier of this situation during his interview and that she noted it in her interview notes.

Since complainant does not contend and the record does not show that complainant ever requested medical leave from CWC prior to filing the instant complaint, the Commission assumes that complainant is alleging that, within the meaning of §103.10(11)(b), Stats., respondent discriminated/retaliated against him for opposing MMHI's denial of certain medical leave requests by

setting his starting rate of pay at a level lower than at least one other reinstated employee.

The analysis of this aspect of the case would parallel that of the marital status aspect, above. And again, the fact that the record shows that Mr. Fancher, at the time that he determined complainant's starting rate of pay, had no knowledge of complainant's identity, much less whether he had ever opposed MMHI's denial of his medical leave requests, necessarily leads to the conclusion that complainant has failed to show that respondent discriminated against him within the meaning of the FMLA.

Fair Employment Retaliation

The record does show that complainant filed with the Commission a charge under the FMLA prior to Mr. Fancher determining his starting rate of pay in the subject RCT 1 position. Complainant alleges that this determination, which resulted in a lower rate than that of Mr. Coogan, was in retaliation for the filing of this charge.

The Fair Employment Act's prohibition against retaliation is set forth in §111.322(2m), Stats., which states as follows, in pertinent part:

> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> (2m) To discharge or otherwise discriminate against any individual because of any of the following:
>
> (a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10 . . .
>
> * * * * *
>
> (d) the individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

Section 103.10, Stats., embodies the FMLA. As a result, complainant is protected by the FEA in §111.322(2m), Stats. from retaliation for having filed the earlier FMLA action.

The analysis of this aspect of the case would parallel that of the marital status aspect, above And again, the fact that the record shows that Mr. Fancher, at the time that he determined complainant's starting rate of

pay, had no knowledge of complainant's identity, much less whether he had ever filed a complaint with the Commission under the FMLA, necessarily leads to the conclusion that complainant has failed to show that respondent retaliated against him within the meaning of the FEA. Although complainant attempted to prove that he had requested certain information from Mr. Kohlman relating to complainant's former supervisor at MMHI and Mr. Kohlman had presented this request to Mr. Fancher before he determined complainant's starting rate of pay, the record simply does not confirm complainant's version of the facts in this regard. Even if the version of the facts in this regard which were most favorable to complainant's argument was considered, such facts do not indicate that any information linking this request for information to complainant's FMLA charge was given to Mr. Fancher. The Commission concludes that complainant has failed to prove that he was retaliated against for engaging in protected FEA activities.

Whistleblower retaliation

Complainant bases his charge of whistleblower retaliation on his filing of an FEA charge prior to Mr. Fancher's determination of his starting rate of pay.

The whistleblower law prohibits "retaliatory action" and defines that term in §230.80(8)(a), Stats., as:

> [A] disciplinary action taken because of any of the following:
>
> (a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85(1)
>
> (b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s 230.81 by another employe.
>
> (c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).

Complainant's previous complaints were filed pursuant to subch. II, ch. 111, Stats., and were not complaints filed pursuant to §230.85(1), Stats. Therefore, with respect to the complainant's allegations here, the relevant language is whether the complainant's previous complaints constitute lawful disclosures under §230.81, Stats., which provides, in pertinent part:

> (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employ shall do either of the following:
>
> (a) Disclose the information in writing to the employe's supervisor.
>
> (b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate . . .
>
> (2) Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.
>
> (3) Any disclosure of information by an employee to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

The filing of the FEA complaint was not a written disclosure to the complainant's supervisor and was not a written disclosure to a governmental unit specified by the Commission as appropriate. The only remaining question is whether the Commission can be considered a "law enforcement agency" under §230.81(2), Stats. While that term is not defined in the whistleblower law, the general usage of the term is not broad enough to include the Personnel Commission, a quasi-judicial administrative agency. This distinction is supported by the reference in the same subsection to "state or federal grand jury or a judge in a proceeding commenced under s. 968.26." By specifically referencing judicial proceedings, the legislature has clearly excluded the court system, and by necessary implication the system of administrative law, from law enforcement agencies. In addition, a definition of the term "law enforcement agency" found elsewhere in the statutes is consistent with excluding the Commission from and scope of the term used in the whistleblower law.

Pursuant to §165.83(1), Stats., which relates to cooperation between agencies for purposes of criminal identification:

> (b) "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employes of such unit are authorized to make arrests for crimes while acting within the scope of their authority.

This definition and the other analysis set out above indicates that the Personnel Commission is not a "law enforcement agency" as that term is used in the whistleblower law. Therefore, filing of the complaint of discrimination with the Commission is not a protected activity and the complainant has failed to qualify for the protections of the whistleblower law.

Order

This complaint is dismissed.

Dated: November 19, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, 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.