STATE OF WISCONSIN PERSONNEL COMMISSION

NICHOLAS PIERCE and ARTHUR SHELDON, Complainants, v. Executive Director, WISCONSIN LOTTERY[1], and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondents. Case No. 91-0136, 0137-PC-ER	RULING ON MOTIONS

These matters are before the Commission on motions by respondent Wisconsin Lottery to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim. The Wisconsin Lottery and the complainants have filed briefs. In a previous ruling dated February 21, 1992, the Commission rejected various motions filed by respondent DER.

The complainants are employes of the Wisconsin Lottery. Complainant Pierce serves as deputy security director and complainant Sheldon serves as investigator. In his complaint of whistleblower retaliation filed with the Commission on September 12, 1991, complainant Pierce alleged as follows:

> WHISTLEBLOWING ACTIVITIES:
>
> (1) Sometime between August 1, 1990 and September 28, 1990, Complainant disclosed information to an auditor with the firm of Deloitte Touche, which performed the bi-annual security audit required under section [565.37(6)], Stats. Specifically, Complainant disclosed that his position description as Special Investigator did not correspond with the authority he actually possessed. The position description called for law enforcement certification, but the position as implemented lacked the appropriate arrest authority. Lack of such authority jeopardized

[1] Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

Complainant's continued law enforcement certification and protective occupation status. On information and belief, the auditor conveyed this disclosure to William Flynn, the Executive Director of the Respondent Wisconsin Lottery Board.

The auditor was an agent of the legislature because the legislature has required the performance of a bi-annual security audit by an independent agency to fulfill its oversight responsibilities for the integrity of the State Lottery. Disclosure to the auditor is protected disclosure within the meaning of section 230.81(3). The disclosure was also protected because the employer had actual knowledge of the substance of the complaint.

(2) Complainant assisted with a lawful disclosure in that on or about February 5, 1991, Lottery co-worker Gary Cravillion disclosed to the Joint Committee on Audit of the Legislature, information he received from Complainant as follows:

> "[Lottery Executive Director] Flynn complained to [Complainant] about 'people making waves around here' [Flynn] told [Complainant] that one way to cure that was to fire [Cravillion]. [Flynn] further told [Complainant] that [Cravillion] 'may get his job back in a year, but his guts would churn all the while.' [Complainant] believed that the comments were made about [Cravillion]." [brackets in complaint]

In providing this information to Cravillion, who then disclosed it to the legislature, Complainant was lawfully assisting with a lawful disclosure within the meaning of section 230.80(8)(b), Stats.

<u>RETALIATION</u>:

Respondent engaged in retaliation as follows: On July 17, 1991, Flynn asked Complainant to sign a "settlement agreement" wherein Complainant would waive certain legal rights. Flynn threatened that if Complainant did not accept the "settlement offer," Flynn would cause the Department of Employment Relations to take steps to remove Complainant from protective occupation status. Copies of the "settlement agreement" and Flynn's July 17, 1991 memo to Complainant are attached to this complaint. On information and belief, the threat to terminate Complainant's protective occupation status was, in whole or in substantial part, retaliation for Complainant's disclosure described above, and constitutes retaliation prohibited under section 230.85, Stats.

<u>RELIEF REQUESTED</u>:

> Order prohibiting Respondent or the Department of Employment Relations from terminating Complainant's protective occupation status.

Mr. Sheldon filed a substantially identical complaint except that he was not involved in the alleged disclosure by Mr. Pierce to Mr. Cravillion.

The Lottery's initial contention is that while the whistleblower law protects disclosures to individual legislators, it does not protect disclosures to the legislature, as a body, and, therefore also does not protect a disclosure to an agent of the legislature such as the auditor for Deloitte Touche.[2] This contention is based upon the language of §230.81(3):

> Any disclosure of information by an employe 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.

This language clearly entitles an employe from protection against retaliation where the employe has made a disclosure to a legislator, a legislative committee or a legislative service agency. Similarly, a disclosure to an *agent* of a legislator, a legislative committee or a legislative service agency would also serve as a protected disclosure. While "the legislature" is not expressly identified as a separate entity to which protected disclosures may be made, §230.81(3) should be read to include disclosures to the legislature as well as to an individual legislator. In construing the Wisconsin statutes, "the singular includes the plural." §990.001(1). Therefore, a disclosure to legislators is a protected disclosure. The legislature is comprised of member legislators, so a disclosure to the legislature is, at the same time, a disclosure to legislators which falls within the language of §230.81(3).

In interpreting the statutory language in this manner, the Commission notes that the whistleblower law is a remedial statute As such, it is entitled to a liberal construction. Wis. Bankers Assoc. v. Mut. Savings & Loan, 96 Wis.2d 438, 291 N.W.2d 869 (1980). The liberal construction clause in §230.02 is also to be applied to the whistleblower law in aid of the purposes set forth in §230.01,

---

[2]For purposes of this ruling, the Commission assumes that the auditor was acting as an agent of the legislature. In its reply brief, the respondent Lottery specifically indicated that it was not challenging the complainants' agency theory for the purposes of its motion.

which include "to encourage disclosure of information under [the whistle-blower law] and to ensure that any employe employed by a governmental unit is protected from retaliatory action for disclosing information under [the law]." Hollinger & Gertsch v. UW-Milwaukee, 84-0061, 0063-PC-ER, 8/15/85. The same purposes are aided by interpreting §230.81(3) to protect disclosures to a group of legislators, i.e. to the legislature itself (or to an agent thereof) as well as to an individual legislator.

This result is supported by the decision of the Court of Appeals in Kentucky in Harrison v. Brotherhood of Ry. & S. S. Clerks, 271 S.W.2d 852 (1954). In that case, the appellant had been expelled from his union for writing a letter, in his capacity as a union official, to eight members of Congress in opposition to a certain bill. The union's constitution provided:

> When such policy [with respect to federal legislation] has been declared [by the union president], no member of the Brotherhood shall appear before any legislative committee, Legislature, State, Provincial or Federal executive in opposition to such program or policy in any capacity except that of a private citizen.

In affirming the trial court's decision to uphold the expulsion of the appellant from the union, the court of appeals wrote:

> We are finally confronted with the question of whether or not appellant appeared before a body within the scope of the prohibition. Strictly speaking, he did not present himself to a legislature or to a legislative committee. These consist of organized bodies of men, and we cannot say that appearing before a member of Congress is technically an appearance before a legislative body or committee.
>
> On the other hand, it is apparent on the face of section 9 that is whole design and purpose was to prevent members of the Brotherhood from using their office to influence legislative or executive action contrary to the policies of the Brotherhood. Under the wording of this particular Section it seems to us that the word "legislature" may fairly be construed to include members of the legislature when the appearance is for the purpose of inducing legislative action. Apparently this was the construction adopted by appellee's authorized officers, and... the courts should hesitate to upset a labor organization's interpretation of its own Constitution and by-laws. (emphasis added)

Just as the court in Harrison interpreted the term "legislature" to include the members of the legislature, the reference in §230.81(3) to "legislator" should

be interpreted to include the legislature, thereby reflecting the liberal construction to which the statute is entitled.

Respondent Lottery also contends that Mr. Pierce's contact with Mr. Cravillion was not protected by the whistleblower law. In support of its contention, the respondent relies on §230.81:

> (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 employe 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.

While Mr. Pierce has made no allegation that, prior to his conversation with Mr. Cravillion, he complied with either §230.81(1)(a) or (b), making a protected disclosure is not the only basis for protection under the whistleblower law. The prohibition against retaliation set forth in §230.83(1) is based on the definition of "retaliatory action" found in §230.80(8):

> (8) "Retaliatory action" means 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).

Mr. Pierce contends that his contact with Mr. Cravillion falls within the scope of §230.80(8)(b) in that he assisted Mr. Cravillion in making his disclosure to the legislative committee. For purposes of ruling on the Lottery's motion to dismiss, the Commission must accept the complainant's description of his contact with Mr. Cravillion, and, on that basis, the Commission will deny the respondent's motion, without prejudice.

Respondent Wisconsin Lottery also contends that complainants are not entitled to the protection from retaliation established in §230.83 because their disclosures to the Deloitte & Touche auditor were for personal benefit as described in §230.83(2):

> This section does not apply to an employe who discloses information if the employe knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employe or for the employe's immediate family, unless the employe discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

Respondent argues that the complainants made their disclosure that they didn't have arrest authority "in anticipation that their protective occupation status would no longer be jeopardized, and each complainant could remain in the protective occupation status and reap its financial benefits." Information relating to the nature of the disclosure and the complainants' knowledge at the time is limited. The following statement is found in the complaints:

> Complainant disclosed that his position description... did not correspond with the authority he actually possessed. The position description called for law enforcement certification, but the position as implemented lacked the appropriate arrest authority. Lack of such authority jeopardized Complainant's continued law enforcement certification and protective occupation status

In their brief, the complainants describe the disclosure and argue as follows·

> The disclosure would not result in the receipt of anything of value because at the time of the disclosure, complainants in fact had protective classification status; furthermore, they were operating under position descriptions which were written by their employer and which did, on their face, constitute positions in law enforcement. Action in response to the disclosure would not have changed the status quo. The thrust of the disclosure was that the employer was proceeding on questionable authority when it utilized complainants under job descriptions which were inaccurate in light of the powers actually exercised. Correction of the problem would not have gained complainants anything of value. Rather, it would have given the employer something of value. Moreover, correction of the problem would not give the complainants anything of value which in the sense of a benefit... would have added any increments to what they were receiving at the time of the disclosure.

The complainants appear to be suggesting that the respondents should have "corrected" the problem referenced in their disclosures by actually assigning them the arrest authority identified in their position descriptions. There were two other options presented by the disclosure. One was for the respondents to continue to maintain the complainants' status in a protected occupation even though they did not perform the requisite duties, and the other was to initiate a change in that status to reflect the absence of arrest authority.

The language of §230.83(2) specifies that the whistleblower law may not be used to to protect an employe who has made a disclosure in order to receive something of value.[3] That language clearly applies to the situation where an employe has sought to invoke the law in order to perpetuate the receipt of benefits where the employe is otherwise not entitled to those benefits. For example, an employe who, in a whistleblower disclosure, announces that he is being paid at a rate twice that permitted by law is not protected by §230.83(1) from the employer's subsequent action to reduce the employe's rate of pay to a level permitted by statute. If those payments were permitted to continue under the guise of protecting the whistleblower against retaliation, the disclosure would result in the receipt of something of value, contrary to §230.83(2). It is not enough to simply look at the status quo prior to disclosure in terms of whether the complainants' positions were in the protected occupation category. The Commission must also consider the status quo in terms of the actual duties which were assigned to the complainants and must look at the anticipated consequences of the disclosure.

Here, the complainants have not contended that, given the absence of any enforcement authority, the change in their protective status was incorrect from a classification standpoint. Complainants appear to argue that, once the disclosure was made, the respondent should have proceeded to assign them the enforcement authority that was described on their inaccurate position descriptions. This contention is comparable to the employe in the previous hypothetical arguing that, as a consequence of his disclosure, the respondent should be required to reassign him duties commensurate with his improper rate of pay. That would result in maintenance of the status quo in the sense that the employe would continue to receive the same rate of pay. However, it

[3]A statutory exception exists for disclosures made in pursuit of a governmental award.

would clearly not be a continuation of the status quo in terms of the underlying duties which were assigned to the employe. The assignment of the additional duties to the employe would result in the receipt of something of value in that it would mean the continuation of a rate of pay to which the employe would otherwise not be entitled.

In the present case, the status quo was that the complainants were not assigned enforcement responsibilities, even though they were incorrectly held protective occupation status. To the extent the complainants sought to have their disclosure result in the reassignment of enforcement responsibilities to them, that change would "likely... result in the receipt of [something] of value" to them in the form of greater retirement benefits. For that reason, their disclosures to the Deloitte & Touche auditor did not entitle them to protection under §230.83(1).

The final contention raised by respondent Lottery is that the complainants have failed to state a claim because respondents' conduct, characterized by complainants as a "threat to terminate" complainants' protective occupation status, is not prohibited by the whistleblower law.

The briefs and other documents filed in these matters indicate that on or about May 25, 1989, complainant Pierce filed with DER a request to reclassify his position from Police Sergeant (PR 01-14) to Police Captain (PR 01-16). On or about May 24, 1989, complainant Sheldon filed with DER a request to reclassify his position from Special Agent 2 (PR 01-11) to Special Agent 3 (PR 01-13). In separate memos dated July 9, 1991, to the Deputy Director of the Wisconsin Lottery, a classification analyst at DER concluded that the Pierce position was more appropriately classified at the Regulation Compliance Investigator Supervisor 2 (PR 01-14) level than at the requested Police Captain classification, and that the Sheldon position was appropriately classified at the Regulation Compliance Investigator 5 (PR 05-13) level than at the requested Special Agent 3 classification. The memo included instructions for how the employe could appeal the classification decision with the Personnel Commission. The memo also referenced an attached draft of a settlement agreement for the review of Mr. Pierce and Mr. Sheldon These materials were forwarded to the complainants by substantially identical memos dated July 17, 1991, from the Executive Director of the Wisconsin Lottery. The memo to Mr. Pierce read:

> Attached please find a memo from the Department of Employment Relations which responds to your request for a reclassification and a settlement agreement from the same agency which deals with your status as a protective occupation participant.
>
> In the first memo, the Department of Employment Relations has concluded that your position is appropriately classified as a Regulation Compliance Investigator Supervisor 2. As noted, you may appeal this decision to the Personnel Commission within the time frame indicated in the memo.
>
> The settlement agreement provides that you will retain your protective status for the period of one year while employed as a Regulation Compliance Investigator Supervisor 2.
>
> If you choose not to sign the settlement agreement by Wednesday, July 24th, it will be deemed that you have refused to accept the proposed settlement. The Department of Employment Relations will then take appropriate steps to remove you from protective status effective with the pay period commencing Sunday, July 28th. At that time DER will also notify you by letter concerning your appeal rights in this matter.

The settlement agreement includes language which describes it as a "just and equitable resolution of potential litigation."

The net effect of the July 17th memo to the complainants was to advise them that their status as a protective occupation participant was going to be changed by action of DER. As a basis for resolving any litigation which might arise from that action, the language of the settlement agreement would have made the change in status effective in July of 1992 instead of July of 1991. If the complainants chose not to accept the proposed settlement terms, DER would take steps to effectuate the change as of July 28, 1991, and the complainants could then appeal that determination. §40.06(1)(e).

In Hollinger v. UW-Milwaukee, 84-0061-PC-ER, 11/21/85, the Commission denied a motion by a complainant to amend her complaint to add an allegation that respondent's settlement offer constituted an attempt to retaliate for prior whistleblower activities. The Commission explained the ruling as follow:

> In the present case, the complainant contends that the various conditions of settlement proposed by the respondent are retaliatory. However, respondent's conditions of settlement require acceptance by the complainant before they can go into effect. Absent complainant's acceptance, they are merely an offer and do not fall within the prohibition in s. 230.83, stats.

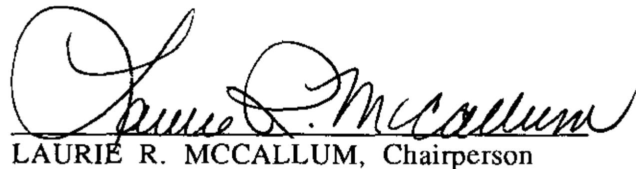
> Respondent's conditions for settlement do not effectuate retaliation against the complainant, nor has the respondent threatened retaliation by proposing the settlement terms.... Here, the respondent's offer was made in the context of an ongoing administrative review of an employment decision. The status quo at the time of the offer of settlement (which was maintained by complainant's decision not to accept the offer) was the processing of a pending complaint of retaliation.
>
> This set of facts may be distinguished from the situation where an employer gives an employe two choices, both of which are penalties and allegedly retaliatory. Under those circumstances, acceptance of either option would be undesirable and would provide a basis for filing a complaint of illegal retaliation or the amendment of an existing charge.

The facts here fall into the category described in Hollinger of two choices, both of which are penalties. The complainants' choices were either to 1) accept an effective date of July of 1992 for losing their protective status but giving up their right to challenge the respondents' conduct, or 2) to have DER take the steps to remove their protective occupation status effective July of 1991. While the respondent Lottery argues that complainants' protective status was, at the time of the July 17th memo, already lost as a consequence of the reclassifications and that the complainants were simply being given advance notice of the date of expiration so they could evaluate the settlement offer, this suggests a lack of discretion which is inconsistent with the terms of the proposed settlement. Therefore, the Commission denies the motion to dismiss for failure to state a claim due to the absence of any disciplinary action taken or threatened.

ORDER

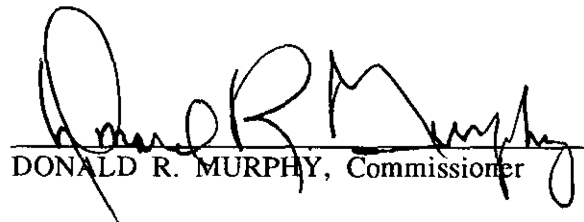
Respondent Lottery's motion to dismiss for lack of subject matter jurisdiction is granted as to the complaint filed by Mr. Sheldon, Case No. 91-0137-PC-ER, is granted in part and denied in part as to the complaint filed by Mr. Pierce, Case No. 91-0136-PC-ER. Respondent Lottery's motion to dismiss for failure to state a claim is denied. In light of the written waiver of the investigation process, the Commission will contact the parties in Pierce v. Wis. Lottery & DER for the purpose of scheduling a prehearing conference relating to the claim relating to protected contacts with Mr. Cravillion.

Dated: October 16, 1992 STATE PERSONNEL COMMISSION



LAURIE R. MCCALLUM, Chairperson

KMS:kms



DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Arthur Sheldon
3906 Sunnyvale Drive
DeForest, WI 53532

Jon E. Litscher
Secretary, DER
137 E. Wilson Street
P. O. Box 7855
Madison, WI 53707-7855

John Tries*, Chairperson
Gaming Commission
150 E. Gilman, Suite 1000
P. O. Box 7975
Madison, WI 53707-7975

*Pursuant to the provisions of 1991 Wis. Act 269 which created the Gaming Commission effective October 1, 1992, the authority previously held by the Executive Director of the Wisconsin Lottery with respect to the positions that are the subject of this proceeding is now held by the Chairperson of the Gaming Commission.

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.