STATE OF WISCONSIN PERSONNEL COMMISSION

NICHOLAS PIERCE and
ARTHUR SHELDON,

Complainants,

v.

Executive Director, WISCONSIN LOTTERY, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case Nos. 91-0136, 0137-PC-ER

RULING
ON
MOTIONS

This matter is before the Commission on respondent DER's alternative motions filed December 6, 1991 to dismiss DER as a party, to dismiss the complaints for failure to state a claim and because the Commission lacks the authority to grant the relief requested, and to require complainants to amend their complaints to state more specifically their allegations against DER. Both sides have filed briefs.

These are basically identical complaints of "whistleblower" retaliation (Subchapter III, Chapter 230, Stats.). Each complaint contains the following:

> WHISTLEBLOWING ACTIVITIES:
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> (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(b), 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 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.
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> 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.

RETALIATION:

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.

RELIEF REQUESTED:

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

DER argues that the complaints do not allege that DER played any role in the alleged threat by Lottery Executive Director Flynn against complainants, that DER somehow had been aware of the alleged disclosures, or that it was

acting as an agent of Executive Director Flynn, and that therefore the complainants fail to state a claim against DER. In response, complainants argue first that DER should remain a party for remedial purposes, as it is DER which has the authority to approve protective occupational status under §40.06(1)(dm), Stats. Second, complainants contend they have sufficiently alleged that DER engaged in a substantive violation of §230.85, Stats. Complainants point out that a memo from the Executive Director attached to the complaint refers to a memo and settlement agreement from DER, and they go on to argue that there is a sufficient allegation "that DER was acting as the agent of the appointing authority by thus lending itself to Flynn's retaliatory threats to terminate protective status."

The Commission agrees that DER should be kept in the case for remedial purposes.[1] With respect to the second aspect of this motion (whether the complaints allege any violation by DER), the Commission must take a liberal approach to construction of the pleadings, see Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), p. 7, citing Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-32, 275, N.W. 2d 660 (1979), as follows:

> For the purpose of testing whether a claim has been stated . . . the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer — to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed only if "it is quite clear that under no circumstances can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.
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> . . . A claim should not be dismissed . . . unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

At this stage of these proceedings and based on the allegations in the complaints and the elaboration provided in complainants' brief, it cannot be said

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[1] Respondent's argument that the Commission lacks authority to grant the relief requested will be addressed below.

that "it appears to a certainty that no relief can be granted under any set of circumstances that [complainants] can prove in support of [their] allegations." id.

Respondent also contends that complainants' alleged statements to the auditors that their position descriptions "called for law enforcement certification, but the position[s] as implemented lacked the appropriate arrest authority" do not as a matter of law constitute "information" under §230.80(5), Stats.:

> "Information" means information gained by the employe which the employe reasonably believes demonstrates:
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> (a) A violation of any state or federal law, rule or regulation.
>
> (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

In response, complainants argue:

> It was DER itself which approved the initial 1988 position descriptions for these employees, incorporating law enforcement certification and arrest authority, and placing the positions under protective status. That the legislation needed to give arrest authority to these employees had never in fact been sought or passed, as promised, was indeed of interest to the auditor and caused the auditor to promptly investigate by noting the discrepancy in the preliminary audit draft. Flynn and the Lottery Board felt sufficiently impelled to respond by having the internal security staff sworn in as members of the Capitol Police. Respondent then provided this information to the auditor, who then changed the audit to removed the reference to the discrepancy. After this, the Lottery Board issued a memo stating that the Capitol Police certification was not in fact sufficient to confer protective status or enforcement powers. It is clear that the communication reflected mismanagement or abuse of authority.

Again, it cannot be concluded on the face of the complaints and as elaborated upon by complainants in their brief that as a matter of law complainants' alleged communication was not "information" pursuant to §230.80(5), Stats.

Respondent also argues that there was no disclosure to an entity covered by the law, and, as a corollary, that disclosure to an agent of a covered entity would not satisfy the law's requirements. The complaints allege that the

auditor to whom the alleged disclosure was made "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." Although the whistleblower law does not explicitly provide that disclosure to an agent is equivalent to disclosure to a named entity, this does not mean the legislature intended that the normal rules of agency law would be inapplicable in this area. If, as complainants allege (and as must be assumed on this motion), the auditor indeed was acting as an agent of the legislature, then under general agency principles: "the agent is the representative of the principal and acts for, in the place of, and instead of, the principal." 3 Am Jur 2d Agency §1, and: "whatever an agent does in the lawful prosecution of the transaction entrusted to him is the act of the principal," supra, §2. Therefore, it follows that a disclosure to an agent of the legislature would be equivalent to a disclosure to the legislature.

Respondent also argues that the Commission lacks authority to grant the relief requested:

> It is DER's position that the appellants' appeal rights to DETF under sec. 40.06(1)(e), Stats., are the exclusive administrative remedy available to the appellants to challenge DER's determination that their positions do not qualify for coverage as protective occupation participants. By statute DETF and the ETF Board are given authority to review determinations by DER concerning the protective occupation status of any state employee's position. ETF has exclusive authority to determine issues concerning employee retirement fund issues. Therefore, DER contends that the Personnel Commission does not have jurisdiction to make any order to DER concerning the protective occupation status of any state position, or to intervene in DER's decisions made under sec. 40.06(1)(dm), Stats.

The Commission rejected a similar contention in Phillips v. DHSS & DETF, 87-0128-PC-ER (3/15/89), which involved a complaint of sex, sexual orientation, and marital status discrimination with respect to insurance coverage administered by DETF. Respondent argued that the operation of §40.03(1)(j), Stats., which specifically provides for appeals of DETF eligibility decisions to the Employe Trust Funds Board, precluded any Personnel Commission jurisdiction under the FEA. The Commission rejected this contention:

> The fact that administrative agencies which derive their authority from the same source (here, the state) have jurisdiction over the save transaction does not automatically give rise to the conclusion that the agency with the more specific grant of authority has exclusive jurisdiction. This is particularly true where the agencies are enforcing different statutes. See Warner-Lambert v. FTC, 361 F. Supp. 948, 952-53 (D. D.C. 1973).
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> In this case, the Commission's inquiry is limited to the question of whether there has been a violation of the FEA. The Employe Trust Funds Board has no statutory responsibilities under the FEA and cannot make that kind of determination. There is nothing inherent in the statutory framework underlying the two proceedings (appeal to the Employe Trust Funds Board and charge of the discrimination before the Personnel Commission) that would make the two proceedings inconsistent, and there is no explicit statutory provision making one remedy exclusive.
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> Carried to its logical extreme, respondent's position would strip FEA protection from an employe with respect to any transaction where the legislature provides an additional, specific remedy. For example, a county employe who has the right pursuant to §63.10(2), Stats., to a hearing before the civil service commission in connection with a disciplinary action presumably would not have the right to pursue a claim with the Department of Industry, Labor and Human Relations that the disciplinary action was unlawfully discriminatory. Such a result would substantially and arbitrarily undermine the FEA and many other protective labor laws. (footnote omitted)

The same principles apply in the instant case. The Commission has jurisdiction pursuant to §230.85, Stats., over the subject matter of these complaints, and this jurisdiction is not ousted by DETF's concurrent administrative jurisdiction

Finally, respondent DER makes the point that complainants have not alleged with any degree of specificity what DER allegedly did, and moves that complainants be required to amend their complaints to allege this claim with more specificity. While DER is entitled to seek more specific information about the nature of this claim, in the Commission's opinion, in light of the liberal pleading requirements involved in these proceedings it would be more appropriate for DER to pursue this through depositions or interrogatories rather than through a motion directed to the pleadings. Therefore, this motion will be denied without prejudice to DER seeking this information through other means.

ORDER

Respondent's motions filed December 6, 1991, are denied. In light of the complainant's written waiver of the investigation process, the Commission will contact the parties for the purpose of scheduling a prehearing conference.

Dated: February 21, 1992 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner