STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 7

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VERNON SEAY,
Petitioner

Case Nos. 93-CV-1247
94-CV-1238

v.

WISCONSIN PERSONNEL COMMISSION,
Respondent

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MEMORANDUM DECISION AND ORDER

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PROCEDURAL BACKGROUND

Before the court are two petitions for review of decisions of the Wisconsin Personnel Commission. These actions were consolidated by Stipulation and Order of May 3, 1994; both cases arise from related facts regarding Petitioner's employment.

The first proceeding, Dane County Court Case No. 93-CV-1247, was brought before the court on March 29, 1993. In that action, Mr. Seay requests that the Commission's Interim Decision and Order of November 19, 1992 be reversed. The Order denied his motion to amend a whistleblower complaint against his employer to reflect that the conduct he alleges violated § 230.44(1)(b),(c),(d), Wis. Stats. That case was held in abeyance on October 12, 1993, pending resolution of the entire case before the Commission.

The second case, Dane County Court Case No. 94-CV-1238, was brought on April 14, 1994. In it, Mr. Seay seeks reversal of the Commission's Final Order of March 31, 1994, which found no retaliation against the petitioner, and dismissed his

whistleblower complaint in its entirety.

FACTUAL BACKGROUND [1]

Mr. Seay began his employment as a facilities repair worker for the University at Arlington Farm in August of 1987. This position consisted of maintaining and repairing wood, metal, and masonry. In January of 1989, Petitioner sought reclassification of his position to that of painter.[2] On March 29, 1989, and on July 12, 1989, Mr. Seay filed additional complaints alleging that his supervisor and co-workers were retaliating against him for requesting reclassification.[3]

Before and after Mr. Seay sought reclassification, his interactions with co-workers were not harmonious. Petitioner was described as having a poor attitude and unsafe work habits. Some of Mr. Seay's co-workers antagonized, abused and harassed him. In its final order, the Commission found that all these incidents either occurred before the whistleblower complaint was made, or were that the allegations of retaliation were sufficiently rebutted by the University.

Robert Vetter, the petitioner's immediate supervisor, was unaware of Mr. Seay's whistleblower complaint until well after the acts alleged to be retaliatory had begun. Mr. Vetter was aware of the animosity between Mr. Seay and his co-workers,

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[1] Unless otherwise indicated, the sources for the statements in this section are the findings by the Commission.

[2] The Commission found that over 80% of Mr. Seay's work assignments prior to his reclassification request involved painting.

[3] This complaint will be referred to as the "whistleblower complaint". It was the first disclosure by the petitioner which arguably gave rise to the protection of the whistleblower statute. See, § 230.83, Wis. Stats.

which began sometime in the summer of 1988. However, Mr. Vetter was not informed of the petitioner's whistleblower complaint until after March 15, 1989.[4] In October of 1990, the petitioner left his position at Arlington Farm.

ISSUES PRESENTED

1. Does the Personnel Commission have jurisdiction, under § 230.44(1)(b), over acts of alleged retaliation arising from a request for reclassification?

2. Is there substantial evidence to support the Commission's finding that there was no retaliation against Mr. Seay for a protected disclosure?

STANDARD OF REVIEW

Judicial review of the Commission is provided for in §§ 230.87, 227.57, Wis. Stats.[5] § 227.57 requires that the court set aside or modify the agency action only if it finds that the agency has erroneously interpreted a provision of law. [§ 227.57(6)]. However, decisions of an administrative agency that deal with the scope of its own power are not binding on a reviewing court. GTE North Inc. v. Public Service Commission, 176 Wis.2d 559, 564, 500 N.W.2d. 284 (1993); Wisconsin's

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[4] The facts regarding Mr. Vetter's awareness of the whistleblower complaint, and his conduct toward the petitioner after he became aware of the whistleblower complaint will be given in section II of the decision in which petitioner's challenge to the finding of no retaliation is addressed.

[5] Section 230.87, Wis. Stats. JUDICIAL REVIEW
(1) Findings and orders of the commission under this subchapter are subject to review under ch. 227.

Section 227.52, Wis. Stats. JUDICIAL REVIEW; DECISIONS REVIEWABLE
Administrative decisions which adversely affect the substantial interests of any person . . . are subject to review as provided in this chapter.

Environmental Decade v. Public Services Commission, 81 Wis.2d 344, 351, 260 N.W.2d. 712 (1978). Board of Regents v. Wisconsin Personnel Commission, 103 Wis.2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981). Agency jurisdiction over the subject matter of a complaint is an issue that is reviewed *ab initio*. Loomis v. Wisconsin Personnel Commission, 179 Wis.2d 25, 30, 505 N.W.2d 462 (Ct. App. 1993), citing Republic Airlines v. DOR, 159 Wis.2d 247, 257, 464 N.W.2d 62 (Ct. App. 1990). Following these precedents, there must be an independent review of the Commission's finding that it lacked subject matter jurisdiction over Mr. Seay's complaint.

Review of the Commission's findings of fact requires a different standard. "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." § 227.57(6). An agency's finding of fact will not be set aside if it is supported by substantial evidence. Guthrie v. Wisconsin Employment Relations Commission, 107 Wis.2d 306, 315, 320 N.W.2d 213 (Ct. App. 1982), affirmed 111 Wis.2d 447, 331 N.W.2d 331. It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. ILHR Department, 94 Wis.2d 611, 617, 288 N.W.2d 857 (1980). Where two conflicting views are each sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Id.; Robertson Transport v. Public Service Commission, 39 Wis.2d 653, 658, 159 N.W.2d 636 (1968).

In deciding whether there is substantial evidence to support an administrative decision, the test is whether reasonable minds could arrive at the same conclusion as the agency. Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis.2d 518, 538, 271 N.W.2d 69 (1978); Sanitary Transfer & Landfill, Inc. v. Dept. of Natural Resources, 85 Wis.2d 1, 14, 270 N.W.2d 144 (1978); Gilbert v. State, Medical Examining Board, 119 Wis.2d 168, 195, 349 N.W.2d 68 (1984). Therefore, the Commission's conclusion that there was no retaliation against Mr. Seay must be upheld, if there is substantial support for that conclusion in the record.

DECISION

I. Under § 230.44(1)(b), does the Personnel Commission have jurisdiction over acts alleged to be retaliatory which arise from a request for reclassification?

A. Express Language of § 230.44(1)(b):

A determination of whether the Commission erred in concluding it lacked appellate jurisdiction pursuant to § 230.44(1)(b) depends upon the scope of actions and decisions that the legislature intended to include within the reach of the statute. That subsection states:

> (1) Except as provided in par. (e), the following are actions appealable to the commission . . .:
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> *(b) Appeal of a personnel decision under 230.09(2)(a) or (d)* [reclassification] or 230.13(1) [closed records] made by the secretary or by an appointing authority under authority delegated by the secretary under s. 230.04(1m). § 230.44, Wis. Stats.

Statutory construction begins with the plain language of the statute. Sturgis v. Town of Neenah Board of Canvassers, 153 Wis.2d 193, 198-99, 450 N.W.2d 481 (Ct. App. 1989). The plain meaning of language is the meaning that would be

ascribed by a reasonable, informed person. Kerns v. Madison Gas & Electric Co., 134 Wis.2d 387, 393, 396 N.W.2d 788 (Ct. App. 1986). Only if the language of the statute has ambiguous meaning, may the court interpret legislative intent. Town of Seymour v. City of Eau Claire, 112 Wis. 2d 313, 319, 332 N.W.2d 821 (Ct. App. 1983).

Section 230.44(1)(b) directs the Commission to review personnel decisions regarding reclassification and closed records. Petitioner argues that the phrase "personnel decisions" regarding reclassification also encompasses any retaliation which results from a request for reclassification.

"Personnel decisions" are not statutorily defined. The Court of Appeals has provided guidance on the interpretation of § 230.44(1) in Cozzens-Ellis v. Wisconsin Personnel Commission, 155 Wis.2d 271, 455 N.W.2d 246 (1990). There, the employee had appealed a promotion denial to the Commission, but the Commission found that, since the "personnel action" complained of was the denial of the promotion, not the subsequent promotion of another, the employee's appeal was not timely. Id., at 273. The appellate court affirmed, distinguishing "personnel actions" (the denial), from later events stemming from those actions (another person being promoted). Id.

Other cases provide an implied definition of the scope of "personnel decisions": employer actions that might undermine fundamental policy preferences regarding employees [Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 37 (1986)]; supervisor's termination of an employee [Black v. St. Bernadette

Congregation, 121 Wis.2d 560, 360 N.W.2d 550 (Ct. App. 1984)]; supervisor's reassignment of an employee to a job with lower pay range (Basinas v. State, 104 Wis.2d 539, 312 N.W.2d 483 (1981)].

The individual acts of harassment by petitioner's co-workers are clearly not "personnel decisions" regarding reclassification, as contemplated by § 230.44(1)(b). Section 230.09(2)(a), enumerates the factors that are to be considered in making a personnel decision regarding reclassification.[6] Those factors demonstrate that the admittedly unpleasant treatment of Mr. Seay's by his co-workers could not be personnel decisions. Petitioner's co-workers are not in any position to consider his "duties, authority, responsibilities", nor to evaluate his status as a worker, as specified in § 230.09(2)(a). In this employment context, they are his equals, and do not have the authority to make personnel decisions regarding his reclassification.

Even if Mr. Seay's co-workers had authority over him, the individual acts would not be "personnel decisions". A decision, as used in this statute, implies a contemplation of, or reflection upon, options; then a selection from among those options. It is a mental process. The kinds of unpleasantries inflicted upon the petitioner by his co-workers implicate neither "personnel" nor "decisions", as these words are used in common parlance or the statutes. If, as petitioner alleged, these

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[6] § 230.09(2)(a), Wis. Stats. states:

> After consulting with the appointing authorities, the secretary shall allocate each position in the classified service to an appropriate class on the basis of its duties, authority, responsibilities or other factors recognized in the job evaluation process. The secretary may reclassify or reallocate positions on the same basis. [Emphasis added].

acts were the result of his protected disclosure, then they are events stemming from the personnel decisions regarding his reclassification request. In this circumstance, the "decision" within the contemplation of § 230.44(1)(b) is the denial of petitioner's reclassification, not the reactions of his co-workers to his request. See, Cozzens-Ellis, 155 Wis.2d 271.

Mr. Vetter's assignment of work duties and admonishment of employee's bad conduct are clearly decisions, which affect personnel. But all decisions made by a supervisor affect personnel to some degree. There is no basis to believe that the legislature, by allowing the appeal of personnel decisions to the Commission under § 230.44(1)(b), intended that the Commission would oversee the otherwise lawful assignment and oversight of day-to-day duties. To include within § 230.44(1)(b) decisions about who used which truck, how people received their paychecks, or whether shingling a roof required one person or two would imply a legislative intent to allow the Commission to micro-manage all aspects, no matter how inconsequential, of public employment. Such a result does not flow from the language of the statute.

Included in the text of § 230.44(1)(b) are personnel decisions made under the reclassification statute, § 230.09(2)(a).[7] Mr. Seay argues that the language of § 230.09(2)(a) prohibits harassment of and threats of bodily harm against an employee

[7] Decisions made regarding classification and reclassification are governed by § 230.09(2)(a), and are expressly included as "personnel decisions" in the text of § 230.44(1)(b).

during the reclassification process. (Petitioner's Brief, at 17, 18).[8] The statute is not only completely silent with regard to harassment or retaliation, but it is also clearly directed toward the secretary's decision-making process, not toward any acts that result from that process. Protection from retaliation, even that which stems from a reclassification request, is not included in the language of § 230.09(2)(a), and therefore, is not within the plain meaning of § 230.44(1)(b).

B. **Implied Authority:**

Petitioner argues that the Commission's power to review reclassification decisions pursuant to § 230.44(1)(b) necessarily implies the power to prevent retaliation against an employee bringing such an appeal. (Petitioner's Brief, at 18). An administrative agency has only those powers which are expressly conferred or can be fairly implied from the statutes under which it operates. Oneida County v. Converse, 180 Wis.2d 120, 125, 508 N.W.2d 416 (1993); Peterson v. Natural Resources Board, 94 Wis.2d 587, 592, 288 N.W.2d 845 (1980). Agencies may exercise "power which arises by fair implication from [its] express powers." Wisconsin's Environmental Decade, Inc. v. Public Service Commission, 69 Wis.2d 1,

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[8] Subsection 230.09(2)(a) merely provides the basis upon which the secretary shall make reclassification decisions. Mr. Seay appears to argue that because the enumerated factors guiding the reclassification decision do not include "[h]arassment, particular threats of bodily harm" (Petitioner's Brief, at 17, 18), that "the language of sec. 230.09(2)(a)" somehow encompasses a prohibition of these omitted factors. Id. He argues that the occurrence of actions which may be impliedly prohibited during decision-making creates express jurisdiction under sec. 230.09(2)(a). This thought process escapes the undersigned.

16, 230 N.W.2d 243 (1975). Any reasonable doubt as to the existence of an implied power should be resolved against the exercise of such authority. Kimberly-Clark Corp. v. Public Service Commission, 110 Wis.2d 455, 462, 329 N.W.2d 143 (1983).

These cases stand for the proposition that implied powers may be found only if they are clearly necessary for the implementation of a statute. Protection against retaliation for those seeking reclassification is not required for the Commission to exercise its authority to review personnel decisions granted in § 230.44(1)(b). Indeed, the fact that the legislature has expressly provided separate statutes prohibiting retaliation in other contexts is evidence that that authority cannot be implied.[9] The authority to address Mr. Seay's complaints of retaliation cannot be fairly implied from the Commission's authority to review reclassification decisions under § 230.44(1)(b).

C. **Equitable Considerations:**

Petitioner argues that to affirm the Commission's finding that it lacked jurisdiction over the subject matter of Mr. Seay's complaint would be inequitable and would lead to an absurd result. (Petitioner's Brief, at 18, 19). The result he claims is absurd is that the legislature did not provide protection for employees from retaliation after they have filed for reclassification. (Id.).

While a court has the authority to grant equitable relief, an aggrieved party may not sue in equity where a statute provides the procedures for appeal. Kultgen v. Mueller, 3 Wis.2d 346, 350, 88 N.W.2d 687 (1958); Dairyland Harvestore v.

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[9] See, §§ 230.45(1)(gm), 230.83.

Department of Revenue, 151 Wis.2d 799, 447 N.W.2d 56 (Ct. App. 1989). Mr. Seay's complaint is "...not an action at law nor in equity as recognized by the common law. It is a statutory proceeding where the rights, remedies, and procedures are established by statute. The relief sought must be within the statute." Borello v. Industrial Commission, 26 Wis.2d 62, 67, 223 N.W.2d 536 (1974). Mr. Seay's rights to a hearing before the Commission are statutorily created, and to expand those rights would be creating "an end-run around the . . . statute". Dairyland Harvestore, at 806.

As stated previously, the legislature has expressly prohibited retaliation against employees in other contexts. See, §§ 230.45(1)(gm), 230.83. It would be reasonable for the legislature to conclude that an employee did not need protection from retaliation over a reclassification request. Reclassification does not usually include issues giving rise to retaliation. Whether there should be statutory protection under § 230.44(1)(b) is a legislative, not a judicial determination.

II. Is there substantial evidence to support the Commission's finding that there was no retaliation against Mr. Seay for a protected disclosure?

Mr. Seay challenges the Commission's finding that there was no retaliation against him contrary to Wis. Stats. § 230.83. He argues that the record does not support the finding that the supposed retaliators were unaware of the his protected disclosure until after the alleged acts of retaliation occurred; nor does it support the finding that the incidents complained of were merely the product of a poor relationship between Mr. Seay and his co-workers. (Petitioner's Brief, at 20, 21). As discussed above, the question for this court is only whether the Commission's findings have

substantial support in the record. A reviewing court is not to weigh the evidence, nor the credibility of witnesses separately, nor is it to substitute its own judgement for that of the Commission.

The whistleblower law, Wis. Stats. § 230.83, prohibits retaliation against employees who have made a protected disclosure of illegal, arbitrary or capricious governmental activities.[10] Under § 230.80(5), a "protected disclosure" is one which the employee "reasonably believes demonstrates a violation of state or federal law, rule or regulation"; or the "mismanagement or abuse of authority in state or local government . . .. "

Mr. Seay's sought-after reclassification did not a disclosure of improper activities as contemplated by § 230.80(5), even if it had been sought because the employee was assigned particular duties in amounts that did not conform to his job description. Petitioner's job description did include some painting duties, as part of

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[10] Section 230.83, Wis. Stats. RETALIATORY ACTION PROHIBITED
(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe.

Section 230.80, Wis. Stats.
(8) "Retaliatory action" means a disciplinary action taken because of the following:
(a) The employe lawfully disclosed information under s. 230.81. . ..

Section 230.81, Wis. Stats. EMPLOYE DISCLOSURE
(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.

maintenance and repair work. Assigning too many painting duties to the petitioner was not a violation of law, nor was it an abuse of authority, as defined by the statute.[11] Mr. Seay's requests for reclassification, therefore, did not give rise to protection from retaliation under § 230.83. However, when Mr. Seay complained of harassment and alleged retaliation on March 29, 1989, and on July 12, 1989, he was making disclosures that are protected by § 230.83, and § 230.85(6).

While Mr. Vetter knew of Mr. Seay's reclassification request in early 1989, there is substantial evidence in the record to support the Commission's finding that Mr. Vetter did not know of the petitioner's protected disclosures of harassment until November 15, 1989. Mr. Seay made his first disclosure of improper activities on March 29, 1989, and his second on July 12, 1989, but Petitioner's complaints to the Commission were not forwarded to Mr. Vetter. The prehearing conference was not attended by Mr. Vetter, nor was he sent a report. The meeting between Mr. Seay and Arlington Farm management of June 13, 1989 was not attended by Mr. Vetter, nor was he advised of what was discussed. Petitioner's letter of June 15, 1989, restating his claims was not sent to Mr. Vetter The letter from Mr. Seay's doctor, advising Mr. Vetter that Mr. Seay required a leave of absence from work did not include any reason. A memo dated November 15, 1989 advised all Arlington Farm management of petitioner's retaliation charge. Mr. Vetter received a copy of this memo.

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[11] "Abuse of authority" means arbitrary or capricious exercise of power. § 230.80 (1), Wis. Stats.

It is the function of the Commission, and not the reviewing court, to determine the credibility of witnesses. Wehr Steel Co. v. DILHR, 102 Wis.2d 480, 487, 307 N.W.2d 302 (Ct. App 1981), modified on other grounds, 106 Wis.2d 111, 315 N.W.2d 357. Based upon the testimony, the Commission found that some of Mr. Seay's co-workers were not aware of his efforts to get reclassified, and still more of them were unaware of his whistleblower complaint.

This conclusion is supported by substantial evidence regarding Petitioner's co-workers which is in the record. Mr. Barclay, who had been reclassified himself, was not aware of the retaliation complaint until or after November 15, 1989. Mr. Lytle was not aware of any of the complaints. Mr. Bohne and Mr. Letsinger both knew about petitioner's reclassification request, but neither knew about the retaliation complaint. Therefore, the conclusion of the Commission will not be disturbed by this court.

The Commission also found that the incidents that occurred after Mr. Vetter (and Mr. Barclay) knew of Mr. Seay's protected disclosure were not instigated because of Mr. Seay's disclosure. The record contains numerous allegations of reciprocal antagonisms among the workers at Arlington Farm. The Commission found that the facts as a whole "[presented] the picture of an employee who was alienated from his fellow crew members at least as early as the summer of 1988 . . .", long before Mr. Seay's protected disclosure. The record shows that while there was a change over petitioner's tenure, it was a gradual worsening of relations, and not a sudden commencement of hostilities following Mr. Seay's disclosures. The testimony of co-workers regarding Mr. Seay's poor attitude, the evidence of mutual antagonism,

the conferences with Mr. Vetter and Schlough about incidents of bad conduct all provide ample support for the Commission's conclusion.

While there was evidence of hostility aimed at Mr. Seay in reference to painting (clipped newspaper "want-ads" for painters on his truck, paint in his lunchbox, etc.), the Commission found these acts insufficient to show retaliation. And where two conflicting views might each be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Hamilton, 94 Wis.2d at 617. The Commission heard the testimony and examined the witnesses. It found that there was no retaliation against Mr. Seay for protected disclosures. That finding is affirmed.

CONCLUSION

For all the foregoing reasons, The Personnel Commission does not have jurisdiction under § 230.44(1)(b), Wis. Stats., to hear an appeal of Mr. Seay's complaint. The Commission's finding that Mr. Seay was not retaliated against, in violation of § 230.83, for making a protected disclosure must be affirmed.

ORDER:

The Personnel Commission's INTERIM DECISION AND ORDER, of November 19, 1992; and FINAL ORDER, of March 31, 1994 are AFFIRMED. The petitions are **DISMISSED.**

Dated this 3d day of March, 1995 at Madison, Wisconsin.

BY THE COURT:

Moria Krueger, Judge
Circuit Court, Branch 7

cc:
Atty. John C. Talis
AAG Stephen Sobota