STATE OF WISCONSIN PERSONNEL COMMISSION

RALPH J[redacted],
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 96-0089-PC-ER

RULING ON RESPONDENT'S MOTION IN LIMINE AND ON RESPONDENT'S MOTIONS TO DISMISS

Mr. J[redacted] filed a discrimination complaint on July 19, 1996, alleging that the Department of Health and Family Services (DHFS) discriminated against him on the bases of age, handicap and in retaliation for his participation in activities protected under the Fair Employment Act (hereinafter, FEA retaliation). DHFS, by letter dated September 27, 1996, filed a motion in limine as well as motions to dismiss several allegations raised in the complaint and such motions were supplemented by letter dated October 7, 1996. The Commission sent Mr. J[redacted] a letter dated November 7, 1996, which provided explanation of the motions raised as well as an opportunity to submit written arguments. He filed arguments by letter dated November 21, 1996.[1]

The facts recited below are made for the purpose of resolving the present motions only. Some facts, as specifically noted below, are based on findings of prior Commission decisions. Other facts appear to be undisputed by the parties, unless specifically noted to the contrary.

FINDINGS OF FACT

1. Mr. J[redacted] began employment with DHFS in 1986, as a Management Information Specialist 3 (MIS 3), working in the Wisconsin Council on Developmental Disabilities (WCDD). The WCDD is a federally funded state agency attached to DHFS for certain administrative purposes. Until July 1996, WCDD was attached to respondent's Division of Community Services (DCS) and thereafter to respondent's Division of Supportive Living (DSL).

2. Respondent placed Mr. J[redacted] on indefinite leave effective November, 1991. He filed a civil service appeal alleging that the forced leave was a suspension

[1] It is unclear whether complainant's letter of November 21, 1996, was intended as a response to the current motions as he did not address the letter to the Commission staff person who sent him information on the motion and established his response deadline. However, it is the only document received from complainant after the November 7th, letter was mailed.

imposed without just cause, within the meaning of s. 230.44(1)(c), Stats. (case no. 91-0220-PC). He also filed a discrimination complaint alleging that such action was taken because of his handicap in violation of s. 111.34, Stats. (case no. 92-0001-PC-ER). These cases were combined for hearing and for a decision issued on October 16, 1992, in which the Commission held that respondent's suspension was without the requisite "just cause" and that such action was not taken for any discriminatory reason. [redacted] *v. DHSS*[2], 91-0220-PC and 92-0001-PC-ER, 10/16/92; aff'd by Dane County Circuit Court, [redacted] *v. SPC and HSS v.* SPC, 93-CV-4574 & 93-CV-0097, 9/9/94. Mr. [redacted]'s request for costs and attorney fees under the Equal Access to Justice Act (s. 227.485, Stats.) was denied by Commission decision dated December 29, 1992. The Commission's decision required respondent to restore Mr. [redacted] to employment with back pay and benefits. Mr. [redacted] was restored to a position at the same classification and pay level (hereafter, the "Restored Position") on January 25, 1993. The parties could not agree on the amount of back pay due which led Mr. [redacted] to file a Request for Post-Judgment Relief regarding case number 91-0220-PC. A hearing was held on damages with a Proposed Decision and Order issued on May 14, 1996. The parties later settled the back pay issue and the Commission dismissed the case based on the settlement agreement. [redacted] *v. DHSS*, 91-0220-PC (6/28/96).

3. In the summer of 1995, WCDD decided to eliminate the funding of the Restored Position saying the action was taken due to a reduction in federal funding. Mr. [redacted] was not the only WCDD employee affected by the federal funding reduction. One other employee's position also was not renewed, and two vacant positions were unfilled for the federal fiscal year with one being eliminated the following fiscal year.

4. Respondent provided an official "at risk" notice to Mr. [redacted] by letter dated August 4, 1995, as well as forms for completion if he desired consideration for other of respondent's vacancies. By letter dated September 12, 1995, he was officially notified that he would be laid off effective September 29, 1995. The official layoff letter included the following information about potential recall rights:

> If you accept a voluntary demotion, successfully bump to a lower level position or are laid off, you will have recall rights to vacant positions in the (DCS) in your current classification. Recall rights are made

[2] The Department of Health and Family Services (DHFS) prior to July 1, 1996, was called the Department of Health and Social Services (DHSS). The name changed pursuant to 1995 Wis. Act 27, s. 9126(19).

> according to inverse order of layoff and supersede the transfer rights of other employees set forth in Article VII of the (union contract) . . .

5. Mr. J[redacted] completed respondent's forms for placement of his name in the Lay-off Referral System (LRS) maintained for state employment. His inclusion in the LRS lead to an offer of employment in a MIS-3 position at the Department of Corrections (DOC). He notified respondent of his acceptance of the DOC position by memo dated September 26, 1995, which stated as follows:

> This is to inform you that I will be transferring to the (DOC) starting on Monday, October 2, 1995. My last day of work at (respondent) will be on Friday, September 29, 1995. Having received an At-Risk letter and a Notice of Lay-off, I am transferring in lieu of lay-off as per the contract with the Wisconsin Professional Employees Council (WPEC).

6. Mr. J[redacted] contended (in his written arguments dated November 21, 1996) that he spoke to DHSS personnel staff person, Julie Babler, prior to accepting employment with DOC. Due to the briefing schedule order, DHSS has not had an opportunity to reply to the new information from complainant as noted below from p. 2-3 of his arguments. Accordingly, for purposes of this motion, the Commission will assume that DHSS disputes the newly-provided information.

> I was in close contact with Julie Babler and it was not until she assured me that all my rights with DHSS would be preserved if things didn't work out at the (DOC). (sic) I specifically wanted to know about recall rights and she assured me that if for any reason (whether I quit or was terminated from permissive probation) whether it be my fault or DOC's, that I would be put back in lay-off status and have recall rights with DHSS. I made sure that the union and Julie Babler were in agreement on this before I took (the DOC) position. Julie indicated that she had taken this to her supervisors to make sure she was right. Julie Babler was my contact person in personnel and I trusted her word.

7. Mr. J[redacted] accepted the transfer to DOC knowing he would be required to serve a probationary period of 6 months. On December 28, 1995, which was prior to the end of his probation, DOC gave him the option of resigning or of being terminated. He resigned by letter dated December 22, 1995. He filed a grievance under the union contract over his separation from DOC which is pending arbitration (case #014168) in a different forum.

8. On January 30, 1996, Mr. J[redacted] wrote to respondent requesting to "be recalled into MIS-3 position 301226 or MIS-3 position 307249 or MIS-2 position

021119 or any additional vacant positions within DHSS." He was informed by respondent's letter dated February 1, 1995, that he was ineligible to exercise recall rights based on his "resignation from[3] and having not been separated from state service".[4] He filed a grievance under the union contract over this denial which is pending arbitration (case #014389) in a different forum.

9. Mr. J[redacted] learned of a MIS-3 vacancy at DHSS' Central Wisconsin Center (CWC). In June 1996, he telephoned CWC and asserted that he had recall rights to the position. DHSS' Bureau of Personnel and Employment Relations (BPER) determined that Mr. J[redacted]'s departure from DOC had been "based on misconduct" and advised CWC that Mr. J[redacted] was not entitled to recall or reinstatement. BPER later learned from Jesse Garza of the Division of Merit Recruitment and Selection (DMRS) in the Department of Employment Relations (DER) that Mr. J[redacted] had reinstatement rights because the DOC resignation letter (made in lieu of termination) left no official indication that he resigned under any circumstance other than "in good standing". BPER then re-contacted CWC saying Mr. J[redacted] did have reinstatement rights.[5] CWC did include Mr. J[redacted] in the interview process but hired a different candidate.

10. Mr. J[redacted] provided 7 pages of text to supplement the present complaint form (96-0089-PC-ER), plus attachments. His description of events includes matters raised in his prior cases (91-0020-PC and 92-0001-PC-ER) which he continues to describe in discriminatory terms even though the Commission dismissed the discrimination allegations after hearing. (See paragraph #2 above.) He also disputes for the first time whether his placement in the Restored Position was a placement in a "comparable position" as would satisfy the Commission's order in his prior appeal (case no. 91-0020-PC).

11. In the fall of 1991, Mr. J[redacted] engaged in certain behaviors on the job which the Commission characterized as shown below (*Id.*, p. 22 of the Interim

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[3] It is unclear whether the "resignation" referenced was intended to refer to Mr. J[redacted]'s departure from DHFS, or from DOC.

[4] "Separation" appears to be a term of art under the applicable union contract. Section 8/3/1 of the contract in effect from April 13, 1996 through June 1997, indicates that employes who have been notified of layoff have the option to accept other employment by: a) transferring to a position in the same agency or in a different agency, b) demoting to a lower classified position, or c) bumping a less senior employe. An employe who was notified of layoff and did not exercise one of these options is considered under the contract to have been "separated in accordance with the layoff notice". Mr. J[redacted] exercised option "a", and accordingly would not appear to have been "separated in accordance with the layoff notice".

[5] Reinstatement rights are different in nature (permissive) than restoration rights (mandatory). See, for example, ss. ER-MRS 1.02(29) & (30), Wis. Adm. Code, as well as Ch. ER-MRS 16, Wis. Adm. Code.

Decision and Order dated 10/16/92, which was issued in the prior combined cases 91-0020-PC and 92-0001-PC-ER):

> It should be obvious that an agency does not have to put up with an employe who listens to his radio all day, and wanders around the office repeatedly attempting to engage other employees in conversations about current events, while behaving in a querulous, intimidating manner. Such behavior clearly provides a basis for just cause for disciplinary action under the test enunciated in *Safransky v. Personnel Board*, 62 Wis. 2d 464, 215 N.W.2d 279 (1974).

In response to such behaviors and, as the Commission noted "it appears that respondent's actions were in good faith and motivated both by a genuine concern about what had been happening in the workplace and by the very real fears of [Mr. J[redacted]'s] co-employees" (Ibid.), respondent removed Mr. J[redacted] from the workplace under the auspices of s. 230.37(2), Stats., and ordered him to submit to two psychological examinations. As noted by the Commission, the "evaluators provided the opinion that [Mr. J[redacted]'s] personality characteristics contributed to his interpersonal difficulties at work, and that without treatment he could not return to work without becoming involved in more inappropriate interpersonal behavior." Id., p. 1. Based on the psychological evaluations, DHSS refused to allow Mr. J[redacted] to return to work unless he became involved in a counseling and treatment program. Because he terminated a treatment program he had begun, and because his psychologist failed to provide a status report which DHSS considered adequate, DHSS continued to say he could not return to work. *Id.*, p. 9.

LEGAL OPINION

Respondent raised a motion in limine as well as separate motions regarding eight claims raised in the complaint. The motion in limine is addressed first below, followed by an analysis of the remaining motions.

Motion in Limine

Respondent's motion in limine is shown below.

> Mr. J[redacted]'s complaint (Exhibit R-1) offers a detailed narrative in paragraphs 1-19 of his version of the events leading up to his indefinite suspension from the WCDD in the fall of 1991. Although the complaint does not appear to allege any retaliation claims involving DHSS actions leading up to his suspension, its apparent intent is to lay the foundation for its claims of later retaliation in the motives of DHSS agents. Relying

> on what he admits is "all gossip, hearsay and rumor" (Exhibit R-1, para. 2), Mr. J[redacted] mischaracterizes the motives of DHSS management personnel and employees, in particular WCDD's executive director, Jayne Wittenmyer. DHFS hereby expressly denies the accuracy of the complaint's characterization of the motives of Ms. Wittenmyer and others.
>
> However, DHFS should not have to respond to these factual allegations because the events leading up to Mr. J[redacted]'s suspension have been fully litigated. Mr. J[redacted] has had his opportunity to present his version of these events at hearing. The Commission has issued findings of fact and conclusions of law regarding these events. Therefore, on the principles of res judicata and collateral estoppel, the Commission should issue an order in limine relieving DHSS from responding to these allegations.

Mr. J[redacted]'s response to the above motion is shown below, using the same emphasis as appears in the original document.

> Regarding the first paragraph of MOTION IN LIMINE, I said it was all gossip, hearsay and rumor, but I also said that I was sure there is a certain amount of truth to it. (Regarding the first and second paragraphs) of MOTION IN LIMINE, the only two things that were litigated were whether the job action (suspension) was within the scope of the administrative code (230.37(2)) (sic), and whether this constituted discrimination. It was never litigated as to whether I was guilty or innocent of the allegations.

The prior consolidated cases involved the same parties as in the present case. The prior cases resulted in the Commission issuing a decision on the merits of Mr. J[redacted]'s discrimination claims (case no. 92-0001-PC-ER) and of claims raised under the civil service code (case no. 91-0220-PC). Such decision included resolution of disputed facts and resolution of the ultimate legal issues raised. He had a full and fair opportunity to litigate all his factual and legal disputes and took advantage of such opportunity. Under these circumstances, both the findings of fact and the legal determinations are binding on these parties. *Lindas v. Cady*, 175 Wis. 2d 270, 282, 499 N.W.2d 692 (Ct. App. 6/92). Accordingly, respondent's motion in limine is granted.

Remaining Motions

The parties addressed the remaining motions by reference to a "claim numbering" system utilized in respondent's initial motion letter (dated September 27, 1996). The same numbering system is used here for convenience.

Claim No. 1

Complainant's first claim is that respondent retaliated against him when (in 1991) Jayne Wittenmyer requested a treatment plan from Dr. Peter Weiss. Respondent moved for an order dismissing the claim on the grounds of res judicata, collateral estoppel, failure to file a timely claim under s. 240.44(3), Stats., and Mr. [redacted]'s release of claims which he signed as settlement of his prior appeal (case no. 91-0220-PC), as referenced in ¶2 of Finding of Fact in this ruling. Complainant's argument in opposition to the motion is shown below with the same emphasis as shown in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 1: This is part of an on-going discrimination. Jayne Wittenmyer was not willing to listen to a Professional, Dr. Peter Weiss because she had an agenda that she wanted to carry out. She has no medical degree, but yet she feels that she is more qualified to make decisions regarding the welfare of me. Dr. Peter Weiss tried unsuccessfully to communicate to her and finally requested that he not have to deal with her as she obviously does not have my best interests at heart. He said this because he felt that she was out to do me in. This is pretty potent stuff coming from a person with a Doctor's Degree in Psychiatry and head of the Mental Health Department at Group Health Cooperative.

Despite Mr. [redacted]'s attempt to characterize Ms. Wittenmyer's 1991 decision as "on-going discrimination", such decision was a discrete event (*see*, *Tafelski v. UW-Superior*, 95-0127-PC-ER, 3/22/96) which already has been litigated. Respondent's request for dismissal of this claim, accordingly, is granted under the preclusion principles discussed previously in connection with the motion in limine. In the alternative, such allegation would be dismissed because it was filed untimely. Section 111.39(1), Stats., provides the general rule that complaints are timely-filed as to matters which occurred within 300 days of the filing date. Mr. [redacted] filed the present complaint (96-0089-PC-ER) on July 19, 1996. The resulting 300 day period commenced on September 23, 1995. Discrete allegations which occurred prior to September 23, 1995, are barred by the 300-day filing period. Further, this claim arises out of the same subject matter as the prior appeal and, accordingly, was a released claim under the following provision of the settlement agreement (Exh. R-5 attached to respondent's motion) of the prior appeal (91-0220-PC):

> ¶6. The Complainant, for and in consideration of the terms of this Agreement, does hereby for himself and for his heirs, personal representatives and assigns, fully and forever, irrevocably and

> unconditionally, release and discharge the State of Wisconsin and the Respondent and its employees, successors and assigns, from any and all claims, damages, charges, grievances, actions, complaints, rights of action, both known and unknown, costs, loss of wages, expenses, compensation, attorneys fees, and any other relief . . . based on or growing out of the subject matter of the grievances, charges, complaints, appeals, or actions which are the basis for the claims in this case. This Agreement is in full and final settlement of all Claimant's claims, both as to the question of liability on behalf of the Respondent and its employees, and as to the nature and extent of any damages which may be or may have been allegedly suffered.

Claim No. 2

Complainant's second claim is that Richard Kiley retaliated against him by withdrawing a job offer in December 1992, when the parties were exploring how to implement the Commission's decision in the prior appeal (case no. 91-0220-PC). Respondent moved for dismissal of this claim on the grounds of res judicata, collateral estoppel, failure to file a timely claim under s. 240.44(3), Stats., and complainant's release of claims in the prior appeal. Complainant's opposing arguments are shown below using the same emphasis as in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 2: This is part of an on-going discrimination. There was no mention of my being allowed to return to WCDD for a length of time before taking the job with Richard Kiley.

Whether respondent's preclusion argument has merit is not addressed here. Rather, respondent's request for dismissal of this claim is granted because the allegation was filed untimely. Furthermore, this claim concerns how to implement the Commission's previous order in the prior appeal and, accordingly, arises out of the same subject matter as the prior appeal. As such, it is a claim released under the settlement agreement of the prior appeal.

Claim No. 3

Complainant's third claim is that respondent retaliated against him by restoring him to a position at WCDD with the same pay rate but with fewer responsibilities than he had before. Respondent moved for dismissal of this claim on the grounds of res judicata, collateral estoppel, failure to file a timely claim under sec. 240.44(3), Stats., and complainant's release of claims in the prior appeal. Complainant's opposing arguments are shown below using the same emphasis as in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 3: This is on-going discrimination. This position was only comparable to my former position in wages. There was no responsibility connected with this position. In fact the first few months, they hardly had anything for me to do. I was given a bare computer (all of the software had been erased except for the word processing program). In my previous position, I was the Network Administrator overseeing 11 computers that were hooked to a Novell Network. I was responsible for solving any computer problems that developed. I also did some training of the employees in computer usage and was there to help anyone that had a computer question. I had accumulated many utility programs for repairing damaged files and dealing with memory problems that were never returned to me. I was also responsible for the upkeep of the mailing list database consisting of about 12,000 names. It was my responsibility to be knowledgeable in the latest computer technology and make recommendations regarding new equipment. I was expected to go to trade shows and computer shows to maintain this knowledge.

Whether respondent's preclusion argument has merit is not addressed here. Rather, respondent's request for dismissal of this claim is granted because the allegation was filed untimely. Furthermore, this claim concerns how to implement the Commission's previous order in the prior appeal and, accordingly, arises out of the same subject matter as the prior appeal. As such, it is a claim released under the settlement agreement of the prior appeal.

Claim No. 4

Mr. J[redacted]'s fourth claim is that respondent retaliated against him after he began work in the Restored Position by warning his co-workers to not talk with him and refusing to let him use the computer hardware and software he had used in his prior position at WCDD. Respondent denied the allegations and stated that Mr. J[redacted] was provided with computer hardware and software necessary to perform his duties. Respondent further stated that if Mr. J[redacted] did not have access to the same software as in the prior position, such software was acquired while in his prior position and "was not necessary for him to do his work in either position." Respondent further moved for dismissal of this claim on the grounds of res judicata, collateral estoppel, failure to file a timely claim under sec. 240.44(3), Stats., and the release of claims which Mr. J[redacted] signed. (Exhibit R-5)

Mr. J[redacted]'s reply is shown below using the same emphasis as in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 4: This is on-going discrimination. In my old job at the WCDD, I had to write a justification for purchasing the software or hardware and it had to be approved by Jayne Wittenmyer. I can assure you that all software and hardware that was purchased was used for WCDD projects unless it was replaced by software and hardware that did the job better or it was outdated. I always tried to use the best software suited for the job. I did not try to use word processing software to do spreadsheets, although it can be done. I did not try to use spreadsheet software to do databases, although it can be done. I resent the insinuation that I ordered more equipment and software than was needed for the job.

Claims of unequal treatment in the Restored Position were not relinquished by the settlement agreement in the prior appeal. The circumstances of the prior appeal arose out of Mr. J[redacted]'s prior employment at WCDD. Partial resolution of the prior appeal was to place Mr. J[redacted] in the Restored Position. While such placement was an element of damages in the prior appeal, the settlement agreement cannot be read so broadly as to waive claims of discrimination that might arise during employment in the Restored Position. Such a broad reading would be contrary to good public policy as opening the door for employers to settle claims of discrimination by returning a complaining employe to work but only to make conditions so intolerable as to force a later resignation. The Commission is not attempting to resolve here the question of whether a settlement agreement would be considered invalid if it contained such a broad waiver. The Commission only rules that absent such specific language in a settlement agreement, the Commission will not interpret the agreement to have such wide-reaching effect. For similar reasons, the fourth claim is not barred under preclusion principles.

Respondent also requested dismissal of the fourth claim for "failure to file a timely claim". The Commission denies this request without prejudice because the facts recited by the parties are insufficient to resolve the motion, as discussed in the following paragraph.

Mr. J[redacted] worked in the Restored Position from January 25, 1993, until September 29, 1995, after which he began working at DOC. As noted previously, the actionable period in this case commenced on September 23, 1995 and ended on July 19, 1996. Mr. J[redacted]'s employment in the Restored Position included a period of 7 days (from September 23-29, 1995) in the actionable period. It could be that the alleged "cold shoulder" from coworkers and the denial of computer software continued to occur during this 7 day period, but the information provided by the parties is insufficient to tell. If such conduct occurred during the 7-day period, the fourth claim

might be considered as timely filed. The information simply is not sufficient to make a determination at this time.

Claim No. 5

Mr. J[redacted]'s fifth claim is that respondent retaliated against him by giving him an "at-risk" letter, not "absorbing" him into another agency, and then giving him a lay-off letter. Respondent contends the position elimination was the result of federal funding cutbacks which affected other positions besides Mr. J[redacted]'s. Respondent opined that Mr. J[redacted] was "absorbed" into another position through his use of the (LRS) and resulting placement with DOC. Respondent further contends:

> DHSS sent Mr. J[redacted] an official lay-off notice only because he and his union insisted. In actuality, Mr. J[redacted] had a job lined up with the (DOC) before DHSS issued his layoff notice. Mr. J[redacted] would not have received a letter confirming his transfer to DOC dated one day after the date of his layoff notice from DHSS, if he had not obtained an offer for the DOC position before DHSS issued its letter. Indeed, because Mr. J[redacted] notified DHSS prior to the date of his impending layoff that he was transferring to DOC "in lieu of lay-off", and that his last day with DHSS would be the date set for his lay-off, he was not laid off by DHSS under the terms of the WPAC contract.
>
> DHFS moves for judgment on the pleadings, or, in the alternative, for summary judgment that Mr. J[redacted] is not entitled to any compensation for loss of earnings due to the elimination of his position in DHSS. There are two grounds for this motion. First, DHSS did not lay off Mr. J[redacted], as explained in the previous paragraph. He transferred to the DOC position prior to being laid off by DHSS. Second, Mr. J[redacted]'s subsequent loss of employment was not proximately caused by DHSS's action in giving him an "at-risk" notice and a notice of lay-off. Mr. J[redacted]'s loss of employment was proximately caused by his resignation from the position he transferred to in the (DOC), not by the elimination of his DHSS position. DHSS did not cause Mr. J[redacted]'s resignation from his position with DOC; it should not be held responsible for remedying the consequences of that resignation.

Complainant's response to the motion is shown below with the same emphasis as appears in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 5: This is on-going discrimination. All other people that received at-risk letters were either kept in their present job and another funding source was obtained or they were offered other jobs within DHSS. I was forced to look elsewhere. Before I took the position at DOC, I made sure that all my rights would be preserved should things not work out at DOC, including Recall rights and layoff rights, and was assured

> by both the union and Julie Babler (my contact person in personnel). I would never have taken the position at DOC if they would not have told me that. This was discussed at length with Ken Golden, a supervisor in the Bureau of Developmental Disabilities. When I tried to return to DHSS and exercise my recall rights, I was told first by Julie Babler and then by to her people in DHSS that I no longer had those rights available to me.

The material facts underpinning the fifth claim are in dispute and, accordingly, a motion for summary dismissal would be inappropriate. (*See*, *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 249 N.W.2d 473 (1980), wherein the court noted that the moving party has the burden to establish the absence of a genuine, disputed, issue as to any material fact.) Respondent contends its elimination of Mr. J[redacted]'s position was unrelated to his acceptance of employment at DOC, while the tone of Mr. J[redacted]'s complaint is that he would not have accepted employment at DOC absent the elimination of his position. Further, it appears Mr. J[redacted] is saying that he attempted to "engineer" his movement to DOC to coincide with the layoff date for the purpose of preserving any additional rights which might attach to departing on layoff status versus departing to accept a transfer opportunity and that respondent's staff assured him he accomplished his purpose.

Claim No. 6

Mr. J[redacted]'s sixth claim is that respondent retaliated against him through the actions of three DOC employees who were involved in his resignation from DOC and who had previously been employed with respondent. Respondent denied the allegation saying the "claim is on its face sheer unsupported speculation and absurd." Respondent's further reply is shown below:

> It would make no sense for Mr. Eisman to fire Mr. J[redacted], based on his own former employment with DHSS, after he had hired Mr. J[redacted] in the first place. Moreover all three individuals named by Mr. J[redacted] deny that their previous employment with DHSS had any effect on their actions with respect to Mr. J[redacted]'s employment with DOC. Indeed, they did not know Mr. J[redacted] until he interviewed for the DOC position or started working at DOC.

Mr. J[redacted]'s response on the sixth claim is shown below:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 6: This is on-going discrimination. These individuals may not have known me before hiring me but there was contact between DHSS and

> Nelson Eismann during my employment there. During my initial interview, I made it very clear that I had never worked at a help desk before and I would have a lot to learn and I would need training in some aspects of the job. I was never given any training except for on the job training. I also made it very clear that because of my vision, it takes me longer to do some jobs. Nelson Eismann said that was not a problem. Even after proving beyond a doubt that I was not guilty of violating the work rule that I was charged with, Nelson Eismann saw fit to give me a choice of resignation or termination. There was no logical reason for this employment action, unless DHSS had requested him to do this.

Respondent does not request dismissal of the sixth claim, apparently recognizing that the disputed facts would be more properly addressed and resolved in an Initial Determination. Accordingly, the sixth allegation will continue to be processed by a Commission Equal Rights Officer through investigation and issuance of an Initial Determination.

Claim No. 7

Mr. J[redacted]'s seventh claim is that respondent retaliated against him by denying him recall rights, removing him from the layoff referral list, and by BPER advising Central Wisconsin Center (CWC) that he was ineligible for reinstatement. Respondent's reply is shown below.

> Mr. J[redacted] does not have recall rights to DHFS under the WPEC contract: J[redacted] transferred to DOC in lieu of lay-off from DHSS; the WPEC contract provides recall rights only for an employee who has been laid off, bumped or demoted in lieu of layoff. (Exh. R-18, Article VIII, Section 4) DHFS removed Mr. J[redacted] from the layoff referral list based on the opinion it received from DER's Jesse Garza that J[redacted] is not eligible for this service following his resignation from DOC. BPER's initial advice to (CWC) that Mr. J[redacted] was not entitled to reinstatement was based on incomplete information about Mr. J[redacted]'s resignation from DOC; however, when BPER learned that J[redacted]'s personnel file gave no evidence that he had not resigned from DOC in good standing, it retracted its advice to CWC, and CWC then gave Mr. J[redacted] an opportunity to interview for the open position.
>
> Moreover the Commission lacks jurisdiction to adjudicate the claim that DHFS retaliated against Mr. J[redacted] by refusing to recall him, until the pending grievance arbitrations determine whether DHSS violated J[redacted]'s rights under the WPAC by refusing to recall him. Under sec. 111.93(3), Stats., the provisions of the WPAC contract regarding recall supersede the civil service and other applicable statutes and administrative rules promulgated thereunder. Article IV, Section 6 of the WPAC contract provides that the grievance procedure set out in the contract "shall be exclusive and shall replace any other grievance

> procedure for adjustment of any disputes arising from the application and interpretation" of the contract. (Exhibits R-18 and R-19) Although the Commission has jurisdiction over retaliation claims under the Fair Employment Act, the success of J[redacted]'s claim that DHSS retaliated against him by refusing to recall him rests on his first establishing that DHSS violated his recall rights under the WPAC contract. On this issue the Commission must defer to the results of the pending grievance arbitrations. (Exhibits R-17 and R-22)

Mr. J[redacted]'s reply is shown below, using the same emphasis as in the original document:

> Regarding RESPONSE TO CLAIMS OF RETALIATION; CLAIM NO. 7: This is on-going discrimination. When the contract does not address an issue, the Administrative code takes precedence and this is the case with recall rights. The contract also does not deal with permissive probation. Because the contract does not address it, the administrative code is adhered to. If as DHSS says, if it isn't in the contract then it doesn't apply were adhered to, then there would be no permissive probation when transferring to another agency. As for CWC, DHSS knew full well that I had resigned and was not terminated, and yet they proceeded to give CWC false information which gave a negative impression of me to CWC. It was only after a grievance was filed by the union that DHSS saw fit to change its position and tell CWC that I was eligible for reinstatement. The damage had already been done. The impression left on CWC could not be erased even by a good interview.

The Commission recognizes that the forum for resolving disputes under a union contract lies elsewhere. However, a violation of contract rights is not the sole factor for determining whether discrimination occurred. It could be, for example, that Mr. J[redacted] was treated differently than other employees (regardless of what his contract rights may be) and that such disparate treatment was due to alleged retaliation or discrimination. The Commission will follow its usual practice here which is to proceed with the investigation of the discrimination/retaliation claims even though a grievance is pending

Claim No. 8

Mr. J[redacted]'s eighth claim is that DHSS retaliated against him by acting to keep him off employment lists. Respondent denied the allegation and explained that Mr. J[redacted] was removed from the LRS after his resignation from DOC because a DER official advised that he was ineligible for LRS. Mr. J[redacted] did not address respondent's arguments on this claim.

Respondent does not request dismissal of the eighth claim, apparently recognizing that one purpose of the investigative process is to determine whether facts exist to support speculative claims raised in a complaint. Accordingly, the eighth claim will proceed through the investigative process and will be addressed in an Initial Determination.

SUMMARY AND PROCEDURAL INSTRUCTIONS

'Respondent's motion in limine is granted. Respondent's motions to dismiss claims 1, 2, and 3 are granted. Respondent's motions to dismiss claims 4 and 5 are denied. Respondent's motion for a stay on claim 7 pending resolution of the arbitration proceeding is denied. Claims 4, 5, 6, 7 and 8 will proceed to investigation.

Respondent has not had an opportunity yet to reply to information raised by Mr. J[redacted], as noted in paragraph 6 of the Findings of Fact in this ruling. If respondent wishes to have the Commission's Equal Rights Officer consider a rebuttal, such rebuttal must be submitted by February 28, 1997. If respondent files a rebuttal, the complainant will have until March 14, 1997, to file a response.

ORDER

That respondent's motions are granted in part and denied in part, as detailed above.

Dated February 6, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner