STATE OF WISCONSIN — PERSONNEL COMMISSION

MATHEW T. STANLEY,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case Nos. 97-0189-PC-ER, 98-0035-PC-ER, 98-0123-PC-ER

RULING ON RESPONDENT'S MOTION TO DISMISS

These cases are before the Commission to resolve respondent's motion to dismiss. The facts recited below are made solely for the purpose of resolving this motion and appear to be undisputed by the parties unless specifically noted to the contrary.

FINDINGS OF FACT

1. Complainant has been employed for several years as a Recreation Leader at the Drug Abuse Correctional Center (DACC) in Winnebago, Wisconsin. His immediate supervisor is Sheri Graeber. Dennis Sutton is the superintendent of DACC. In each of his complaints, complainant alleges Transportation Sergeant, Fred Mueller, harassed him and that actions were taken in retaliation for his participation in an activity protected under the Whistleblower Law, §§230.80, et. seq., Stats.

2. Case No. 97-0189-PC-ER was filed with the Commission on December 1, 1997, alleging that respondent retaliated against complainant in violation of the Whistleblower Law. (Hereafter referred to as the First Case.)

3. Case No. 98-0035-PC-ER was filed with the Personnel Commission on February 19, 1998, alleging further retaliation prohibited under the Whistleblower Law. (Hereafter referred to as the Second Case.)

4. Case No. 98-0123-PC-ER was filed with the Personnel Commission on June 30, 1998, alleging further retaliation prohibited under the Whistleblower Law. (Hereafter referred to as the Third Case.)

5. These cases were combined for investigation. On November 20, 1998, an Initial Determination (ID) was issued which found no probable cause to believe that retaliation occurred as alleged in the complaints. The complainant filed an appeal of the ID.

6. The parties agreed to a statement of the issues for hearing (see Commission letter dated May 5, 1999) as shown below in bold type. The issues were framed with reference to certain paragraphs of the Investigative Summary (IS) section of the ID. The regular (not bold) type below was added to provide information necessary to the Opinion section of this ruling.

> Case #97-0189-PC-ER: **Whether there is probable cause to believe that respondent retaliated against complainant for engaging in activities protected under the whistleblower law in regard to the following incidents:**
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> a. **9/3/97 informal counseling (¶7 of the Investigative Summary (IS) section of the Initial Determination),**
> b. **9/29/97 performance evaluation (¶9 IS),**
> c. **1996-1997 harassment by Sgt. Mueller (¶¶3 & 5 IS),** alleged to have involved the following incidents:
>   1. In the summer of 1996, Sgt. Mueller made fun of complainant's apparel, particularly of a certain type of hat he liked to wear and opined that complainant should not wear shorts, even though there is no dress code policy for Recreation Leaders.
>   2. In May 1997, Sgt. Mueller spoke with complainant in a harsh demeaning tone regarding use of radio #18, even though there is no radio-use policy.
>   3. In the summer of 1997, Sgt. Muller continually assigned complainant vehicle #2, which had no air conditioning.
>   4. In the summer of 1997, Sgt. Mueller sent complainant on a "wild goose chase" regarding accident insurance forms.
>   5. In September 1997, complainant's supervisor, Sheri Graeber, and Captain Torsella told complainant and no one else to

dress appropriately for DACC visits from Terri Lee Danner, WCCS Sector Chief.

6. Prior to October 2, 1997, complainant told others that Sgt. Mueller was harassing him. Sheri Graber told complainant to put his allegations in writing and then a meeting would occur. Complainant did not put his allegations in writing. No meeting occurred. On an undisclosed date, Supt. Sutton told complainant "that's just the way Fred [Mueller] is." On an undisclosed date, Capts. Pusma and Torsella looked into the alleged harassment but said Supt. Sutton would handle Sgt. Mueller.

d. **11/8/97 & 11/10/97 verbal harassment by Sgt. Mueller (¶11 IS),** as noted below:
   1. On 11/8/97, Sgt. Mueller inappropriately commented to an inmate, "Your apology won't work with me. It might with (complainant) but not me."
   2. On 11/10/97, Sgt. Mueller commented that management wasn't doing their job regarding the availability of C-45s for that day, and he then went off on a tangent about management having assigned complainant to make an emergency medical trip with an inmate.

e. **10/6/97 & 12/10/97 denial of C-45 requests (¶¶13 & 16 IS),** as noted below.
   1. On 10/6/97, complainant completed a C-45 for a trip with 10 inmates. He put 15 inmate names on the form pursuant to instructions from Ms. Graeber because he did not know which inmates were going. Ms. Graeber later cancelled the trip saying there were too many names on the form.
   2. On 12/10/97, complainant submitted two C-45 requests for 2 separate off-site sporting events. Complainant completed the forms using what he perceived to be Sgt. Mueller's format. Sgt. Mueller's trips were authorized but complainant's were not. Ms. Graeber said complainant had completed the forms incorrectly and so the trips were cancelled.

f. **12/8/97 investigation to determine whether meals were paid for (¶18 IS)[1], and**

g. **12/15/97 removal of Christmas lights (¶19 IS)**

Case #98-0035-PC-ER: **Whether there is probable cause to believe that respondent retaliated against complainant for engaging in activi-**

[1] The statement of the hearing issues in the Commission's prior correspondence, incorrectly referenced ¶8 of the IS in regard to this allegation. The correct reference is ¶18.

ties protected under the whistleblower law in regard to the following incidents:

- **h. 2/2/98 meeting with Ms. Graeber where complainant perceived that she was threatening to eliminate his job (¶¶21 & 25 IS).**
- **i. 2/2/98 complainant scheduled to attend both a grievance and an investigative meeting (¶¶22 & 24 IS).**
- **j. 2/4/98 Sgts. Mueller, Reigh, Burg and Krause talked about the internal complaints filed by complainant and such conversation was overheard by inmates who informed complainant (¶28 IS).**

Case #98-0123-PC-ER: Whether there is probable cause to believe that respondent retaliated against complainant for engaging in activities protected under the whistleblower law in regard to the following incident:

- **k. 6/8/98 Ms. Graeber told complainant (first in a meeting and then by memo) that his request for vehicles must be made 24 hours in advance (¶¶30-31 IS).**

7. Complainant contends that the "first-step" union grievances he filed on October 2 and 3, 1997 constitute disclosures protected under the Whistleblower Law. Superintendent Dennis Sutton, Sector Chief Sandi Sweeney and Supervisor Sheri Graeber received copies of these grievances.[2] The text of the grievances are shown below:

> **Grievance #1 (dated 10/2/97)**: On 9-3-97, Mr. Stanley had an informal counseling with Dennis Sutton, Supt. and Sheri Graeber, supervisor. He was told that this meeting was only an update on his job duties so was not offered union representation. Yet, each of the attached 3 issues[3]

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[2] Complainant disclosed who received copies of the grievance by letter dated January 20, 1998.

[3] The "attached 3 issues" is a reference the following (emphasis shown is the same as in the original document):

> ISSUE #1 Vehicle Logs: Matt writes illegibly on logs; numbers indistinguishable, cross outs and write overs. Told to cross out whole line and make new entry. Told to write clearly. Tried to impress how others are impacted by this, eg: monthly reports.

were then included as negative performance in his PPD on 9/29/97. Each of these issues involve his interactions with another staff person whom Matt has reported to his supervisors for harassing him. Relief sought: Administration follow contract directives. Make employee whole. Cease arbitrary enforcement of legible writing.

Grievance #2 (dated 10/2/97): The examples used at this meeting were obviously arbitrary and capricious since the instructions written on the example are illegible and there are other illegible entries and numerous cross offs not attributable to this employee. No others were counseled regarding these entries. Matt requested use of a computer on C-45 which was denied. Current policy regarding C-45's was discussed, but no written policy has been made available to the employe. Relief sought: Use of a computer. Provide a written policy regarding C-45's to the employees at DACC.

Grievance #3 (dated 10/3/97): On 9-23-97 and 9-29-97 the employe requested a union member present at the performance Planning and Development session because he believed that discipline may result from this session. His request was denied each time. The PPD directly addressed issues presented on 9-3-97 where he was not afforded union representation by administration calling it [an] updated job description. Relief Sought: Prior practice in DOC has been established that whenever an employe requests union representation he/she has been accommodated. Follow prior practice and article 4 section 9 par. 2 & 3.

Grievance #4 (dated 10/3/97): On numerous occasions Sgt. Fred Mueller made harassing statements to the grievant. The grievant requested that Mr. Mueller stop this behavior without Mr. Mueller doing so. Mr. Stanley reported this situation to Supervisor Sheri Graeber, Supt. Sutton

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ISSUE #2 C-45's: (This is a form entitled "DOC-45 Temporary Release Order," which temporarily releases inmates to staff-supervised destinations outside the institution.) Problems with filling out completely, including names of WCC inmates for whom Matt is responsible as escort; all C-45's need to be filled out completely and must be readable. Error will prevent trips. ORIGINAL MUST ACCOMPANY TRIP. NAMES OF INMATES MUST BE LISTED ON EVERY C-45 PRIOR TO PLACING IT IN THE TRANSPORTATION BOX. As per current policy, changes must be approved by a supervisor.

ISSUE #3 Vehicle Assignments: From this point forward, Matt must take the vehicle assigned on the trip list by Transportation Sgt. Late C-45's will be approved only on an exceptional basis.

> and Capts. Loesella and Paukma without any resolution. Both Capts. reported to Mr. Stanley that they could not remedy the situation because they are not allowed to supervise Mr. Mueller only the Supt. supervises him. The Supt. told Mr. Stanley that, "this is just the way Fred is." Supervisor Graeber said she would set up a meeting between these two men to address these issues. When questioned about why this wasn't done she told Mr. Stanley because he didn't put the allegations in writing no further action was taken. Relief sought: Create and maintain a harassment free environment for Mr. Stanley.

8. In December 1997, complainant pursued some of the issues as grievances at the second step. He contends that these grievances also constitute a disclosure protected under the Whistleblower Law. The second-step grievances went to Bill Grosshands. The text of these grievances is shown below:

> **Grievance #1 (dated 12/1/97)**: On 9-3-97, Mr. Stanley was informally counseled by Supt. Sutton and Supervisor Sheri Graeber. He was told this was an update of job duties. The grievant expected a meeting where he was given new responsibilities therefore he was not offered or requested union representation. Yet 3 issues were discussed which may result in discipline and were then included as negatives in his PPD on 9/27/97. Each of these issues involved the grievant's interaction with a staff person he had reported previously for harassment. The issues were arbitrary since the instructions were written in an illegible handwriting when he was being counseled on his illegible handwriting. On the examples given other entries were also illegible, yet no one else was counseled. He requested the use of a computer yet his request was denied. Current policy regarding C-45s was discussed but no written policy is available. Relief sought: Provide the use of computer. Provide a written policy regarding DOC-45 to all DACC employees. Offer union representation at informal counseling.

> **Grievance #2 (dated 12/1/97)**: On 9-23-97 and 9-29-97 the employe requested a union representative at his performance, planning and development session because he believed that discipline may result from this session. On each occasion the request was denied. The PPD directly addressed issues presented on 9-3-97 at an informal counseling where he was not offered union representation because the supervisor called it an updated job duties (sic). Relief sought: Removal of this PPD from the employee's personnel file. Past practice has allowed union representation whenever requested.

> **Grievance #3 (dated 12/1/97)**: On numerous occasions Sgt. Fred Mueller made harassing statements to the grievant. The grievant requested that Sgt. Mueller stop this behavior. Mr. Stanley reported the situation to Supervisor Sheri Graeber, Supt. Sutton and Captain Tosella and Paulsma without any resolution. The Captains indicated that they could not remedy the situation since they were not allowed to supervise Sgt. Mueller, only the Supt. Supervises Sgt. Mueller. The Supt said, that's just the way Fred is. Supervisor Graeber said a meeting would be set up between the two men to discuss the problem, which never happened. Relief sought: Create and maintain a harassment free environment for Mr. Stanley. Follow the employee handbook which clearly states that a harassment free workplace will be established for all employees not just protected status.

OPINION

This case is before the Commission pursuant to respondent's motion to dismiss for failure to state a claim. The motion is analyzed pursuant to the guidance set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W. 2d 660 (1979):

> For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the fact 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 as legally insufficient only if "it is quite clear that under no conditions 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.

I. Alleged Retaliation Prior to October 2, 1997

Respondent first contends this case should include only the alleged retaliatory actions taken after the complainant filed his first grievance on October 2, 1997. Complainant contends acts prior to October 2, 1997, should not be dismissed under a con-

tinuing violation theory. The legal theory advanced by complainant does not address the issue raised by respondent. Specifically, respondent notes that incidents prior to October 2, 1997 could not be considered as taken in retaliation for the grievances (claimed as the whistleblower disclosures) which complainant had not filed yet. Complainant does not offer any explanation of how a past event could be motivated by an event that had not yet occurred.

The Commission dismisses the allegations regarding events that occurred prior to October 2, 1997. See *Richert v. UW System*, 99-0074-PC-ER, (date), citing *Seay v. UW-Mad.*, 89-0082-PC-ER, 3/31/94; affirmed by Dane County Circuit Court, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; affirmed by Court of Appeals, 88-CV-1223, 1/10/90. This portion of the ruling does not affect case number 98-0035-PC-ER or 98-0123-PC-ER. It does affect case number 98-0189-PC-ER with dismissal of the following allegations (using the same numbering system as used in ¶6 of the Findings of Fact): a) 9/3/97 informal counseling session, b) 9/29/97 performance evaluation and c) harassment by Sgt. Mueller.

II. Whether Disclosure Merited Further Investigation

Respondent contends that no protected disclosure occurred because the respondent did not believe that the allegations merited further investigation. (Respondent's final brief, dated 7/9/99.) Respondent's argument is shown below:

> It is not enough to say that there was a disclosure in the form of a grievance and that some retaliatory action occurred or was threatened thereafter. Disclosure under Wis. Stat. §230.81 must merit further investigation. Wis. Stats. §230.85(6)(b). This Commission reached the same conclusion when it modified Conclusion of Law 3 in the *Williams'* Proposed Decision and Order. The Commission, in *Williams v. UW Madison*, 93-0213-PC-ER, 9/17/96, affirmed Dane County Circuit Court, *Williams v. Wis. Pers. Comm.*, 96-CV-2353, 11/19/97,[4] indicated that because the record failed to show that the respondent concluded that the issue presented in the grievance merited further investigation or that such

[4] Respondent incorrectly recited a decision date of 1993, rather than the correct date of 1996. The citation also was modified to reflect the later decision of the circuit court.

> investigation occurred, that the complainant failed to satisfy the requirement under §230.85(6)(b).

Respondent's recitation of the Commission's decision in *Williams* is incorrect. The Commission modified the third conclusion of law as shown below:

> Complainant has not established that a disciplinary action occurred under circumstances which give rise to the presumption, set forth at §230.85(6), Stats., that the disciplinary action was retaliatory.

The cited statutory section governs when a presumption of retaliation arises in regard to disciplinary actions taken. It does not govern the question of whether disciplinary action occurred under §230.80(2), Stats.

III. Union Grievances as Whistleblower Disclosure

Respondent contends that the union grievances filed (claimed as the protected whistleblower disclosure here) did not disclose "information," within the meaning of §230.80(5), Stats., and, accordingly, the grievances were insufficient to trigger the protections provided under the Whistleblower Law. The Commission first notes that this argument is pertinent only to the First Case. The filing of a whistleblower complaint with the Commission is a protected disclosure pursuant to §230.80(8)(a), Stats. Accordingly, the protected disclosure underpinning the Second Case is the filing of the First Case with the Personnel Commission. The protected disclosures underpinning the Third Case is the filing of the First and Second Cases. (Also see, *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98.) Accordingly, this portion of respondent's motion is denied with respect to the Second and Third Cases.

The Commission now returns to the question of whether the union grievances constitute a protected disclosure in the First Case. The statutory provisions relevant to this argument are noted below:

> §230.80(5), Stats.: "Information" means information gained by the employe which the employe reasonably believes demonstrates:
> (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 the public health and safety.
>
> §230.80(7), Stats.: "Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean the mere failure to act in accordance with a particular opinion regarding management techniques.

Complainant contends that the union grievances disclosed information, within the meaning of §230.80(5), Stats. His argument is noted below (from pp.3-4 brief dated 6/4/99):

> Union grievances dated 10/2/97 and 10/3/97 dealt with not merely lack of union representation, but with the harassment of the complainant by a coworker. The 12/1/97 grievance repeated complaints of harassment set forth earlier in the 10/2/97 and 10/3/97 grievances, because nothing had been done to stop the harassment.
>
> The respondent has declared that "[t]he maintenance of a harassment-free work environment is a necessary component of equal opportunity. The Department of Corrections is committed to treating each employee, client and inmate with basic respect and sensitivity." Executive Directive 7. By failing to stop the harassment, the respondent is violating its own executive directive. And this violation is particularly egregious because the respondent knows that the complainant has taken stress leaves, has seen, and is currently seeing, a counselor for anxiety and stress reactions resulting from the harassment received at his employment. The respondent knows of complainant's problems and still has done nothing. Clearly, the information disclosed about the harassment concerns the violation of a state rule or regulation under Wis. Stats. sec. 230.80(5)(a).

Under complainant's theory of the First Case, the fourth grievance filed in October 1997 has the potential of being considered as a disclosure of information under §230.80(5), Stats. The first grievance filed on October 2, 1997 (see ¶7 of the Findings of Fact), concerned the informal counseling session on September 3, 1997. While the text of the grievance does reference that the 3 performance issues raised during the

meeting "involve [complainant's] interactions with another staff person whom Matt has reported to his supervisors for harassing him," there is no allegation raised in the grievance that respondent failed to correct the situation. Nor is there a request for management to remedy the perceived harassment. The second grievance filed on October 2, 1997, concerned the same informal counseling session and contains no reference to perceived harassment. The third grievance filed on October 3, 1997, concerned the lack of union representation at meetings in September 1997. The third grievance does not reference perceived harassment. The fourth grievance filed on October 3, 1997, specifically raises the perceived harassment by Sgt. Mueller and contains a request for management to remedy the situation. For similar reasons, the third grievance filed on December 1, 1997 (see ¶8 of the Findings of Fact) has the potential of being considered as a disclosure of information under §230.80(5), Stats.

Complainant contends that the grievances, which raised the issue of management's failure to remedy harassment by Sgt. Mueller, "concern the violation of a state rule or regulation under Wis. Stats. sec. 230.80(5)(a)" because of respondent's Executive Directive 7. (Complainant's brief, dated 6/4/99, p. 3.) The executive directive clearly is not a statute or an administrative rule. A question exists whether the executive directive is a "regulation." Webster's Third New International Dictionary (1981) contains the following definition of regulation (showing the same emphasis as appears in the original text):

> Regulation . . . 2b: a rule or order having the force of law issued by an executive authority of a government usually under power granted by a constitution or delegated by legislation; as . . . (2) one issued by the president of the U.S. or by an authorized subordinate - called also *executive order*.

It could be argued that an executive directive issued by an agency might be considered comparable to an executive order. The problem here, however, is that Executive Directive 7 relates to harassment as a component of "equal opportunity" or, in other words, harassment as a component of a work environment free from illegal discrimination under Title VII of the

Civil Rights Act or under the Fair Employment Act (Subch. II, Ch. 111, Stats.). The complainant here does not claim that the harassment was due, for example, to his race, creed or sex. As such, the harassment mentioned in the grievances is not covered under Executive Directive 7 and, accordingly, does not constitute a disclosure of information regarding a regulation violation, within the meaning of §230.80(5), Stats.

The complainant argues in the alternative, as shown below:

> This inaction also constitutes mismanagement under 230.80(5)(b). That the superintendent knew of the ongoing harassment and did nothing to stop it is a wrongful and negligent management action. The respondent had been told verbally of the harassment and did nothing. The respondent was then informed on 10/2/97, 10/3/97 and 12/1/97 of the harassment. Still, nothing was done. The repeated failure of the respondent to stop the harassment is a "pattern of incompetent management actions which are wrongful [and] negligent . . . which adversely affect the efficient accomplishment of an agency function." Wis. Stats. Sec. 230.80 (7). The complainant submits that the harassment of any employee, and the creation of such a work environment that tolerates such behavior, does "adversely affect the efficient accomplishment of an agency function." The complainant has met this element of the statute.

This case is before the Commission on a motion to dismiss for failure to state a claim. Accordingly, the Commission accepts complainant's contention that the alleged retaliation impacted on his ability to perform his job and, consequently, that the circumstances adversely affected the efficient accomplishment of an "agency function," within the meaning of §§230.80(5)(b) and (7), Stats. Based on the foregoing, this portion of respondent's motion is denied with respect to the First Case.

IV. Disciplinary Action

The Commission now turns to respondent's contention that the allegations raised cannot be construed as disciplinary action. The pertinent statutory sections are noted below:

> §230.80(2), Stats.: "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:
> a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
> b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
> c) Reassignment.
> d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The introductory clause clearly states that the action(s) complained of must have the effect (at least in part) of a penalty. The examples given of actions having the effect of a penalty are contained in subparagraphs (a) through (d) of the statute, but are not intended to be an all-inclusive list. The Commission has held that the common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform one's job efficiently. Rather, only actions that have "a substantial or potentially substantial negative impact on an employe" may be considered as disciplinary action under the Whistleblower Law. *Vander Zanden v. DILHR*, 84-0069-PC-ER, 8/24/88; affirmed *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1233, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. We now turn to each case to assess whether the allegations raised constitute disciplinary action, within the meaning of §230.80(2), Stats.

Case #97-0189-PC-ER: Allegations "a" through "c" (using the same numbering system as used in ¶6 of the Findings) were dismissed as untimely in this ruling. **Allegation "d"** relates to two comments made by Sgt. Mueller, one on November 8, 1997 and the other on November 10, 1997. The two comments may have aggravated complainant but are not sufficiently onerous to characterize as having a substantial or potentially substantial negative impact on complainant and, accordingly, cannot be characterized as rising to the level of a disciplinary action under the Whistleblower Law.

Allegation "e" relates to Supervisor Graeber's rejection (on October 6, 1997 and on December 10, 1997) of two C-45 forms prepared by complainant. The rejection of two forms prepared over a two-month period is not sufficiently onerous to characterize as a disciplinary action under the Whistleblower Law. **Allegation "f"** relates to respondent's decision to investigate complainant due to a grievance filed by two employees. The investigation is not alleged to have resulted in the imposition of discipline. The Commission previously has ruled that a decision to investigate an employe is not a disciplinary action under the Whistleblower Law. *Bruflat v. DOCom.*, 96-0091-PC-ER, etc., 7/7/98. **Allegation "g"** concerns the removal of Christmas lights, which cannot be characterized as creating a substantial or potentially substantial negative impact on the complainant and, accordingly, cannot be characterized as a disciplinary action under the Whistleblower Law.

The Commission grants respondent's motion in regard to case #97-0189-PC-ER. All allegations raised the case are dismissed as either untimely filed or as failing to state a claim as detailed in this ruling.

Case #98-0035-PC-ER: **Allegation "h"** involves what complainant perceived as his supervisor threatening to eliminate his job. In the context of the present motion to dismiss, the Commission looks at the allegations raised in a light most favorable to complainant. The alleged threat to eliminate his job is a disciplinary action specifically recognized under §§230.80(2)(a) and 230.83(1), Stats. **Allegations "i" and "j"** involve complainant's dissatisfaction with scheduling and a comment overheard by an inmate. Neither of these allegations involved serious or potentially serious consequences to the complainant and, accordingly, cannot be characterized as a disciplinary action under the Whistleblower Law. The Commission grants respondent's motion with respect to allegations "i" and "j", and denies the motion with respect to allegation "h."

Case #98-0123-PC-ER: This case involves Ms. Graeber, as complainant's supervisor, directing him to request a vehicle 24 hours in advance. The alleged action did not involve any serious or potentially serious consequence to the complainant and, ac-

cordingly, cannot be characterized as a disciplinary action under the Whistleblower Law. Respondent's motion is granted regarding this case.

V. Request for Fees and Costs

Respondent requested the Commission to assess fees and costs against complainant citing as authority §230.85(3)(b), Stats., the text of which is shown below (emphasis added):

> If, *after hearing*, the commission finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The commission shall order the employe's appointing authority to insert a copy of the findings and order into the employe's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the commission finds by unanimous vote that the employe filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employe or the employe's attorney, or assessed so that the employe and the employe's attorney each pay a portion. To find a complaint frivolous the commission must find that either s. 814.025(3)(a) or (b) applies or that both s. 814.025(3)(a) and (b) apply.

A question exists whether the Commission, under §230.85(3)(b), Stats., may assess fees and costs only after a formal hearing, as opposed to after a summary motion such as the present motion to dismiss for failure to state a claim. This question arises due to the phrase "after hearing" contained in the first sentence of §230.85(3)(b), Stats., which could be interpreted as a prerequisite for any action authorized under §230.85(3)(b), Stats. Since the statute is ambiguous on this point, the Commission may look to extrinsic aids to ascertain the intent of the legislature. *Tahtinen v. MSI Ins. Co.*, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985).

When construing an ambiguous statute, it is proper to consider the entire section of a statute and related sections in its construction or interpretation. *Kerkvliet v. Kerkvliet*, 166 Wis.2d 930, 939, 480 N.W.2d 823, 827 (Ct. App. 1992). "[W]e do not read statutes out of context."

The ambiguous text of §230.85(3)(b), Stats., references §§814.025(3)(a) and/or (b), Stats. The text of the referenced (and a related) statutes are shown below (emphasis supplied):

> 814.025 Costs upon frivolous claims and counterclaims. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complainant commenced, used or continued by a defendant is found, *at any time during the proceedings or upon judgment*, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees . . .
>
> (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
>
> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The Commission believes it has the authority to assess fees and costs for frivolous claims under the Whistleblower Law only if the case is resolved by a decision issued after a formal hearing and not where the case is resolved by summary motion. If the Legislature had intended the Commission to have the power to assess fees and costs for a frivolous action at any time during the proceeding, then the Legislature would have included in §230.85(3)(b), Stats., a reference to that broad range of authority in §814.025(1), Stats.

This conclusion is further supported by §230.85(2), Stats., the pertinent portion of which is shown below:

> The commission shall receive and . . . investigate any complaint under [the Whistleblower Law] . . . If the commission finds probable cause to believe that a retaliatory action has occurred or was threatened, it may endeavor to remedy the problem through conference . . . If that endeavor is not successful, the commission shall issue and serve a written notice of

> hearing, specifying the nature of the retaliatory action which has occurred . . . The testimony at the hearing shall be recorded or taken down by a reporter appointed by the commission.

Reading §§230.85(2), Stats., in conjunction with §230.85(3)(b), Stats., results in a conclusion that the word "hearing" as used in §230.85, Stats., means a formal hearing where testimony is recorded.

Based on the foregoing, respondent's request for fees and costs, accordingly, is denied.

VI. Final Note

Complainant asserted in his brief (dated June 4, 1999, p. 6) that certain job duties have been removed from complainant's position. The allegations raised here by complainant go beyond the statement of the hearing issues that were agreed upon by the parties. Accordingly, the Commission did not address this argument.

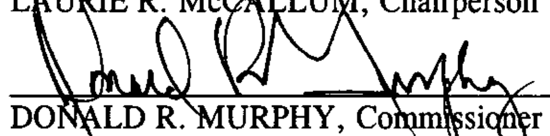
ORDER

Respondent's motion to dismiss case numbers 97-0189-PC-ER and 98-0123-PC-ER is granted. Respondent's motion to dismiss case number 98-0035-PC-ER is granted in part and denied in part, as detailed in this ruling. Respondent's motion for fees and costs is denied.

Dated: August 25, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

JMR:970189+Crul1.doc

Parties:
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Oshkosh, WI 54904

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Secretary, DOC
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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95