STATE OF WISCONSIN | PERSONNEL COMMISSION

FRANKIE JOHNSON,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 98-0029-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a charge of discrimination alleging respondent, the Department of Corrections (DOC), discriminated against complainant because of his race in violation of the Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. and retaliated against him for participating in activities protected under the FEA. The issue for hearing is as follows:

> Whether respondent discriminated against complainant based on race or retaliated against complainant for engaging in protected activities under the Fair Employment Act when it terminated his probation as a Power Plant Operator-In Charge and returned him to the position of Power Plant Operator-Senior, as reflected in respondent's letter dated August 11, 1997.

FINDINGS OF FACT

1. Complainant is of a minority race—i. e., non-white.

2. Complainant began working for the State of Wisconsin on May 22, 1989. In March 1997, he was working as a Power Plant Operator-Senior (PPOS), at Waupun Correctional Institution (WCI), a prison under DOC's management. On March 30, 1997, he was promoted to Power Plant Operator in Charge (PPOIC). He was required to pass a six-month probationary period in the PPOIC position.

3. Prior to his promotion, complainant's disciplinary record at WCI was not the best, and included one incident of inattentiveness (official reprimand, Respondent's Exhibit

R122); confrontational behavior (official reprimand, Respondent's Exhibit R123); unauthorized break (official reprimand, Respondent's Exhibit R124); and temporary shift reassignment (interpersonal relationships, Respondent's Exhibit R125). Problems with interpersonal relationships had been noted in annual performance evaluations. At the time of his promotion, respondent believed complainant had good technical ability, but had strong doubts about his ability to handle the interpersonal relationships in a quasi-supervisory lead worker role. However, management wanted to give complainant a chance in the lead worker position, and also were motivated to promote him because of affirmative action considerations and because he was the only candidate on the certification WCI had at the time who respondent felt was technically qualified for the PPOIC position.

4. Respondent removed complainant from the PPOIC position, effective August 17, 1997. This removal occurred prior to complainant completing his probationary period. Complainant was informed of this decision by letter dated August 11, 1997; relevant excerpts of which are shown below:

> This letter is to inform you of our intention to remove you from your current position of (PPOIC) due to your failure to meet probationary standards . . .
>
> Specifically, you failed to meet expectations by duplicating Central Generating Plant (CGP) keys without authorization and failing to report lost key chits at the time of loss. You have also demonstrated unsatisfactory performance as a leadworker in maintaining positive working relationships with other plant staff.
>
> Effective Sunday, August 17, 1997, you will be restored to the position of Power Plant Operator-Senior at the Waupun Central Generating Plant [CGP].[1]

5. Respondent's termination of complainant's probation was based on a number of factors. However, the termination was precipitated by an incident that was summarized in an "Employee Disciplinary Investigation" report dated July 28, 1997, (Respondent's Exhibit 102) prepared by complainant's immediate supervisor, Steve Bach, which accurately described essentially what happened. This document includes the following:

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[1] The restoration of complainant to his prior position was pursuant to §ER-MRS 14.03(1), Wis. Adm. Code,

> On the above date, it was brought to my attention that Frankie Johnson may have duplicated power plant keys without authorization. When I questioned this person as to why he believed this, he indicated that he had observed a smaller ring of keys in Frankie's possession.
>
> On the same date, around noon, Frankie came to the office and brought up the topic of keys. He pulled a set of keys from his pocket and said he'd copied the well-house key, boiler room key cabinet and some tool cabinet keys. I asked him how many copies he'd made and he said one . . .
>
> On 7/29/97, Frankie came to the office and informed me that he'd lost two key chits, probably inside the prison. He said he thought he'd lost one . . . two summers ago and the second one last summer.

6. Respondent conducted an investigative meeting on August 4, 1997. Complainant explained at this meeting that he had had his wife copy the keys at Farm and Home on July 27, 1997, and that the keys were away from WCI for about an hour. He said he wanted the duplicate keys so he could carry them at work because he found the standard key ring that held more keys cumbersome. He did not explain why he previously had failed to report that he had lost key chits.

7. Respondent's conclusion stated in its August 11, 1997, termination letter (Respondent's Exhibit 101) that complainant "demonstrated unsatisfactory performance as a leadworker in maintaining positive working relationships with other plant staff" was based upon the following three incidents.

8. On June 7, 1997, complainant was working with Mr. Niemeyer. Complainant functioned as leadworker for Mr. Niemeyer. A conflict arose when complainant smoked a cigar in a designated smoking area near Mr. Niemeyer. Mr. Niemeyer was known to be sensitive (allergic) to smoke. Respondent conducted an investigation of both employees. The investigation of complainant was to determine whether he was smoking in a designated area or whether (as Niemeyer alleged) complainant also was smoking in a non-designated area. The investigation of Niemeyer was to determine whether he abused sick leave by leaving work after he confronted complainant about smoking. Ultimately, respondent did not impose discipline

on either employe. Respondent's written notes of the statement complainant gave during the investigation is shown below:

> Johnson stated that about 0715 he sat down next to Niemeyer with a wrapped cigar. Niemeyer asked him if he was going to light the cigar but Johnson did not respond. Johnson then lit the cigar. Niemeyer stood up and said "You fucker" and opened the overhead door.
>
> Johnson said that Niemeyer then returned to the operator's desk and told Johnson that if he did not put the cigar out he was going to go home sick. Johnson responded "Go home sick. I don't give a fuck. I'll get someone to work for you." At this point he called Assistant Superintendent Clover. Johnson pointed out (during the interview) that there is a smoking permitted sign in front of #2 boiler.
>
> Johnson asked Niemeyer if he should call in a relief. Niemeyer said no. Johnson then said that he then made rounds and tested water in the lab. When asked about smoking in the lab Johnson replied he had the cigar in his mouth but it wasn't lit.
>
> Johnson states that about 0755 Niemeyer asked him to call in a relief. Pat Miller was contacted and relieved Niemeyer at 0830. Respondent's Exhibit R114.

9. On June 26, 1997, one of complainant's subordinates submitted a written statement saying complainant was uncooperative in opening both halves of a gate. The text of the subordinate's statement is shown below in relevant part:

> Big request!! Not only from me but also from others who have complained about it.
>
> When 2-10 operator Frankie Johnson opens up the Lincoln Street gate, he only opens up half of it. Get him to shove both halves open!!
>
> When I asked him about it he flew off the handle and I wasn't about to get into a shouting match with him over it so now you people handle it . . . Lincoln Street is quite narrow and just at the time when we here at CGP are coming to work, DCI people are also doing the same. Quite a lot of traffic goes right past our gate at that time.

> With both gates open, it is much easier and safer to enter our lot and get out of the flow of traffic. Others always have opened up both gates, why don't Frankie? Respondent's Exhibit R113.

10. Respondent determined that the matter described in the prior paragraph needed correction and, accordingly, issued a memo to the PPOIC's that the gate must be fully open during traffic times. Respondent did not conduct an investigation, but dealt with the situation by issuing this memo to all PPOIC's, and complainant never had an opportunity to rebut the subordinate's version of events.

11. On July 4, 1997, complainant and the same subordinate were involved in an incident regarding a fly swatter. Respondent took complainant's statement on April 9, 1997, as part of its investigation. Excerpts are shown below:

> [The subordinate] told Frankie that [the subordinate] had found the fly swatter laying on the floor. [The subordinate] was very upset that the fly swatter was not in its proper place. [The subordinate] said he'd found it under #4 boiler the day before and that "all evidence indicated that you are responsible for messing with the flyswatter." When asked Frankie replied that he never felt threatened by him. Frankie told him that if [the subordinate] had a problem with the flyswatter he should talk to Steve Bach and Chuck Clover about it.
>
> [The subordinate] said something to the effect of "You're always messing with people; for instance the Lincoln Street Gate" . . . Frankie said that issue has been resolved. There's a letter from Clover stating that the gates should be open all the way.
>
> Frankie mentioned to [the subordinate] again that if he had a problem with the flyswatter, write a letter to management and they will address the situation. [The subordinate] said he didn't believe in writing letters about stuff like that. Frankie said "You're a damn liar. You've been writing letters to management ever since April 1990" . . .
>
> [The subordinate] said that Ricky Socha said that Frankie was a troublemaker and an instigator and that [the subordinate] should watch out for Frankie . . . Frankie said "I don't believe a word you're telling me. Ricky filled me in on everybody here at the plant and you especially. He said that you were a union steward that will fight good for some people but others he will stab in the back. He's continually writing letters to the office, often about things that didn't involve him."

> [The subordinate] then said "Since you dislike it here so badly, why don't you leave and go somewhere else?" Frankie said, "Why haven't you left? Why have you stayed here for 30+ years? I've never been on disciplinary layoff from this job or any other. You cannot say the same. You've been laid off 7 or 8 times from what I understand . . . It would be a joyous occasion if you were to retire tomorrow."
>
> [The subordinate] said, "When are you going to Green Bay?" Frankie said "I don't know . . . I do have transfer papers in there . . . I don't see anyone trying to drum me out of WCI. There isn't a soul at CGP that doesn't say 'when is [the subordinate] leaving' and hoping that you do leave."
>
> Frankie mentioned that G. Hoffman had said with all of his health problems, why doesn't he just retire. [The subordinate] got very upset with Gordie, "It's none of his business when I leave." Frankie said "You claim Joel called you up one time and asked when you were going to retire." Now [the subordinate] was sitting in the chair very upset, Frankie was upset. Respondent's Exhibit R111.

12. After investigating the above incident, Mr. Bach determined there was no basis to pursue disciplinary action against either employe.

13. The subordinate had a record at WCI of not always geting along with his co-workers. On December 21, 1994, an incident occurred between [the subordinate] and Darroy Hanson. Respondent gave [the subordinate] a written reprimand for this incident based on a determination that his actions "were abusive and disruptive to the work environment." On December 29, 1994, an incident occurred between [the subordinate] and Dennis Johnson. Respondent suspended [the subordinate] without pay for one day based on a determination that his actions "were threatening, abusive and disruptive to the work environment." Respondent did not demote [the subordinate] for his inability to get along with co-workers. Unlike complainant, [the subordinate] was never on probation at the time of any of the matters discussed in this decision, but had permanent status in class.

14. Respondent's policy is to terminate the probation of any probationary employe who is involved in misbehavior that would result in the formal discipline of an employe with permanent status in class.

15. Complainant bases his claim of WFEA retaliation on an internal harassment complaint he filed on July 14, 1997 (Respondent's Exhibit R 110) regarding the fly swatter incident discussed above in Finding of Fact #11. On this form, complainant did not check off any of the alleged bases for harassment—e. g., race, color, sex, etc. When he was interviewed by management on July 9, 1997, complainant stated "[Complainant] feels that the situation is harassment as opposed to discrimination." Respondent's Exhibit R111. As set forth above in Finding of Fact 12, respondent reached the conclusion after its investigation of the complaint that there was no basis for any disciplinary action.

16. Both parties presented evidence of activity by other employes involving keys and other misconduct that did or did not result in discipline being imposed. There were no cases that were comparable to complainant's—i. e., a probationary employe, without first obtaining permission authorized keys to be taken off grounds for approximately one hour to have them copied, and losing key chits and failing to report this for a period of years.

CONCLUSIONS OF LAW

1. This case is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish that respondent discriminated against him on the basis of race or retaliated against him for activities protected by the WFEA when it terminated his probationary employment as PPOIC and restored him to his PPO-Senior position effective August 17, 1997.

3. Complainant failed to sustain his burden of proof.

4. Respondent did not discriminate against complainant on the basis of race or retaliate against him for activities protected by the WFEA when it terminated his probationary employment as PPOIC and restored him to his PPO-Senior position effective August 17, 1997.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the case of a demotion, the elements of a prima facie case are that: 1) the complainant is a member of a group protected under the FEA, 2) complainant was qualified for the job yet was demoted and 3) the demotion occurred under circumstances giving rise to an inference of discrimination or retaliation.

In its post-hearing brief, respondent contends that complainant did not establish the first element because he did not put his race on the record during the hearing. However, Jeff Smith, the institution's human relations director, testified that complainant has minority status and is a member of a "target group" for affirmative action purposes. Therefore, he has established he is a member of a group protected by the WFEA

Complainant also satisfied the second element of a prima facie case because he was removed from his PPOIC position and restored to a position in a lower pay range. As to the third element, he was replaced by a non-minority, and this creates a sufficient inference of discrimination to satisfy the third element of a prima facie case.

The burden of proceeding then shifts to the employer to articulate a legitimate non-discriminatory reason for demoting complainant. Respondent met this burden by saying complainant was demoted for: 1) duplicating keys without permission, 2) failing to report lost key chits and 3) poor work performance, in particular his failure to maintain positive working relationships with other plant staff. The burden of proof then shifts back to complainant to attempt to show that respondent's stated reason is a pretext for discrimination and/or FEA retaliation.

The main thrust of complainant's attempt to show pretext was to try to demonstrate that he was being singled out with regard to violation of work rules. This attempt ultimately was unsuccessful. Complainant did demonstrate there were various security-related rules which were frequently ignored without apparent consequences. For example, many employes (including complainant[2]) did not pass keys hand to hand in accordance with policy, but sometimes tossed them or slid them on the floor. However, there are significant differences between these occurrences and complainant's actions with regard to improperly having his keys duplicated off the grounds, and failing to report the loss of key chits at the time this occurred.

A lot of the rule violations were not observed by management, and thus could not possibly have resulted in discipline. Also, any rule violations involving employes with permanent status in class presented a different set of circumstances than was the case with regard to employes on probation, like complainant. The formal discipline of a permanent employe is subject to grievance (or appeal if a non-represented employe), where the employer has the burden of proving just cause for its imposition of discipline. The discipline of a probationary employe is neither grievable nor appealable. Furthermore, DOC rules *require* that a probationary employe be terminated when involved in misconduct that would merit the imposition of *any* discipline for an employe with permanent status in class. Also, the complainant's key violations were more significant because he not only did not inform management of the loss of key chits until two years after the fact, he duplicated a set of keys (in itself improper) and was without the keys while on duty for a period of approximately one hour while his wife was having the keys duplicated.

Complainant tried to downplay the safety and security significance of this in the face of his supervisor's testimony to the contrary. However, at best he showed a difference of opinion. On this record it is at least clear that respondent had a good faith, reasonable belief that complainant's rule violations had serious potential implications involving safety and security. Even if it were assumed, for the sake of

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[2] Complainant was never disciplined or reproached for this.

discussion, that respondent's concerns were out of proportion to the actual safety and security risks presented, this case is not before the Commission for a determination of whether there was just cause for the demotion, and thus whether respondent satisfied its burden of proof to show just cause for the termination and demotion. This would only be the case if complainant had had permanent status at the time of the termination. Rather, in this case complainant has the burden of proof to show that respondent was motivated by discriminatory considerations when it terminated his probationary employment. A good faith belief that complainant's behavior and performance merited termination of his probationary employment is inconsistent with a conclusion that respondent was motivated to discriminate against complainant because of his race or to retaliate against him because he had engaged in activity protected by the WFEA. *See, e. g., Hawk v. DOCom,* 99-0047-PC-ER, 6/2/99, citing *Mitchell v. DOC,* 95-0048-PC-ER, 8/6/96:

> In a discrimination case involving a discharge, the employer/respondent is not required to show just cause for the discharge, as would be the case in an appeal of a discharge under §230.44(1)(c), Stats., or in a contractual grievance proceeding. Rather, complainant has the burden of proof and must establish a discriminatory motive for the discharge. In a case such as this, where the complainant denies much of the underlying misconduct, if she could establish that respondent had a weak case for discharge, it would be probative of pretext.

> *See also Starck v. DILHR,* 90-0143-PC-ER (9/9/94) (Where Respondent established there were significant problems with a probationary employe's performance, and complainant failed to show that these reasons were pretextual, it was concluded complainant's probation was not terminated for a discriminatory reason.), *Russell v. DOC,* 95-0175-PC-ER, 4/24/97 ("'Whether Paxton did in fact rape Sivolka or otherwise subject her to unwelcome sexual contact is not an issue that needs to be decided in this case. What matters is the question of what the employer's motivation *was*, not whether it was objectively correct. Notwithstanding this, there is some relevance in considering the question of whether Paxton was culpable, because the more reasonable such a conclusion appears on the basis of what the employer's investigation showed, the more reasonable is the conclusion that the

> employer's investigators came to genuinely believe, in good faith, that Paxton was culpable.'" [citation omitted]). *Hawk,* p. 5.

Another significant factor that must be considered when comparing the handling of complainant's discipline with other employes is that not only was he a probationary employe, he was in a lead worker position. As such, respondent had a legitimate reason to expect that he should set an example and function at a higher level in terms of interpersonal relationships than the rank and file employes he was responsible for leading. This concern was even more acute in complainant's case because his record at WCI reflected significant problems over the years in his relationships with other employes, and because of this management had been concerned from the beginning about his capacity to function as a lead worker. Accordingly, management was particularly concerned about complainant's capacity for dealing effectively with the other employes.

A good example of how this played out concerned the "cigar" incident (Finding of Fact #8). Complainant approached this situation essentially from the limited perspective that the rules permitted smoking in front of the boiler, so he was justified in lighting his cigar in front of another worker who had objected due to a claimed allergic sensitivity to cigar smoke. Respondent looked at this from the perspective that a lead worker should have handled this incident in a less confrontational manner, rather than insisting on lighting up the cigar and then engaging in a profane exchange with the co-worker, albeit the co-worker apparently made the first use of profanity. Another example of this involves the "fly swatter" incident (Finding of Fact #11). Complainant's own statement demonstrates that rather than de-escalate the situation, he kept responding in kind to the other employe and "kept the pot boiling." Again, respondent had a right to expect a higher standard of conduct from a lead worker than from a rank and file employe.

With regard to the "Lincoln Street gate" incident (Findings of Fact #10-11), respondent dealt with this without getting complainant's side of the story. However, it did not consider this to be a disciplinary matter at the time, and dealt with it by issuing

a general instruction to all PPOIC's. To the extent that management relied on this in some way at a later point when complainant's probation was terminated, their failure to have given complainant a hearing on this incident is probative of pretext. However, it does not carry a great deal of weight, in light of the fact that this was a relatively minor part of the reasons for termination, and did not result in any discipline or detriment to complainant at the time it occurred.

With regard to the issue of retaliation, a prima facie case here requires a showing that the employe engaged in some kind of activity protected by the WFEA, *see* §111.322(2m)(3), Stats. It is clear that complainant was not alleging any kind of discrimination covered by the WFEA in the internal harassment complaint he filed. He did not check any of the boxes on the form for the different bases of discrimination (age, race, sex, etc.). In the statement he gave during management's investigation of his complaint, he stated explicitly that he thought the incident did not involve discrimination.[3] Therefore, his pursuit of the internal complaint was not covered by the WFEA. Even if he had engaged in such an activity, for the same reasons discussed above under the heading of race discrimination, he did not show that management's rationale for the termination was a pretext for a discriminatory or retaliatory motive.

In conclusion, it should be emphasized that, while this record clearly reflects a good deal of interpersonal conflict in the CGP, this decision makes no attempt to determine who was right or wrong per se in these conflicts. The only issues before the Commission concern whether respondent discriminated against complainant because of his race or retaliated against him because of protected activities when it terminated his probationary employment. As to these issues, complainant has the burden of proof and he has not satisfied it.

[3] Harassment can occur because of factors not covered by the WFEA—e. g. (and as most likely here), personal animosity.

ORDER

This complaint is dismissed.

Dated: April 25, 2000.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

AJT:980029Cdec1

Parties:
Frankie Johnson
P. O. Box 5412
DePere, WI 54115

Jon Litscher, Secretary
Department of Corrections
P. O. Box 7925
149 East Wilson Steet, 3rd Floor
Madison, WI 53707-7925

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