STATE OF WISCONSIN PERSONNEL COMMISSION

BRIAN W. CUNNINGHAM,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

RULING
ON
MOTION

Case Nos. 98-0206-PC-ER, 99-0050-PC-ER

These matters are before the Commission on the respondent's motion for summary judgment. The parties have filed briefs.

A prehearing conference was convened on April 4, 1999. During that conference and in subsequent correspondence, the parties agreed to the following statement of issues for hearing:

> Case No. 98-0206-PC-ER
> Whether respondent discriminated against complainant on the basis of membership in the national guard or military reserve and/or retaliated against complainant in violation of the whistleblower law when, on September 29, 1998, respondent allegedly required complainant to produce documentation before permitting him to take military leave on October 3 and 4, 1998.
>
> Case No. 99-0050-PC-ER
> Whether respondent retaliated against complainant in violation of the whistleblower law or the Fair Employment Act when it issued his performance evaluation dated January 26, 1999, and the replacement evaluation dated March 26, 1999.

FINDINGS OF FACT

1. At all relevant times, complainant has been employed as a Correctional Officer at Waupun Correctional Institution.

Case No. 98-0206-PC-ER

2. Complainant filed an Incident Report on December 2, 1996, in which he complained that Capt. Hable had incorrectly handled complainant's request to cancel a vacation leave scheduled for December of 1996. According to the report, Capt. Hable had informed complainant he would be "ordered off the property" if he showed up for work on the previously scheduled vacation days.

3. Complainant filed another Incident Report on July 24, 1997. In that report, complainant complained that Lt. Hompe had spoken to him in a loud voice ("Well, you don't tell me how to do things!") and had "slammed down" the telephone during a conversation with complainant about an inmate.

4. Complainant alleges that 1) on September 29, 1998, he informed the institution's scheduling officer (CO2 Gorski) he needed to be off work for military reserve training on October 3 and 4, 2) Correctional Officer Gorski said he would take complainant off the work schedule on those dates but that complainant needed to inform the shift supervisor as a courtesy, 3) complainant spoke with Lt. Hompe who said complainant would need to turn in military orders before complainant could take off October 3 and 4 and hung up the phone on complainant, 4) Capt. Hable concurred with Lt. Hompe, 5) Complainant, Lt. Hompe and Capt. Hable agreed complainant would be allowed to take the military service leave as long as complainant provided written notice of military service dates before taking leave on October 3 and 4, 6) complainant filed an incident report later on September 29th regarding this incident.

5. Complainant was granted military leave for October 3 and 4, 1998.

6. This complaint was filed on November 19, 1998. Complainant contends he was retaliated against when he was allegedly required to produce documentation before being allowed to take military leave on October 3 and 4, 1998.

7. By letter dated January 27, 1999, complainant waived the investigation of Case No. 98-0206-PC-ER.

Case No. 99-0050-PC-ER

8. Complainant's supervisor, Lt. David Tarr, completed a performance evaluation (Performance Planning and Development Report) for complainant on January 26, 1999. Complainant received the report on February 23, 1999. The evaluation rated complainant as "Does not meet standard" in 12 of 20 performance standards and "Meets standard" as to the other 8 standards.

9. This complaint was filed on March 15, 1999.

10. Respondent issued a replacement evaluation dated March 26, 1999. The replacement evaluation rated complainant as "Does not meet standard" in 4 categories and "Meets standard" as to the other 16 categories.

11. Complainant contends he was retaliated against when he was issued the performance evaluations in January and March of 1999.

OPINION

Although the respondent denominates this as a motion for summary judgment, it is more properly identified as a motion to dismiss for failure to state a claim. Therefore, the Commission will follow the method of analysis 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 facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer - to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed 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.

> Sec. 802.06(2)(f), Stats., on which the motions to dismiss were based, is similar to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A claim should not be dismissed under the Wisconsin rule or the federal rule unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations. (citations omitted)

The Commission notes that complainant appears *pro se* in these matters. The Commission has previously held that, in evaluating a preliminary motion, particular care should be taken not to erode a complainant's right to be heard where the complainant is not represented by counsel. *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92

Case No. 98-0206-PC-ER

Respondent's motion as to the whistleblower claim in this case is based on two theories. In the first instance, respondent contends complainant did not make a disclosure of information entitling him to protection under the whistleblower law because the two disclosures preceding the alleged retaliation on September 29, 1998, arise from a mere failure to act in accordance with a particular opinion regarding management techniques.

The Commission will address the respondent's second theory because it is dispositive as to complainant's whistleblower claim in Case No. 98-0206-PC-ER.

Only those personnel actions that have a substantial or potentially substantial negative impact on an employe fall within the definition of "disciplinary action" found in §230.80(2), Stats. 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. Complainant is not retaliated against where his disclosure results in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline. *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. In prior decisions, the Commission has held that the following personnel actions do not fall within the whistleblower law's definition of

"disciplinary action:" 1) Temporarily placing complainant on leave with pay while seeking clarification of her medical restrictions, *Rentmeester v. Wis. Lottery,* 91-0243-PC, etc., 5/27/94; 2) the decision to investigate and to hold an investigatory meeting, *Bruflat v. DOCom*, 96-0091-PC-ER, etc., 7/7/98; and 3) a statement to complainant, a food service worker, by a supervisor of officers in a correctional institution, that it was not a good idea to "tick-off" correctional officers, *Bentz v. DOC*, 95-0080-PC-ER, 3/11/98. In contrast, respondent's action to deny complainant the use of leave time for a day of absence, resulting in the loss of a day's pay, is a disciplinary action under the whistleblower law. *King v. DOC*, 94-0057-PC-ER, 3/22/96.

Here, complainant did not suffer a loss of pay. He was only required to provide certain documentation, which he did. The respondent's action did not have a "substantial negative impact" as required in *Vander Zanden*. The alleged conduct does not meet the definition of "disciplinary action."

The respondent also seeks dismissal of complainant's claim of military reserve membership discrimination in Case No. 98-0206-PC-ER. Respondent argues:

> The complaint also alleges that there was discrimination/retaliation based on membership in the national guard or military reserve. The last page of the complaint suggests the events which actually occurred: Complainant was granted the military leave that he had requested and he has in fact never been denied military leave. The "orders" that management had requested was nothing more than his annual drill schedule which other officers had routinely provided to management to give notice of the need for military leave (see the affidavit attached from Peter Huibregtse, Security Director at the Waupun Correctional Institution).
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> A request for an annual schedule of military training dates does not rise to the level of discrimination/retaliation.

Guidance can be drawn from decisions interpreting the comparable provisions of Title VII. For example, in *Smart v. Ball State University*, 71 FEP Cases 495 (7th Cir. 1996), the court concluded that a negative performance evaluation was not an adverse personnel action:

> While adverse employment actions extend beyond readily quantifiable losses, not everything that makes and employee unhappy is an actionable

> adverse action. Otherwise, minor and even trivial employment actions that "an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit." *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 70 FEP Cases 1639 (7th Cir. 1996). In *Crady v. Liberty National Bank & Trust Co. of Indiana,* 993 F.2d 132 (7th Cir. 1993), we found that a change in title from assistant vice-president and manager of one branch of a bank to a loan officer position at a different branch did not by itself constitute an adverse employment action. Another case where adverse employment action was found to be absent is *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989). In *Spring*, a 65-year-old school principal was offered the choice between retirement and transfer to a different school as part of a school district reorganization plan. The transfer would have afforded the principal a two-year contract and a merit pay increase, but she would have had to share the position with a co-principal. The court found that the "humiliation" she claimed the co-principal arrangement would case did not constitute an adverse employment action because "public perceptions were not a term or condition of Spring's employment." *Spring* at 886. The only negative employment-related consequence of the transfer was found to be an increase in the distance she had to travel to work. This alone did not constitute an actionable adverse employer action.

The Personnel Commission addressed the question of what constitutes an "adverse employment action" in *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97. In *Klein*, the complainant had been investigated by management as a consequence of an accusation against him. No discipline was imposed. The Commission concluded the respondent's action did not constitute an adverse employment action. In *Marfilius v. UW-Madison*, 96-0026-PC-ER, 4/24/97, the Commission reached a similar conclusion regarding actions by the employing agency to question the complainant about his use of "snow days."

Here, respondent simply required certain documentation from complainant in order for complainant to take two days of military leave. Complainant provided that documentation and then took the leave. The respondent clearly did not engage in one

of the personnel actions specifically listed in the FEA[1] and the action taken did not rise to the level of an adverse personnel action.

Case No. 99-0050-PC-ER

Respondent's motion for summary judgment only refers to that part of Case No. 99-0050-PC-ER "that relates to the whistleblower complaint." Respondent contends that complainant's December 2, 1996, and July 24, 1997, and September 29, 1998, incident reports do not rise to the level of protected disclosures. Respondent argues they arise from a mere failure to act in accordance with a particular opinion regarding management techniques.

The Commission does not need to address respondent's theory because filing a complaint of whistleblower retaliation is itself a protected activity under the whistleblower law. Therefore, a disciplinary action threatened or imposed after respondent learned of complainant's charge of whistleblower retaliation could constitute illegal retaliation under the whistleblower law. *Benson v. UW (Whitewater)*, 97-0112-PC-ER, etc., 8/26/98. Here, the complainant filed his first whistleblower complaint on November 19, 1998. That filing was a protected activity and complainant may allege that respondent's conduct in January of 1999 was in retaliation for his first complaint.

The Commission denies respondent's motion as to Case No. 99-0050-PC-ER.[2]

Further processing of these matters

While the parties agreed to consolidation of these matters and complainant waived the investigation of Case No. 98-0206-PC-ER, complainant declined, at least at

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[1] Complainant was not terminated, denied a promotion, and his compensation was not altered, all actions that are specifically referenced in §111.322(1), Stats., in addition to "terms, conditions or privileges of employment."

[2] Respondent did not raise an issue as to whether the actions that are the subject of Case No. 99-0050-PC-ER were disciplinary actions or adverse employment actions under the whistleblower law and the FEA, respectively.

this point, to waive the investigation in Case No. 99-0050-PC-ER. Therefore, the investigation of the latter case will proceed, while the former case will be dismissed.

ORDER

Respondent's motion to dismiss Case No. 98-0206-PC-ER is granted. Respondent's motion is denied as to Case No. 99-0050-PC-ER.

Dated: July 20, 1999 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:980206Crul1

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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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