STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE
Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION, Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 00-0077-PC-ER

RULING

This is a complaint of discrimination on the bases of color, national origin or ancestry, and race, and of retaliation for engaging in protected fair employment and whistleblower activities in regard to a decision not to certify complainant for a vacancy in the position of Director, State Bureau of Procurement, Department of Administration (DOA). On July 19, 2000, the Commission granted complainant's request that respondents be enjoined from filling the subject position until this complaint was resolved. In a conference on July 24, 2000, the parties agreed to hearing on the following issue:

> Whether there is a substantial likelihood that complainant will succeed on the merits of his whistleblower claim.

Chairperson McCallum was invested by the Commission with the final authority to decide this issue. This hearing was conducted on July 31, 2000. The parties gave final argument, and the hearing examiner presented her decision, orally at the close of the hearing. This written decision incorporates the hearing examiner's findings of fact, conclusions of law, and opinion in reaching her decision.

FINDINGS OF FACT

1. In his charge, complainant stated as follows, in relevant part:

> 13. Hamik had been angry with complainant for a long time for accusing her incompetence in managing the Bureau [of Procurement].
>
> 15. The Bureau has certain statutory annual report it submits to legislature, to Minority Business program (MBE) and Work centers. The Bureau also uses the reports for internal management. The data of the reports are processed through the Procurement Data processing system (PDPS). Now, without consulting Balele, all of a sudden Hamik recommended to DOA management that PDPS discontinued. Hamik could not understand in advance that by discontinuing the PDPS she would be breaking the law by not reporting to legislature and the public what the tax dollars were purchasing. In previous fiscal years the report showed that the state spent more than $850 million dollars on various services and commodities. Balele had asked his former supervisor, Patricia Kramer, to ask Hamik to reinstate the PDPS. Kramer said that it was not Balele's business. Balele gave up advising his supervisors and Hamik. In fact Kramer later told Balele that Hamik's had argued that vendors would report to the state on the type of products and amount vendors were selling to the state. Balele argued that such requirements was not only illogical but also burdened vendors. Further such demand was contrary to DOA Strategic Plan. ... Balele eventually e-mailed Hamik that the discontinuation of PDPS was in violation of the law and had undercut various state programs for lack of management reports. Hamik e-mailed back telling Balele that Hamik would tell the legislators that such reports were not needed or not available. Balele e-mailed back told Hamik that DOA would be breaking the law by not submitting the statutory reports. This time Balele copied the MBE director and Workcetner coordinator. Upon learning that Balele had copied the MBE director, Hamik changed her e-mail tone by responding that she was working on to re-instate the PDPS in compliance with the law. However, Hamik would not have made such a gross mistake if she had listened and consulted with Balele who knew why the PDPS was necessary.

2. In its July 19, 2000, ruling granting complainant's request for a temporary injunction, the Commission identified the above-described e-mails from complainant to Jan Hamik, Director of the State Bureau of Procurement, as described by complainant

in his charge, as the only action identified by complainant which could satisfy the statutory requirements for a protected whistleblower disclosure.

3. In a May 3, 2000, email to Ms. Hamik, the Legislative Librarian for the Legislative Reference Bureau requested two copies of DOA's 1998-1999 Contractual Services Purchasing Report. In a May 10, 2000, email, Ms. Hamik asked complainant to handle this request. The preparation and distribution of this report was part of complainant's assigned job responsibilities.

4. In an email to Ms. Hamik dated May 11, 2000, complainant stated as follows:

> 1. I will take care of that in a few minutes. But I am surprised that they did not get any. We have a mailing list for that. Thanks.
>
> 2. Now that you have raised the issue about Annual Report, what is going to happen next year since the present PDPS does not component of the reports. Are agencies sending in their purchasing Actitivity reports for compilation for this year reports? Please let me know.

5. In an email to complainant dated May 16, 2000, Ms. Hamik responded as follows:

> We will not be issuing a report. We'll issue a statement that we are unable to issue a report. At least, that's the plan for now. jan

6. In an email to Ms. Hamik dated May 16, 2000, complainant stated as follows:

> The problem is with MBE program which will needs to know how much agencies have purchased. This is going to be a tough seller to the MBE Board because there won't be a way to compare performance of the MBE program. Also, vendors as whole need to know what the state buys. I think it's important that we address this issue as soon as possible.

This email was copied to Godwin Amegashie, Director of the MBE program.

7 Ms. Hamik replied to complainant in an email dated May 16, 2000, which was also copied to Mr Amegashie and which stated as follows:

> You are correct. We have been talking to the Council [MBE Council] about this issue and they are going to do a letter to the Secretary [of DOA] to urge that a new system be put in place. jan

8. The PDPS system is a computerized system into which data from state agencies relating to their purchases of certain commodities is entered. The data from this system is used to generate certain reports, including, among others, DOA's Purchasing Activities Report upon which the MBE program relies to determine whether state agencies are meeting their minority business contracting goals.

9. Early in 1999, certain information technology experts advised DOA management that the PDPS system was not Y2K compliant, that it would be too expensive to make the system Y2K compliant, and that a new system needed to be developed and installed. This was brought to the attention of the DOA Secretary to whom a funding request for a new system was forwarded. This request was put "on the back burner" due to the fact that the priority at the time was to expend information technology dollars on Y2K projects. A decision was made by top DOA management, including Ms. Hamik, that no new data would be entered into the PDPS system after June 30, 1999; that state agencies and other entities which utilized reports generated by the PDPS system would be notified; that an attempt would be made to obtain certain purchasing data from other sources; and that funding for a new system would be aggressively pursued. This decision was the result of numerous management meetings and discussions beginning in early 1999 and continuing into 2000. Those making this decision were well aware at the time of the fact that the PDPS system was used to generate certain reports, including statutorily-mandated reports. This situation was brought to the attention of the MBE Director, Mr Amegashie's predecessor in the position, early in 1999, and Mr. Amegashie was aware of it when he was appointed to the position in March of 1999. This situation was brought to the attention of the MBE Council, a citizen advisory group, and the members of the group decided after discussion at several meetings and prior to May of 2000, to write a letter to the DOA Secretary in support of allocating funds for a new system to replace the PDPS system.

This demise of the PDPS system had also been discussed at meetings of the staff of the Bureau of Procurement in 1999 and 2000.

10. In March of 2000, Ms. Hamik was promoted to the position of Policy Initiatives Advisor, DOA. The vacancy in her former position as the Director of the State Bureau of Procurement was advertised on or around May 1, 2000. In this advertisement, applicants were advised how to obtain the special application materials and that completed application materials were due before 4:30 p.m. on May 12, 2000.

11. The application materials consisted primarily of a cover sheet requesting personal information about the applicant and an Objective Inventory Questionnaire (OIQ) which obtained information from the applicant about his or her work background.

12. The cover sheet of the application materials included a quote from §ER-PERS 6.10, Wis. Adm. Code, to the effect that the Administrator of the Division of Merit Recruitment and Selection (DMRS) may refuse to certify an applicant for a position who has made a false statement of any material fact in any part of the selection process or who practices, or attempts to practice, any deception or fraud in application, certification, examination, or in securing eligibility or appointment.

13. The cover sheet also included a section in which the applicant was to certify, through his or her signature, that he or she had read and acknowledged, among other things, the quoted provisions of §ER-PERS 6.10, Wis. Adm. Code; and that "my responses about my experience in the questionnaire are true to the best of my recollection; that I can document or demonstrate these experiences and performance levels if required to do so at some future date. Complainant signed this section of the cover sheet on April 26, 2000.

14. In the OIQ which he submitted with his other application materials on or around April 26, 2000, complainant modified the language of certain questions and apparently answered these questions based on the content of the modified question. Patricia Thysse, the DOA Human Resource Program Officer who was responsible for reviewing the OIQ's, brought this to the attention of Peter Olson, DOA Human

Resources Director, and Mark Saunders, DOA Deputy Legal Counsel. These three decided that, consistent with the practice followed when applicants submitted incomplete applications, complainant should be contacted and afforded an opportunity to submit an OIQ in which he responded to the unmodified questions. Ms. Thysse notified complainant of this opportunity by email.

15. Complainant submitted a second OIQ before the application deadline which contained the same answers to the questions as his first OIQ but which did not modify the language of any of the questions.

16. During the relevant time period, complainant was employed by DOA as a Contract Specialist. In this position, complainant did not supervise other staff. Ms. Thysse, Mr Olson, and Mr Saunders were familiar with the duties and responsibilities of complainant's position not only due to their personnel-related responsibilities for DOA but also due to their roles in previous litigation of cases filed by complainant against DOA.

17 Section 2. of the OIQ included the following questions, among others:

> ***For each question in this section, circle the Response Criteria that best describes your highest level of experience.*** ...
>
> ***D I have extensive working experience and a thorough knowledge. It is the principal focus of my current job.*** ...
>
> Managed at least 15 professional, administrative, and technical staff through subordinate levels of supervision.
>
> Experience managing a diverse work group with various backgrounds (cultural, technical, non-technical).
>
> Managed staff using general management concepts such as delegation, motivation, and team building.
>
> Experience developing performance standards and conducting evaluations for subordinate staff.
>
> Experience establishing work plans and priorities for subordinate staff.

18. Complainant recorded his answer as "D" to each of the five questions quoted in Finding of Fact 17, above.

19. Ms. Thysse concluded, after reviewing complainant's second OIQ, that he had misrepresented his level of experience in his current job as exemplified by the responses complainant gave to the questions quoted in Finding of Fact 17, above, despite the fact that, in his current job, complainant had no supervisory responsibilities. Ms. Thysse discussed her conclusion with Mr Olson and Mr Saunders on May 10, 2000. The three of them decided that, in view of the language of §ER-PERS 6.10, Wis. Adm. Code, quoted on the cover sheet of the application, and complainant's certification that his responses to the OIQ were accurate, a letter should be sent to DMRS requesting that complainant be refused certification for the subject position.

20. Neither Ms. Thysse, Mr Olson, nor Mr Saunders was aware of or had any reason to be aware of complainant's emails to Ms. Hamik relating to the PDPS system during the time period relevant here, or discussed the request to DMRS not to certify complainant with Ms. Hamik or anyone else at DOA.

21. Since Mr Saunders had never prepared such a request before, he contacted Paul Hankes of the Public Service Commission, who had extensive human resource experience in state government, and David Vergeront, Chief Counsel, Department of Employment Relations, for advice on what the content of such a request should be. Mr Saunders also decided to verify with complainant's supervisor that complainant did not in fact have certain of the experience he had represented on his second OIQ that he did have. Due to a vacancy in a section chief position at the time, complainant's first-line supervisor was Ms. Hamik, who was continuing to function in the Bureau Director position until it could be filled. Mr Saunders visited Ms. Hamik's office on May 11 or 12, 2000; explained that he had a few questions to ask her but was not going to explain to her why he needed the information; read to her three or four questions from the OIQ, including one related to the assignment of supervisory responsibilities to complainant's position; and asked her if complainant had the responsibilities stated in the questions in his current position. Ms. Hamik answered "no" to each question. Ms.

Hamik and Mr. Saunders did not discuss any other matter relating to complainant during this conversation.

22. Mr. Saunders did a draft of the request to DMRS during the week of May 15, 2000. Due to the press of business, this request was not finalized and sent until May 22, 2000. This request was directed to Robert Lavigna, Administrator of DMRS and explained the basis for DOA's conclusion that complainant had misrepresented his level of work experience on the OIQ in contravention of §ER-PERS 6.10, Wis. Adm. Code.

23. DOA's request was granted by Alan Bell, Staffing Analyst, DMRS, in a letter to complainant dated May 25, 2000. Before granting the request, Mr. Bell reviewed the matter with Dennis Hewitt, Policy Advisor, DMRS. Before their review of the request, neither Mr. Bell nor Mr. Hewitt discussed the matter with anyone employed by DOA, or had any reason to be aware of complainant's emails to Ms. Hamik relating to the PDPS system.

24. Ms. Hamik played no role in the recruitment process for the subject position after the OIQ was drafted, and played no role in DOA's decision to request that complainant not be certified for the position.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and (gm), Stats.

2. Complainant has the burden to show, in order for the injunction imposed by the Commission on July 19, 2000, to remain in effect, that there is a substantial likelihood that he would succeed on the merits of his whistleblower claim.

3. Complainant has failed to sustain this burden.

OPINION

In issuing the temporary injunction under consideration here, the Commission relied, among other factors, on complainant's description of his emails to Ms. Hamik relating to the PDPS system (See, Finding of Fact 1, above), and on his representation that Ms. Hamik had input into DOA's request to DMRS that complainant be refused certification, in concluding that complainant had satisfied his burden to show that there was a substantial likelihood that he would succeed on the merits of his whistle blower claim. The record developed at the July 31, 2000, hearing does not support the complainant's version of events in either regard.

It is axiomatic, in the context of any retaliation allegation, that the alleged retaliator must be aware of the protected activity in order to have any reason to retaliate because of it. *Radtke v. UW-Madison*, 92-0214-PC-ER, 11/22/94. *Seay v. DER & UW-Madison*, 89-0082-PC-ER, 3/31/94; aff'd Dane Co. Circ. Ct, *Seay v. Wis. Pers. Comm.*, 93-CV-1247, 3/3/95; aff'd Ct. of App., 95-0747, 2/29/96. In other words, those who made the decision here to request that complainant not be certified and those who granted this request, would need to have been aware of complainant's emails to Ms. Hamik relating to the PDPS system in order for them to retaliate against complainant because of his authorship of these emails. The record does not show that Ms. Hamik was one of the individuals who had input into the request by DOA or the granting of the request by DMRS, or that any of the individuals who did have such input were aware, or had any reason to be aware, of these emails. Although Mr Saunders did have contact with Ms. Hamik during the period of time he was drafting the request, both his testimony and Ms. Hamik's testimony were very consistent in specifying the nature of such contact (See Finding of Fact 21, above), which did not include discussion of the emails or any related matter.

It is also just a matter of common sense that a whistleblower disclosure must relate to circumstances which are not already common knowledge in order for the alleged retaliator to have any reason to retaliate because of it. *See, Morkin v. UW-*

Madison, 85-0137-PC-ER, 11/23/88. Here, the discontinuation of the PDPS system and the ramifications of this discontinuation on various components of the state procurement program had been a matter of discussion among members of DOA management, including the Secretary's office and the directors of the MBE program, since early in 1999. These individuals were well aware of the effect this discontinuation would have on the ability of DOA to generate reports, including certain statutorily-mandated reports. This situation was also the subject of discussion at Bureau of State Procurement staff meetings prior to May of 2000. There would simply have been no reason for Ms. Hamik, even if she had been involved in the decision to request that complainant not be certified, or anyone else at DOA, to retaliate against complainant for the subject emails since the matter which was the subject of the emails had been under discussion at the highest agency levels for a year and a half prior to complainant's disclosure and certain strategies for handling the situation were already in place. Complainant argues that the tone of Ms. Hamik's responses to his emails changed once he began copying Mr. Amegashie, implying that, once Mr. Amegashie was copied, Ms. Hamik realized that the problem with generating reports had been discovered and communicated to another manager and she was in trouble. However, the record shows that Mr. Amegashie had been aware of this problem since he was appointed to the MBE Director position in March of 1999, and that he and Ms. Hamik had communicated about the problem on several occasions during 1999 and 2000.

Complainant also points to the proximity in time between his PDPS emails to Ms. Hamik and the decision to request that he not be certified, and the fact that the request to DMRS did not go out from DOA until after he made his disclosure on May 16, as evidence of retaliation. However, although the proximity in time may create a presumption of retaliation (§230.85(6), Stats.), it does not alone establish retaliation. Without more, it is as likely to demonstrate that complainant, having realized he did something wrong on his OIQ, took action to try to protect himself, as it is to demonstrate retaliation by respondents. It should first be noted in this regard that the statutory presumption would not apply here because, contrary to the requirement stated

in §230.85(6)(b), Stats., it was concluded by DOA, at least implicitly, that complainant's disclosure did not merit further investigation because it was a matter which had already been under consideration by DOA for some time. In addition, the evidence does not show that the decision made by Ms. Thysse, Mr. Olson, and Mr. Saunders on May 11, 2000, to request of DMRS that complainant not be certified was affected in any way by complainant's disclosure of May 16, 2000. The May 22, 2000, letter from Mr Saunders to DMRS was consistent with the May 11 group decision, and Mr. Saunder's testimony that the letter did not go out until May 22 due to his consultation with personnel experts in other agencies and the press of other business was very credible.

Consistent with the above, complainant has failed to show that there was a substantial likelihood that he would succeed on the merits of his whistleblower claim and, as a result, it is concluded that there is insufficient basis to continue the temporary injunction issued by the Commission in its ruling dated July 19, 2000.

ORDER

The injunction imposed by the Commission by ruling dated July 19, 2000, is lifted.

Dated: August 2, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:000077Crul2

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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