

DONALD DITTBERNER,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS, and
Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondents.

**RULING
ON
MOTION TO
DISMISS PARTY**

Case No. 01-0065-PC-ER

This matter is before the Commission on a motion by the Department of Corrections (DOC) to dismiss it as a respondent. A briefing schedule was established and the following findings of fact are based on materials in the case file and appear to be undisputed. These findings are made solely for the purpose of ruling on DOC's motion. Complainant is representing himself.

FINDINGS OF FACT

1. At all times relevant to this matter, the complainant has been employed as a Correctional Officer 2 at DOC's Columbia Correctional Institution (CCI).
2. Until 1999, complainant's spouse, Dana Dittberner, was also employed as a Correctional Officer 2 at CCI.
3. In 1999, Dana Dittberner filed sexual harassment allegations against Sgt. Leonard Below of CCI. Complainant was involved in the filing of those allegations.
4. In 2001, complainant applied for a position of Lead Correctional Officer at the Sand Ridge Secure Treatment Center operated by the Department of Health and Family Services (DHFS). He was interviewed early in March of 2001 and was offered a position as an Officer, but not as a Lead Officer, and at a reduced rate of pay from his current position at DOC.

5. Steve Schneider and Bruce Thomure were both involved in the hiring process for the vacant Lead Correctional Officer positions at Sand Ridge. Mr. Schneider began employment at Sand Ridge effective February 26, 2001, and Mr. Thomure began employment at Sand Ridge effective February 12, 2001. Mr. Thomure and Mr. Schneider had previously been employed by DOC and are close friends of Sgt. Below. However, their actions of considering complainant for the vacancy at Sand Ridge were undertaken while they were employees of DHFS, rather than of DOC.

6. No employees of DOC were involved in screening complainant's employment application for the Sand Ridge vacancy, conducting his interview or making the selection decision.

7 DHFS did contact one current DOC employee, Capt. Donald Morgan, in order to obtain a reference for complainant regarding the Lead Correctional Officer positions. Capt. Morgan completed an affidavit that included the following information:

I do not have exact recall of what I told Sand Ridge about Mr. Dittberner, however generally it would have been positive, because he is a very good employee. I may have related that Mr. Dittberner was on first step sick leave review, which was a fact. I may have also related some concern over the need for Mr. Dittberner to occasionally use greater tactfulness with inmates.

5. I am aware that Donald and Dana Dittberner filed a sexual harassment complaint against Sergeant Leonard Below some years ago. .

6. When called by Sand Ridge to provide a reference for Donald Dittberner I did not recall or even think of the sexual harassment complaint. The fact that a complaint was filed did not factor into the reference I provided Sand Ridge in any manner.

It is not apparent from complainant's submissions whether he is alleging that Capt. Morgan was influenced by a retaliatory motive.

8. Complainant perfected a complaint of Fair Employment Act retaliation and whistleblower retaliation with the Commission on April 26, 2001. Much of the complaint related to the decision not to select the complainant for the position at Sand Ridge.

9. Complainant's April 24, 2001, submission that was attached to his complaint also included the following language:

In April of 2001 [complainant] signed a posting for a less stressful job in the [Columbia Correctional] Institution's Reception and Orientation Unit. [Complainant] was approached by a good friend of Sgt. Below's (Officer Paltzelberger) who told him, "I suggest that you not take this job due to the fact that BAD BLOOD still exists." This was in reference to the fact that Sgt. Below is the relief Sgt. in that area 2 days per week. [Complainant] turned down the position due to this threat.

10. Respondent DOC filed an answer to the complaint on July 20, 2001, and supplemented its answer on July 31, 2001. The answer included the following response to the language set forth in finding 8:

Respondent's employee, Officer Paltzelberger, denies making the statements attributed to him. Respondent is without sufficient information to form a belief concerning the reasons that Complainant declined the position.

11. On August 21, 2001, respondent DOC moved to dismiss it as a respondent.

12. Respondent DHFS has filed its answer to the complaint, complainant responded, and DHFS filed a reply.

OPINION

The sole issue raised by DOC's motion to dismiss is whether it is an appropriate respondent in the above matter. The *only* argument made by DOC in support of its motion is that it, and its employees, were not involved in the hiring decisions at the Sand Ridge facility operated by DHFS.¹ In its July 18th answer to the complaint, DOC initially denied any involvement in the Sand Ridge hiring process:

Respondent denies involvement in the Sand Ridge hiring process including but not limited to applications, testing, interviewing or selection.

¹ DOC's motion specifically described the complaint as alleging "a failure to hire at Sand Ridge, a Department of Health and Family Services (DHFS) facility, based on retaliation for a protected employment action."

Respondent is not aware of CCI employees that were contacted to provide job references for Complainant

Respondent DHFS had, in its July 16th answer to the complaint, noted that complainant received a reference from CCI. By letter dated July 27, 2001, DOC supplemented its answer, noting that Capt. Morgan of CCI had provided a reference for complainant. When DOC filed its motion to dismiss on August 21st, it included the affidavit from Capt. Morgan that is set forth, in part, in Finding 7. Complainant was given the opportunity to respond to the motion to dismiss DOC, but did not do so.

It is certainly possible that complainant accepts the information in Capt. Morgan's affidavit as true and that he is not alleging Capt. Morgan was motivated, at least in part, by complainant's protected activity. However, because this case is in the middle of the investigative process and, as noted below, complainant has articulated another allegation against DOC, the Commission feels the most prudent procedure is to clarify this point during the course of the investigation. The Commission will direct the investigator to do so.

Irrespective of whether complainant intends to pursue a claim relating to Capt. Morgan's reference, DOC has failed to address complainant's allegation relating to the position in the Reception and Orientation Unit at CCI, a facility operated by DOC. Complainant appears *pro se* and the Commission construes the language in the complaint liberally in favor of complainant. That language (set forth in Finding 8) suggests complainant feels he was forced to refuse the Reception and Orientation Unit position at CCI because of antagonism by Sgt. Below arising from a previous protected activity. As a result, the Commission concludes that complainant has raised an allegation against DOC relating to the position in the Reception and Orientation Unit at CCI. DOC's motion to dismiss it as a respondent must be denied.

ORDER

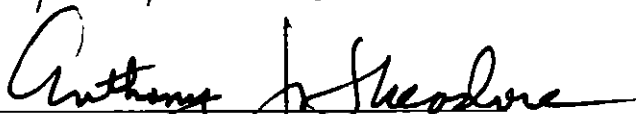
The motion to dismiss the Department of Corrections as a respondent in this matter is denied without prejudice.

Dated: November 14, 2001 STATE PERSONNEL COMMISSION



JUDY M. ROGERS, Commissioner

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ANTHONY J. THEODORE, Commissioner

Laurie R. McCallum, Chairperson, did not participate in the consideration of this matter.