STATE OF WISCONSIN PERSONNEL COMMISSION

BRIAN W. CUNNINGHAM,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case Nos. 99-0050-PC-ER

FINAL DECISION AND ORDER

This case involves a complaint of retaliation on the basis of WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats) and whistleblower (Subch. III, Ch. 230, Stats.) protected activity, with regard to an unfavorable performance evaluation. The issue for hearing is:

> 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. Report of February 9, 2000, prehearing conference.

FINDINGS OF FACT

1. At all relevant times, complainant has been employed as a Correctional Officer 2 at Waupun Correctional Institution.

2. Complainant filed an earlier case, *Cunningham v. DOC,* 98-0206-PC-ER, with this Commission on November 19, 1998. In that complaint, complainant alleged that respondent discriminated against him on the basis of WFEA and whistleblower disclosures when it required him to provide documentation before being allowed to take military leave on October 3 and 4, 1998.[1]

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[1] The Commission dismissed Case No. 98-0206-PC-ER in a decision dated July 20, 1999, on the basis of the conclusion that complainant had not been subjected to an adverse employment

3. The alleged protected activity in 98-0206-PC-ER was as follows:

> 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.
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> 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. July 20, 1999, Ruling on Motion, p. 2.

4. The aforesaid September 29, 1998, incident report (Complainant's Exhibit C102, Incident Report #479217)) accurately summarized in the preceding finding, includes the following statement by complainant:

> Sgt. Newberry [stated] that Lt. Hompe had done the same thing [hanging up the phone] to him (Sgt. Newberry) on a prior occasion. This incident is part of a continuing pattern of unprofessional behavior on the part of Lt. Hompe, dating back to 7/24/97 (incident report #423872) when a very similar incident took place [see Finding #3, para. 3]. Senior management's inability to change this behavior speaks volumes about its (senior management's) stance toward labor management relations and myself.

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action when respondent required him to produce documentation in connection with his request for military leave.

5. Complainant's supervisor, Lt. David Tarr, completed a performance evaluation for complainant on January 26, 1999 (Complainant Exhibit C 103). 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. It includes the following under the "results and comments" section:

> It has been noticed by supervisors while reviewing shakedown reports that Cunningham conducts few searches. Officer staff have complained to supervisors about Cunningham's lack of ambition in this area.
>
> Officer Cunningham has had a problem enforcing the rules in a consistent manner. He has enforced rules in contradiction to the institution handbook. Cunningham has been given job instructions by Captain Houser for this. Cunningham was ordering inmates to close cell doors when going to meals, when the handbook clearly states that the cell doors will remain open. When inmates attempted to talk to Cunningham about this he was very short with them and unwilling to address their concerns.
>
> Officer Cunningham has used incident reports to report subjective information. On 09-29-98 Cunningham turned in an incident report that contained his personal opinion rather than objective information. This report was found to be incomplete.
>
> Officer Cunningham has had a problem taking direction from supervisors and has had problems in accepting job instructions. During this evaluation period Cunningham has been insubordinate and has had a problem with tactfulness when dealing with staff and inmates. On 09-29-98 Cunningham was given job instructions regarding his insubordinate and unprofessional behavior During this meeting Cunningham became loud and profane when talking to supervisors. Sergeants have also complained to supervisors about Cunningham and his inability to take direction from lead workers.
>
> Officer Cunningham has failed to meet standards in several areas. Cunningham must improve in these areas. Cunningham has brought up in the past concerns of his qualifications to use mechanical restraints and POSC training, he was given instruction in proper use of restraints and provided up [to] date training in POSC on 26 Jan 99. It has been observed by supervisors that officer Cunningham shows little effort in improving his own performance, as he shows little to no effort in assisting cell hall staff. Cunningham should participate in any training that may help him improve in the areas he is lacking. It is recommended that su-

pervisors follow up with Cunningham during the next reporting period to ensure that he is improving in the areas he is lacking.

6. Complainant complained internally about this evaluation through the chain of command.

7 In a March 9, 1999, memo to complainant (Complainant's Exhibit C101), WCI Security Director Peter Huibregtse stated:

> Some concerns about your last PPD have been brought to me. It appears there was some miscommunication between supervisors compiling the report. I have instructed Captain Houser, Lt. Core, and Lt. Tarr to meet in order to review and evaluate your performance during the reporting period. You will be receiving an amended PPD upon completion. I trust this addresses your concerns.

8. This complaint (99-0050-PC-ER) was filed on March 15, 1999.

9. Lt. Tarr completed a revised PPD (Complainant's Exhibit C 103) on March 18, 1999. This document assessed complainant's performance during 1998 as meeting standards in 16 categories and not meeting standards in 4 categories. Complainant received the form on March 26, 1999. This document includes the following comments:

> It has been noticed by supervisors while reviewing shakedown reports that Cunningham conducts few searches. Officer staff have complained to supervisors about Cunningham's lack of ambition in this area.
>
> Officer Cunningham has pointed out discrepancies in the institution handbook to a supervisor regarding cell doors being left open or closed when going on pass. There have been numerous ICI's filed on this subject and on Officer Cunningham's demeanor with inmates and concerning staff. Officer Cunningham needs to insure that he is professional in all his dealings with staff and inmates.
>
> Officer Cunningham used incident reports to report subjective information on 09/28/98 Cunningham turned in an incident report that contained his personal opinion rather than objective information. This report was also found to be incomplete. Officer Cunningham needs to [sic] sure he reports the facts in their entirety and refrains from reporting opinion.
>
> Officer Cunningham has had a problem taking direction from supervisors and has had problems in accepting job instructions.

> Officer Cunningham has had difficulties in some areas during this reporting period. Cunningham should participate in any training that may help him improve in the areas he is lacking. This report was compiled with the input of several supervisors.

10. Respondent's rationale for revising complainant's January 29, 1998, PPD included a desire to not include anything in the PPD that could not be documented.

11. There was no causal connection between either the initial (prepared January 26, 1999), or the revised PPD (issued March 19, 1999), and any tangible effect on complainant's employment status, such as salary or promotion.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof and must demonstrate by a preponderance of the evidence all of the facts necessary to establish that respondent discriminated against him as he alleged.

3. Complainant failed to establish an element that is necessary for both a prima facie case and a showing of discrimination under both the WFEA and the whistleblower law—i. e., that he was subjected to an adverse employment action with regard to his PPD's that were prepared by management on January 26, 1999, and March 19, 1999.

4. Respondent did not discriminate against complainant in violation of the WFEA or whistleblower law, as complainant alleges, with respect to the aforesaid PPD's.

OPINION

This case involves complainant's claim that respondent retaliated against him because of activity protected under the Fair Employment Act and the whistleblower

law. The framework for analysis of a charge of discrimination on the basis of retaliation is as follows:

> "The plaintiff must first establish a prima facie case of retaliation by showing that she engaged in a protected activity, that she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two To show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.
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> Once the plaintiff has established a prima facie case, the burden of production devolves upon the defendant to articulate some legitimate, non-retaliatory reason for the adverse action . . The defendant need not prove the absence of retaliatory intent or motive; it simply must produce evidence sufficient to dispel the inference or retaliation raised by the plaintiff . If the defendant meets this burden, the plaintiff must then show that the asserted reason was a pretext for retaliation . The ultimate burden of persuading the court that the defendant unlawfully retaliated against her remains at all times with the plaintiff." *Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89 (citation omitted).

The Commission concluded in its July 20, 1999, ruling that complainant's filing of his first whistleblower complaint with the Commission on November 19, 1998, constituted a protected activity under the whistleblower law, thus satisfying the first element of a prima facie case.

The second element of a prima facie case is that the employer took an adverse employment action against the employe. *See, e. g., Lutze v. DOT,* 97-0191-PC-ER, 7/28/99; *Smart v. Ball State University,* 89 F. 3d 437, 71 FEP Cases 495 (7th Cir. 1996). The complainant maintains that the unfavorable performance evaluation respondent issued on January 26, 1999, and replaced with another one dated March 26, 1999, constituted an adverse employment action. In its post-hearing brief, respondent contends:

> Nothing in the record supports Complainant's theory that the PPD and the amended PPD were retaliation prohibited by s. 111.321, Stats. Testimony of Lt. Tarr established that the negative PPD would not affect complainant's opportunity for promotion , because discipline is

> not considered when an employe is reviewed for promotion. The only negative effect was what Complainant perceived; he had to pay attention to his evaluation and improve his performance. Respondent's post-hearing brief, p. 3.

In its July 20, 1999, ruling, the Commission discussed the subject of what constitutes an adverse employment action under both the whistleblower law and the WFEA.

> 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 [the whistleblower law at] §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.

The Commission's decision went on to discuss the concept of an adverse employment action under the WFEA.

> 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 an 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 cause 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.

In *Lutze v. DOT*, 97-0191-PC-ER, 7/28/99, the Commission held that a negative performance evaluation does not, in and of itself, constitute an adverse employment action under the WFEA, citing, in addition to *Smart v. Ball State University, Bragg v. Navistar International*, 78 FEP Cases 1479, 1482 (7th Cir. 1998): ". a supervisor's assessment of an employe's skills is not an adverse employment action." *See also Sweeney v. West*, 77 FEP Cases 890 (7th Cir. 1998) (employe unfairly reprimanded for conduct she either did not engage in or should not have been responsible for did not suffer adverse employment action in absence of tangible job consequences accompanying reprimands); *Collins v. Village of Woodridge*, 83 FEP Cases 45 (N. D. Ill. 2000)

(employe experienced adverse employment action from negative performance evaluation when it prevented her participation in a training program that was a pre-requisite for becoming a certified police officer).

This case law establishes that a negative performance evaluation is not considered an adverse employment action under either the whistleblower law or the WFEA unless it has a tangible adverse effect on an employe's employment status with regard to such things as salary or promotion. In this case, complainant did not sustain his burden of establishing that the PPD's in question had such an effect. There is no indication in the record that the performance evaluation affected complainant's pay status. Also, there is little or no evidence that the PPD's complainant's affected complainant's employment status with regard to promotion.

Security Director Peter Huibregtse, who reviewed and signed the two PPD's, testified in response to complainant's general question, that the first PPD "could" affect complainant's capacity to be promoted within DOC. Lt. Tarr, who signed the two PPD's, testified, in response to complainant's question about the possible effects of the PPD's on complainant's capacity for promotion, as follows:

> I don't think it would hinder your chances at all, because I've been involved in the selection of sergeants[2] and the first thing is done is you write an exam. You're scored on it. You show up for an interview, you're interviewed, your credentials are checked as far as references. I'm not aware of anybody going through anyone's "P" file to look at PPD's or anything like that.

There is no indication on this record that complainant ever sought a promotion, to sergeant or otherwise, during the period covered by this record, or even that there was an opportunity for promotion which he passed up. The most that can be said about complainant's evidence on this issue is that he made a showing that there was at least a theoretical possibility that the PPD's could someday have a negative impact on his promotional potential within DOC, while Lt. Tarr's essentially uncontradicted testimony is inconsistent with any contention that the PPD's were potentially damaging to complain-

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[2] Complainant was a CO 2 whereas sergeants are at the CO 3 level.

ant's capacity to promote to sergeant at WCI, which would have been the most logical type of promotion for a CO 2. A bare theoretical possibility of the nature involved here can not, in this context, constitute a concrete, tangible effect on complainant's employment status under the case law referred to above.

Therefore, the Commission finds that complainant failed to establish that the PPD's in question constituted an adverse employment action. Since this is an essential element of both a prima facie case and a retaliation claim under both the WFEA and the whistleblower law, complainant did not satisfy his burden of proof and his complaint must be dismissed. Because complainant failed to demonstrate a necessary element of his case, the Commission does not address other issues such as the question of whether the reasons respondent gave for his PPD's constituted a pretext for retaliation against complainant.

ORDER

The Commission having concluded that respondent did not discriminate or retalilate against complainant as he alleged, this complaint is dismissed.

Dated: January 19, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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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 judi-

cial 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