

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 \*  
 JAMES C. HRUSKA, \*  
 BRUCE C. LUECKE, \*  
 and GARY A. WEAVER, \*  
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                   Complainants, \*  
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 v. \*  
 \*  
 STATE OF WISCONSIN, \*  
 DEPARTMENT OF AGRICULTURE, \*  
 TRADE AND CONSUMER PROTECTION, \*  
 CENTRAL ANIMAL HEALTH \*  
 LABORATORY, JOAN M. ARNOLDI \*  
 and DAVID SPRECHER, \*  
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                   Respondents. \*  
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 Case Nos. 85-0069, 0070 & \*  
           0071-PC-ER \*  
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INTERIM  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This matter involves three complaints of retaliation filed under Subchapter III, Chapter 230. Stats. ("EMPLOYEE PROTECTION"), and is now before the Commission on complainants' "motion for an interlocutory order" filed May 22, 1985, pursuant to §230.85(3)(c), Stats. The complainants seek a temporary injunction prohibiting the respondents from implementing a proposed reorganization, the reassignment of their work duties and office locations, and removal of educational opportunities. A hearing on the motion was held before the Commission on June 28 and July 1, 1985, and the parties filed posthearing briefs. The respondents have agreed to refrain from taking any of the aforesaid acts until the Commission decides the motion. The findings which follow are made solely for the purpose of deciding the aforesaid motion.

FINDINGS OF FACT

1. On February 27, 1980, James Hruska, a veterinary pathologist at the Department of Agriculture, Trade, and Consumer Protection's (DOATCP) Central Animal Health Laboratory (CAHL), examined a specimen of the brain of a dead cow from the Teske herd in Marathon County. Dr. Hruska's diagnosis was that the cow had tubercular meningoencephalitis. Dr. Hruska reported his diagnosis to the acting director of the CAHL of the DOATCP.

2. During 1983, there was a serious tuberculosis outbreak which resulted in the destruction of five herds of cattle in Wisconsin. Two of the herds were located in Marathon County. Complainants first became aware of the extent and source of such outbreak during an October, 1983, DOATCP staff meeting.

3. Dr. Hruska had earlier advised Gary Weaver and Bruce Luecke, veterinary pathologists at the DOATCP's Central Animal Health Laboratory, of his 1980 diagnosis of the Teske cow brain specimen and of his feeling that such diagnosis had been mishandled by the DOATCP. Dr. Hruska told Drs. Weaver and Luecke that he had not made his opinion public because he feared retaliation. Dr. Weaver and Dr. Luecke reviewed the DOATCP records of the Teske case and reached the same diagnosis and the same opinion regarding the DOATCP's handling of the case as Dr. Hruska had reached.

4. In April of 1984, Dr. Weaver did a microscopic review of the Teske brain specimen and confirmed Dr. Hruska's diagnosis.

5. Subsequently, complainants continued their investigation of the Teske case by requesting certain information from the United States Department of Agriculture and the DOATCP. Joan Arnoldi, state veterinarian and administrator of DOATCP's Division of Animal Health, became aware of this in July or August of 1984.

6. In a letter dated November 21, 1984, complainants advised David Sprecher, the Director of the Central Animal Health Laboratory since July of 1984 and complainants' first-line supervisor, that they considered the DOATCP's handling of the Teske case a violation of state and/or federal law, as evidence of DOATCP mismanagement, as a possible danger to public health and safety, and as a threat to the dairy industry of Wisconsin. Complainants also advised in such letter that they intended to disclose such information "to those other individuals and agencies we consider appropriate, as provided for under Wis. Stats., Ch. 230, Subch. III."

7. In a letter dated December 17, 1984, Dr. Arnoldi advised complainants that "the situation described in your letter and supporting documents will be investigated. You will be informed of the results of this investigation."

8. In a letter to complainants dated January 17, 1985, Dr. Arnoldi and A. R. McLaughlin, United States Department of Agriculture, Area Veterinarian In Charge - Wisconsin, summarized the findings of their investigation of the Teske case and concluded that the case was not mishandled by the DOATCP.

9. On February 7, 1985, complainants disclosed the information they had collected relating to the Teske case to State Senator Russell Feingold.

10. In a letter to Dr. Arnoldi dated March 6, 1985, complainants took issue with the DOATCP investigation of the Teske case, requested a further investigation by a third party and advised that a copy of this letter had been sent to Senator Feingold, among others. In a letter dated March 26, 1985, Dr. Arnoldi requested that Ralph L. Hosker, Chief Staff Veterinarian, Tuberculosis Eradication, United State Department of Agriculture, conduct

an investigation of the Teske case. In a letter dated April 18, 1985, Dr. Hosker concluded that the DOATCP had not mishandled the Teske case.

11. On March 25, 1985, an aide of State Senator Rodney Moen contacted complainants to set up a meeting with Senators Feingold and Moen and contacted Dr. Sprecher to advise him of the meeting. On or around April 1, 1985, DOATCP requested that complainants complete legislative contact forms. These forms were required to be completed by all DOATCP staff having contact with a legislator at least since 1980.

12. During the period of his employment with respondent, Dr. Weaver has performed very few gross pathological examinations and has been assigned to the small animal biopsy program.

13. During his period of employment with respondent, Dr. Luecke has performed approximately one or two gross pathological examinations per month and the majority of the remainder of his time has been spent performing microscopic pathological examinations.

14. During the last several years of Dr. Hruska's period of employment with the respondent, he has performed no gross pathological examinations and has been assigned to the small animal biopsy program.

15. In a rough draft undated memorandum submitted to Dr. Arnoldi on or about January 22, 1985, (Respondent's Exhibit 15), Dr. Sprecher proposed a plan for the reorganization of the Central Animal Health Lab. This plan proposed a gradual change to the more classical diagnostic format which utilizes veterinary pathologists for both gross and microscopic diagnostic services. The CAHL, as it was then organized, used non-pathologists, referred to as diagnosticians, to perform the majority of the gross pathological examinations. This plan also proposed to eliminate the CAHL's small animal biopsy program since such a service was available in the

private sector and to fill future vacancies with pathologists rather than diagnosticians. The following changes in the duties of certain non-management veterinary personnel were outlined in the January 22 memo and described in more detail in a February 20, 1985, memo (Respondent's Exhibit 18):

- Hruska - This position will continue to function as the histopathologist for the remaining CAHL diagnosticians.
- Decker - Diagnostician - His specialities include exotic and avian species and foreign animal diseases. He currently is involved in the National Poultry Improvement Plan. The position will continue to function as a diagnostician but partial assignment to the Animal Health Special Staff would be feasible.
- Myers - Diagnostician - He has indicated retirement within two years. The duties of this position can be covered by the changes described above, so total reassignment to the Animal Health Special Staff is a possibility.
- Weaver - This pathological position will be reassigned to postroom/routine (gross pathological) case flow duties.
- Luecke - This pathological position will be totally assigned to the postroom/routine case flow duties with the exception of a backup role in histopathology support for diagnosticians.
- Vacant - This current theriogenology vacancy will be filled by a pathologist with degrees or practice experience in veterinary reproduction.

Dr. Sprecher first discussed this plan with Dr. Arnoldi in the fall of 1984 and it was finally approved by Dr. Arnoldi in March, 1985.

16. At a meeting of the Bureau of Technical Services held the morning of March 6, 1985, Dr. Sprecher reviewed a proposed change in the organization of the Animal Health Division. He showed the staff an organizational chart dated March 1985, see Complainant's Exhibit 5, which did not show the reassignment of Drs. Decker and Meyers to Dr. Arnoldi's special staff. No mention was made at that meeting of reassignment of the complainants as set forth in Respondent's Exhibits 15 and 18. These

projected reassignments were not made known to complainants until a meeting with Dr. Sprecher held March 18, 1985.

17. Prior to the announcement of the complainants' reassignment and the elimination of the small animal biopsy service, management never consulted with the complainants regarding the changes. Management did not advise the Board of Agriculture, Trade and Consumer Protection of the planned changes. There were no references to the fiscal impact of the changes in the 1985-1986 budget material submitted by Dr. Arnoldi.

18. Drs. Sprecher and Arnoldi had discussed the desirability of using only pathologists to perform gross pathological examinations at least as early as February of 1984. They had been planning to use attrition as the means of filling the "diagnostician" positions on the necropsy (gross pathological examination) floor with pathologists, i.e., waiting until Drs. Rasta, Meyer and Decker retired (presumably in January, 1986, 1987 and 1989 respectively) and filling these then-vacant positions with pathologists, until the decision was made to eliminate the small animal biopsy program, and to reassign complainants additional necropsy duties while reassigning Drs. Meyer and Decker to special projects on Dr. Arnoldi's special staff. In an "Application for Accreditation of Veterinary Laboratory Services dated January 4, 1985, Dr. Sprecher indicated that he diagnosticians would be replaced by pathologists in a gradual manner as the diagnosticians retired.

19. The effect of the proposed reorganization on complainants is as follows:

- a. Dr. Hruska and Dr. Weaver, who currently share a large office on the second floor, would be moved to two comparable offices on the first floor near the post-mortem room where the

gross pathological examinations are performed. Dr. Luecke would remain in the same office.

b. The only change in the duties of Dr. Hruska's position would be that Dr. Hruska would be required to substitute for the other pathologists in necropsy while they were on vacation.

c. Drs. Weaver's and Luecke's duties would include both microscopic and gross pathological examinations. Dr. Luecke feels that the emphasis on gross pathological duties detracts from his position. Dr. Weaver feels that the addition of gross pathological examinations detracts from his position. Dr. Weaver and Luecke feel this way because, in their opinion:

- (a) in the CAHL, the gross pathology work is of a routine nature;
- (b) the CAHL gross pathology facilities, procedures and equipment are inadequate;
- (c) those doing gross pathology work at the CAHL perform the dissection work as well as the pathological examination -- in other laboratories, this dissection work is often done by lower level staff;
- (d) CAHL management has in the past accorded a lower priority and a lower status to gross pathology work than microscopic pathology work.

d. Drs. Sprecher and Arnoldi; Dr. Easterday, Dean of the University of Wisconsin School of Veterinary Medicine; and Dr. Schultz, professor and chairman of the Patho-Biological Department of the UW School of Veterinary Medicine, feel that the performance of both gross and microscopic pathological

examinations renders a pathologist more qualified than one who performs either gross or microscopic pathological examinations but not both.

e. Neither complainant's educational opportunities nor the classifications of their positions would change.

20. The effect on the DOATCP if the proposed reorganization is not implemented is as follows:

a. The veterinary profession has already been informed of the discontinuation of the small animal biopsy service and it is presumed that many veterinarians have located other sources for such service. As a consequence, the small animal biopsy unit would have little work to do if the service were revived, at least at first.

b. The programs to which Drs. Meyer and Decker are to be reassigned, i.e., poultry improvement, rabies, equine quarantine, and bovine leucosis, would suffer if such reassignments were not made.

c. Drs. Sprecher, Arnoldi, Easterday, and Schultz feel that having non-pathologists performing gross pathological examinations detracts from the quality of service offered by the CAHL and, therefore, to the quality of service available to the University of Wisconsin School of Veterinary Medicine.

21. In a performance evaluation of Dr. Hruska dated June 3, 1985, Dr. Sprecher praised Dr. Hruska's skill as a histopathologist and noted: "An ongoing disagreement with the DOATCP has resulted in a perceived disrespect for WAHL management... work relationship with WAHL management must



improve...." None of Dr. Hruska's previous performance evaluations had made reference to such disrespect.

22. In a performance evaluation of Dr. Luecke dated June 3, 1985, Dr. Sprecher praised Dr. Luecke's skill as a pathologist and noted: "Dr. Luecke's full potential will not be realized until his attitude towards management at the CAHL becomes more cooperative... 'chain of command' concepts need refreshing." None of Dr. Luecke's previous performance evaluations had made reference to such matters.

23. In a performance evaluation of Dr. Weaver dated June 3, 1985, Dr. Sprecher praised Dr. Weaver's skill as a pathologist and noted: "However, Dr. Weaver does not respond well to management requests concerning case status or case priority. This seems to stem from a general mistrust of WAHL management... Proper 'chain of command' procedures must be followed...." In his previous evaluations, Dr. Weaver's performance had been rated as satisfactory or above, and there had been no references to a poor attitude toward management or to failure to follow the chain of command.

24. All of the quoted language in the aforesaid performance evaluations are references to complainants' statutorily protected activities in connection with the Teske matter.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.85(1) and 230.85(3)(c), Stats.

2. The complainants have established the prerequisites for issuance of a preliminary injunction by a showing of a substantial cause, a reasonable probability of ultimate success on the merits, and irreparable injury if the status quo is not restored by the issuance of a preliminary injunction.

OPINION

This matter is before the Commission on complainant's motion for a preliminary injunction. Section 230.85(3)(c), Stats., provides:

Pending final determination by the Commission of any complaint under this section, the Commission may make interlocutory orders.

While the legislature has not provided any guidelines for evaluating requests for interlocutory orders, the Supreme Court has held as follows with respect to the discretion to be exercised by a trial court in deciding whether to issue a temporary injunction:

Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits.

Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm.... Werner v. A. L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W. 2d 310 (1977)

See also, Shearer v. Congdon, 25 Wis. 2d 663, 668, 131 N.W. 2d 377 (1964), citing DePauw v. Oxley, 122 Wis. 656, 659, 100 N.W. 1028 (1904), n.5, as follows:

...where the complaint states a cause of action and the motion papers disclose a reasonable probability of plaintiff's ultimate success, it is well-nigh an imperative duty of the court to preserve the status quo by temporary injunction, if its disturbance pendente lite will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party; especially if injury to the other is slight, or of character easily compensable in money....

See also, 42 Am Jur 2d injunctions §285:

The court exercises its discretion upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury alleged flowing from the denial of preliminary relief, the balancing of

damage and convenience generally, and the probability of the ultimate success or failure of the suit....

In this case, there are several subjects of alleged threatened injury sought to be temporarily enjoined: reassignment of certain duties and responsibilities in connection with the planned reorganization of the Animal Health Division, including elimination of the Small Animal Biopsy Service; changes in the office locations of complainants Hruska and Weaver; and elimination of certain educational opportunities. See complainants' motion for an interlocutory order dated May 22, 1985.

During the course of the hearing on the motion, the respondents provided testimony that there was no intention of changing any educational opportunities that might be available to the complainants, and it appears their concerns in this area stem from some revised position description language that does not signify any substantive change. The complainants did not press this aspect of the motion in their posthearing brief. Therefore, the Commission will not address this subject further at this time.

With respect to the changes in office location, it appears from the testimony at the hearing that the respondents' rationale for this is linked to the proposed reorganization and reassignments, and therefore the Commission will not separately address it further in this decision.

One of the key questions the Commission must consider on this motion is whether the complainants have demonstrated a reasonable probability of ultimate success on the merits.

The complainants have clearly demonstrated protected activity under Subchapter III of Chapter 230, Stats. Their transmittal of the letter dated November 21, 1984, (Complainants' Exhibit 1) to their first-line supervisor, Dr. Sprecher, contained "information" under §230.80(5):

(5) 'Information' means information gained by the employe which the employe reasonably believes demonstrates:

- (a) A violation of any state or federal law, rule or regulation.
- (b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

Pursuant to §230.81(1)(a), it was disclosed "...in writing to the employe's supervisor." Subsequently, further disclosure of similar "information" was made to the complainants' legislator, Sen. Feingold, and the respondents were advised of this.

Thereafter, on March 18, 1985, the complainants were informed of the changes in their assignments. Drs. Luecke and Weaver were to be reassigned from primarily histopathology to primarily necropsy, while Dr. Hruska was assigned backup duties in necropsy while remaining primarily in histopathology.

The respondents have argued that these reassignments do not constitute "disciplinary action(s)" under §230.80(2), which provides:

(2) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

- (a) Dismissal, demotion, transfer, removal of any duty assigned to the employe's position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.
- (b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.
- (c) Reassignment.
- (d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

The reassignments clearly involve "removal of any duty assigned to the employe's position" and "reassignment." The only question is whether they also fall within the more general language:

...any action taken with respect to an employe which has the effect, in whole or in part, of a penalty....

The complainants testified that, among their peers, necropsy was considered demeaning work as compared to histopathology, that it required a good deal of gross dissection that at other facilities usually was handled by lower level employes or students, that it was professionally more routine than histopathology, and that it was a good deal more onerous than histopathology in terms of noise, smell, and required physical exertion. The respondent's management witnesses (Drs. Sprecher and Arnoldi) testified that they did not consider necropsy work to be demeaning. There also was testimony that experience in gross pathology would be considered a positive factor for a veterinarian seeking employment in an academic setting.

In the opinion of the Commission, the complainants on this record have shown a clear probability of success on the merits with respect to establishing that their reassignment to necropsy work would have "...the effect, in whole or in part, of a penalty...." §230.80(2), Stats. The work is viewed by the veterinarians in the work unit as more arduous and more routine, and as performed under less pleasant working conditions, than histopathology. That in certain respects assignment to such work could be considered neutral or even professionally beneficial does not remove it from the statutory definition of a "disciplinary action," which is defined as having the effect of a penalty "in whole or in part," (emphasis added).

The next question is whether the complainants have demonstrated a reasonable probability of succeeding in establishing that the threatened disciplinary actions were undertaken in retaliation for their disclosures. In this regard, §230.85(6)(a), provides:

If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action

or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.

(b) Paragraph (a) applies to a disciplinary action under s. 230.80(2)(a) which occurs or is threatened within 2 years, or to a disciplinary action under s. 230.80(2)(b), (c) or (d) which occurs or is threatened within one year, after an employe discloses information under s. 230.81 which merits further investigation or after the employe's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

In this case, the complainants' initial disclosure to their immediate supervisor was determined to merit further investigation. Pursuant to §230.82(1), Stats., the DOATCP had 30 days from receipt of the information in which to decide if it merited further investigation or to refer it to another governmental unit better able to determine if it merited further investigation. Dr. Arnoldi stated in her letters of December 17, 1984, that the "...situation described in your letter and supporting documents will be investigated. You will be informed of the results of this investigation." Subsequently, investigations were in fact conducted. Since "disciplinary action" was threatened within one year of the disclosure, there is a presumption that it was retaliatory. The respondents can rebut that presumption by a preponderance of the evidence.

In their posthearing brief the respondents assert that "the complainants did not present affirmative evidence at the hearing that the respondents' actions were taken because the complainants lawfully disclosed information. The complainants relied instead on the presumption contained in sec. 230.85(6), Stats...." p. 13. In the Commission's view, complainants not only relied on the presumption but also offered substantial evidence that respondents' actions were in fact retaliatory.

Perhaps the most telling evidence of this nature was the performance evaluations completed by Dr. Sprecher on June 3, 1985. These evaluations contained inter alia, the following:

Weaver (Complainant's Exhibit 10): ". . .Dr. Weaver does not respond well to management requests concerning case status or case priority. This seems to stem from general mistrust of WAHL management. Care must be taken not to transfer disrespect of management to interactions with the clerical staff and other employees.

\* \* \*

Proper 'chain of command' procedures must be followed in toxic response team duties and other reporting outside of the Bureau of Technical Services.

Hruska (Complainants' Exhibit 4): "An ongoing disagreement with the DATCP has resulted in a perceived disrespect for WAHL management....

\* \* \*

The work relationship with the WAHL supervisor must improve.

Luecke (Complainants' Exhibit 6): ". . .Dr. Luecke's full potential will not be realized until his attitude towards management at the CAHL becomes more cooperative.

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'Chain of command' concepts need refreshing regarding toxic response team involvement and reporting to Division epidemiologists and other Department officials."

It is quite clear from this record, and particularly Dr. Sprecher's own testimony, that these comments about the complainants' attitude toward management stem solely from their disclosures about the department's handling of the Teske case. Dr. Arnoldi testified on cross-examination that she did not disagree with these evaluations. The evaluations

demonstrate in no uncertain terms that management believed that the complainants acted improperly in making their disclosures, and that the disclosures manifested a disrespectful, uncooperative, and improper attitude toward management by the complainants.

While the Commission on this motion is not called on to decide whether the performance evaluations themselves amount to unlawful retaliation under the act, they constitute significant evidence of management's negative attitude toward the complainants' disclosures about the Teske case. Such evidence about management's attitude is very important because the issue before the Commission has to do with the question of management's intent in reassigning the complainants--i.e., did management intend to retaliate against complainants because of their disclosures.

Another area of evidence has to do with certain circumstances surrounding the reassignments. There is no question but that the reassignment of pathologists to the necropsy service was responsive to a long-standing interest in upgrading that service. While the respondents documented the nature of that interest, a great deal of the documentation refers to an intent to accomplish the goal by a gradual transition process, replacing the non-pathologist veterinarians in the necropsy service as they retired. However, the reassignments which eventually were announced did not hinge on retirement, but rather on the transfers of those veterinarians to newly-created positions directly under Dr. Arnoldi. In the Commission's opinion, the suddenness and some of the other circumstances surrounding the change in plans constitutes some evidence of retaliation.

Both the rough draft and the final version dated February 20, 1985, of Dr. Sprecher's "Proposal for Re-Defining the Duties of Central Animal Health Laboratory Veterinary Personnel" (Respondents' Exhibits 15 and 18)



propose a gradual change to the utilization of pathologists for both gross and microscopic diagnostic services, stressing the filling of diagnostic positions with pathologists as the incumbents retired.

Dr. Sprecher's "Application for Accreditation of Veterinary Laboratory Diagnostic Services" dated "January 4, 1984" ([sic -- this had to have been in error -- the correct date was January 4, 1985], Respondents' Exhibit 13, contains inter alia, the following statement in Attachment #3:

We can best improve service through the slow process of position replacements (by retirements). When the opportunities occur, we plan to slowly replace diagnosticians with pathologists....

While the respondents provided testimony by Dr. Arnoldi that she approved Dr. Sprecher's final reorganization plan on March 1, 1985, the organization chart dated March 1985 that was unveiled to the division on the morning of March 6, 1985, and which was accompanied by Dr. Arnoldi's memo of March 6th (Complainant's Exhibit 5) contains no indication of any move of Drs. Decker and Myers to Dr. Arnoldi's special staff. There was no mention to the division staff at the meeting on March 6, 1985, that Drs. Decker and Meyers would be reassigned to Dr. Arnoldi's special staff and that Drs. Weaver and Luecke would be reassigned to the necropsy service.

There is other evidence that a sudden decision was made to reassign the complainants shortly after management learned of the second disclosure to Sen. Feingold and the complainants' decision to contest the results of management's investigation of the first disclosure. No mention was made in the 1985-1986 budget request of the elimination of the Small Animal Biopsy Service. None of the complainants were consulted by management concerning any aspect of the reassignment and elimination of the Small Animal Biopsy Service, regarding such matters as cost, program impact, etc. The statistics that were presented at the hearing on the motion concerning the

financial impact of the closing of the service were not prepared until May 27, 1985, long after the decision, and then in connection with a legislative inquiry being conducted after the fact. Finally, no mention of the changes were made to the Board of Agriculture, Trade and Consumer Protection, which is statutorily charged with the "direction and supervision" of DOATCP. See §15.13, Stats.

While it is true that the respondents presented evidence that Dr. Sprecher had prepared drafts of revised position descriptions for complainants' positions in February, 1985, see Respondents' Exhibit 17, this is consistent with his February 20, 1985, proposal, Respondents' Exhibit 18, which, while referring to a "gradual change" and to filling positions by the "attrition of retirement," also referred to the need to change position descriptions "to reflect any of the proposed changes which are accepted." In any event, the revised position descriptions were not finalized by the signatures of Dr. Sprecher until March 13, 1985, see Respondents' Exhibits 7, 10 and 12.

While some of these pieces of evidence may not seem particularly significant when viewed in isolation, when all of this evidence is viewed in its entirety, it is quite substantial. Additionally, there is the direct evidence of management's attitude, discussed above, which reveals that management disapproved of complainants' activity concerning the Teske case, felt such activity constituted "disrespect" for and "mistrust of" management, and went so far as to criticize complainants in their official performance evaluations for pursuing their statutorily-protected disclosures.

Furthermore, even if it were conclusively established that management had made a final decision before March 6, 1985, to reassign complainants

forthwith rather than to await the retirement of Drs. Decker and Meyers, there still would be a strong case that this decision was based on the initial disclosure of November, 1984.

Based on the entire record, the Commission believes the complainants have demonstrated a reasonable probability that they would ultimately succeed at a hearing on the merits in demonstrating that the reassignments were in fact retaliatory, and that there would clearly not be a preponderance of the evidence to rebut the presumption flowing from the operation of §230.85(6)(a), Stats.

The complainants also must show irreparable injury in the absence of an interlocutory order. The complainants have demonstrated two aspects of irreparable injury on this record.

First, the assignment of complainants to necropsy has been shown to be a "disciplinary action" as defined in §230.80(2), Stats. Unlike, for example, a demotion or suspension, where the Commission could order reinstatement and back pay following a hearing on the merits, there does not appear to be any way under the act that the Commission could compensate complainants for their reassignment. For example, it would appear to be at best questionable that the Commission would have the authority to award damages beyond back pay.

Second, the longer the Small Animal Biopsy Service remains out of operation, the greater the likelihood of the more or less complete loss of the service's customer base, as prior users obtain other suppliers of this service. This conceivably could impact adversely the ability of the Commission to fashion an appropriate remedy should the complainants prevail on the merits.

The authorities concerning preliminary injunctions cited above suggest that it is appropriate to also consider any irreparable injury to the opposing party that would follow from the entry of a preliminary injunction. In summary, respondents would suffer delay in implementing the personnel and program changes associated with the reorganization for the period of approximately five months it is estimated would be required for further hearing and final disposition of these complaints. However, the record suggests that up until sometime in March 1985, the respondents were content to allow these changes and the development of the new programs to occur gradually through a process of retirement-induced attrition. There has been no showing of any compelling need to do this now as opposed to the original plan to do it gradually as the diagnosticians retire.

Respondents also argue that a return to the status quo would leave the complainants with insufficient work due to program changes that probably cannot be completely undone, primarily loss of clients for the small animal biopsy service due to an announcement that already has been made about its discontinuation. However, limited weight should be given to this since it is a product of the respondent's alleged unlawful acts.

Therefore, the complainants have made out a case for the issuance of a preliminary injunction to preserve the status quo as it existed before the respondents determined to reassign the complainants to the necropsy service. In entering a preliminary injunction, the Commission has no desire to have any impact on DOATCP program policy administration beyond what may be required to protect the complainants' rights under Subchapter III of Chapter 230, and it believes the following order is no more than is necessary to that end based on this record. However, if due to changed circumstances or other appropriate reason, any party wishes to suggest any alternative approaches to preserving the status quo that would afford

adequate protection to the complainants, application could be made to the Commission for modification of its order. The parties are encouraged to consult in an attempt to reach a stipulation before so approaching the Commission.


ORDER

Pending the issuance of a final decision in this matter by the Commission, the respondents are temporarily enjoined from reassigning complainants to perform necropsy work, in the absence of the retirement of any of the current diagnosticians; from reassigning any of the complainants' office locations, unless associated with reassignment connected with retirement, as aforesaid; and from discontinuing or reducing the operation of the Small Animal Biopsy Service, unless associated with reassignment connected with retirement, as aforesaid.

Dated: August 13, 1985 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. MCCALLUM, Commissioner

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