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 GERALD SORGE,
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 Complainant,
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 v.
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 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
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 Respondent.
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 Case No. 85-0159-PC-ER
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INTERIM
 DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion to dismiss. The parties were provided an opportunity to file briefs and the following facts appear to be undisputed.

FINDINGS OF FACT

1. Prior to September of 1985, complainant was employed by respondent DNR as a Facilities Repair Worker 4.

2. By letter dated September 25, 1985, that was hand-delivered to the complainant on September 27, 1985, complainant was informed that his employment had been terminated effective September 19, 1985.

3. On November 14, 1985, the complainant filed a complaint of discrimination with the Commission alleging illegal discrimination based on sex as well as retaliation based on fair employment activities, whistleblowing and occupational safety and health reporting. The complaint was signed on November 13, 1985. The complaint described the details of the allegations as follows:

During or around the month of June 1984 the Assistant Superintendent at the Tomahawk DNR facility harassed me regarding a female social contact and fellow employee. He said he was opposed to my having contact with this female during non-working hours and

alleged and implied that I had been having sexual relations with her. I told him to mind his own business as what I do on my own time was none of his business and furthermore his accusations at the time were false. From that time on the harassment got progressively worse and spread out to other areas. After 1 year of repeated intimidation and discrimination and intense harassment I told him if he continued this type of tactics I would retaliate by exercising my right to disclosure under the whistleblower law. Based on knowledge and beliefs and documentation it would be an understatement to say that himself and several others were in pretty deep as far as stealing, abuse of authority, and other discrepancies were concerned.

On June 14 of 1985 after another private harassment session I told him I would disclose things covered by the whistleblower law. On June 17 of 1985 I left my intentions be known to the superintendent at the Tomahawk DNR facility. I then began to obtain documentation, substantiation, ect. to adduce evidence to prove my allegations of gross wrongdoing. On Sept. 13 1985 the superintendent at Tomahawk DNR shop told me to stop this sort of thing or things would not go well there fore me. Prior to this on the afternoon of the 13 of Sept. the assistant superintendent harassed me and tried to intimidade me to keep my mouth shut.

Between June and Sept. of 1985 the superintendent accused me of a varity of things based on a statement he had prepared and then had signed by a former mental patient and alcoholic that was a mutual acquaintance of many DNR employees including myself. I told the superintendent and his assistant that this female disliked me because of a personal feud in the past and would say or do anything to harm me. After I told them this is when they summoned her a second time to sign their prepared statement. My employment was eventually terminated by the DNR based on accusations by the superintendent and his assistant in a disguised retaliatory measure because of my desire to divulge and disclose under the whistleblower law. The reasons for my termination have yet to be proven. They are however "the status quo" for the Tomahawk facility and based on the every day goings on at the Tomahawk DNR, believeable.

4. By letter received on December 10, 1985, the complainant withdrew his allegations of sex discrimination and retaliation based on fair employment activities.

5. By interim decision and order dated January 23, 1986, the Commission dismissed that portion of complainant's case that alleged retaliation based on safety and health reporting.

6. On February 5, 1987, an investigator for the Commission issued an initial determination finding no probable cause to believe that complainant was retaliated against for making a disclosure under the whistleblower law.

7. By letter dated February 27, 1987, complainant appealed the initial determination and wrote in part:

Prior to 19 September 1985 I also did provide Mr. A. Clarke with a disclosure of allegations concerning the Whistleblower as stated by Wis. Stats. 230.83(a). I suspect he filed them in "13" as his efforts in this coverup are becoming more and more clear. When asked about this statement and provided with a copy by Rich Henneger at a meeting in Wausau along with a Ms. Powers, Mr. Clarke could only turn red with the embarrassment of being found out.

8. By letter dated April 10, 1987, the Commission asked the complainant to indicate, as soon as possible, which of four prehearing dates were preferable.

9. When complainant had not responded by April 30, 1987, the Commission sent him a letter threatening dismissal of the claim unless he contacted the Commission within 20 days to schedule a prehearing conference.

10. Complainant telephoned the Commission on May 8, 1987 during which call the prehearing conference was scheduled for May 21, 1987 at 9:00 a.m. via telephone. Written notice of the conference was also mailed to the parties.

11. The prehearing conference report reflects the following:

Complainant was telephoned as instructed by him at 414-758-2702 but he was not there. The examiner talked with a Mrs. Betty Sorge, who identified herself as complainant's mother. She did not know when complainant would be there. The examiner's telephone number was given to Mrs. Sorge for complainant to respond. Respondent will submit a written motion to dismiss.

DECISION

The respondent's motion to dismiss alleges both a lack of prosecution and a lack of jurisdiction. Each basis for the motion is treated separately, below.

Lack of Prosecution

Respondents contends that because the Commission has "found it difficult if not impossible" to contact the complainant and because the complainant failed to appear at the May 21st prehearing conference, the case should be dismissed.

However, the complainant has filed a written response to the respondent's motion. The mere existence of such a response indicates a desire to pursue the claim even though complainant failed to indicate why he did not participate in the prehearing conference. The file does indicate some difficulty in reaching the complainant and also indicates that complainant is only in a position to check for mail on a weekly basis. However, difficulty in reaching someone does not mean that their case should be dismissed. Given the record in this matter, it would be premature for the Commission to dismiss the case for lack of prosecution. While the Commission is disturbed by the absence of any reason why the complainant did not appear at the prehearing conference, the Commission is reluctant to take the drastic remedy of dismissal.

Lack of Jurisdiction

The respondent also claims that the complainant failed to make a written disclosure prior to filing his claim under the whistleblower law and, therefore, lacks any basis for a finding of retaliation:

The Commission records indicate that the complainant was terminated on September 19, 1985 by letter dated September 25, 1985. However, Mr. Sorge never filed his written complaint for whistleblowing protection until November 14, 1985. Since the law requires a written disclosure in order to be protected from retaliatory action, the Commission has no authority to act on his complaint. Respondent's brief, p. 2.

The determinant fact is not when complainant filed his complaint of retaliation, it is whether he made a disclosure of information prior to the alleged retaliation. The statutory basis for the claim of retaliation is §230.83(1), Stats., which provides:

(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employe.

In turn, §230.80(8), Stats., defines "retaliatory action" as:

a disciplinary action taken because of any of the following:

(a) The employe lawfully disclosed information under §230.81 or filed a complaint under §230.85(1).

(b) The employe testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under §230.81 by another employe.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employe engaged in any activity described in par. (a) or (b).

At the time of the September discharge, complainant clearly had not filed a complaint of retaliation under §230.85(1), Stats., nor has the complainant alleged that he was assisting in any "action or proceeding" relating to a disclosure by another employe as described in §230.80(8)(b), Stats. The remaining question is whether the appellant made a lawful disclosure under §230.81, Stats., or was believed to have done so by the agency at the time of the discipline.

The statutory alternatives for making a lawful disclosure are set out in §230.81, Stats.:

Employe disclosure. (1) An employe with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to another person. However, to obtain protection under §230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employe shall do either of the following:

(a) Disclose the information in writing to the employe's supervisor.

(b) After asking the commission which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit the commission determines is appropriate. The commission may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 an an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employe to receive information under this section.

(2) Nothing in this section prohibits an employe from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under §968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under §885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under §230.83.

(3) Any disclosure of information by an employe to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under §230.83.

A review of the allegations found in the original charge of discrimination fails to turn up any language indicating that the complainant filed a written disclosure of information prior to his discharge. However, the complainant's statement in his appeal from the initial determination (finding #7) can easily be interpreted as a statement that the complainant made such a written disclosure. In addition, nothing in the Commission's file would be inconsistent with an allegation by the complainant that his supervisors believed he had made a disclosure, as provided in §230.80(8)(c), Stats.


Given that the complainant appears pro se in this matter and in the absence of an adequate record of the events leading up to his discharge, the Commission is unable to conclude that the complainant did not make a lawful disclosure of information or that the appointing authority, agent of

the appointing authority or supervisor did not believe that such a disclosure had been made.


ORDER

Respondent's motion to dismiss is denied. The parties shall be contacted for the purpose of scheduling a prehearing conference.

Dated: July 8, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

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LAURIE R. McCALLUM, Commissioner