

ROBERT FLANNERY,

Petitioner,

v.

Secretary, DEPARTMENT OF
CORRECTIONS,

Respondent.

Case Nos. 90-0157-PC-ER, 91-0047-PC

INTERIM
DECISION
AND
ORDER

These matters are before the Commission on the respondent's motions to dismiss for failure to state a claim on which relief may be granted. The parties have filed briefs. The general rules for consideration of a motion to dismiss for failure to state a claim were discussed in Morgan v. Pennsylvania General Ins. Co., 87 Wis. 2d 723, 731-32, 275 N.W. 2d 660 (1979):

The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted A claim should not be dismissed ... unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his allegations.

Case No. 90-0157-PC-ER

The respondent contends that the petitioner has failed to allege that he has engaged in an activity protected by the whistleblower law and that he has failed to allege that the respondent took any "retaliatory action" against him as that term is defined by statute.

Petitioner filed his initial complaint of whistleblower retaliation with the Commission on October 3, 1990. After the Commission requested additional information, petitioner filed an amended complaint on May 22, 1991. The petitioner also filed an affidavit dated May 23rd to clarify his allegations. Based upon a review of these materials, it is apparent that the petitioner is employed by the respondent as Assistant Superintendent at the McNaughton Correctional Camp, and that his immediate superior is Phil Kingston, the

Warden of the Wisconsin Correctional Center System. The materials also include the following allegations:

1. In January of 1989, petitioner filed with Mr. Kingston a document entitled "Events of Thursday, January 12, 1989" which described certain conduct by Sergeant James Somers, an employe at McNaughton. The document reads, in relevant part, as follow:

I then directed Mr. Somers to lend assistance to Mr. Ehmann in going through the inmate's property. He didn't comply with the directive and started making other excuses. I said, "Jim, I'm tired of listening to your excuses. I want you to go and help Mr. Ehmann go through the property." During the conversation, he had stood up and had come over to the counter, where supplies and medications are passed to inmates, and he was leaning on the counter. After I gave him the directive to give Mr. Ehmann a hand, he looked at me and stated, "Bob, you and I have a problem." I ignored him and again directed him to lend assistance to Mr. Ehmann. He continued to stare at me and repeated, "Bob, you and I have a problem." I replied that if we did, I was unaware of it and that maybe he did, but I sure didn't. I again recommended that he comply with my directive. He continued to stare at me for a while and finally stated, "I'm going, but you'll be hearing from me." He then went and complied with my directive.

2. William Schmidt, a union representative, was permitted to improperly conduct investigatory interviews with inmates and with fellow employes of the petitioner regarding petitioner's work performance.

3. Respondent harassed petitioner by improperly carrying out an investigation of his conduct. The investigation resulted in an oral reprimand by Mr. Kingston in December of 1989.

4. Petitioner was denied a wage increase on July 1, 1990.

5. Petitioner was denied a promotion to camp superintendent in April or May of 1989.

6. Respondent failed to adequately prepare the petitioner for a deposition conducted in August of 1990.

7. On numerous occasions, Mr. Somers stated that he was out "to get" the petitioner.

The whistleblower law prohibits "retaliatory action" against an employe who has engaged in certain protected activities. The term "retaliatory action" is defined in §230.80(8), Stats., as:

a disciplinary action taken because of any of the following:

(a) The employe lawfully disclosed information under s. 230.81 or filed a complaint under s. 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 s. 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).

The petitioner contends he is entitled to protection under the law because he made a lawful disclosure under §230.81(1)(b), Stats., which provides for the disclosure of "information in writing to the employe's supervisor." The law defines "information" to include:

information gained by the employe which the employe reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

There is nothing in the file in the instant matter which indicates the context of the document sent to Mr. Kingston. The petitioner did not provide any indication that the document was part of a request that discipline be imposed against Sgt. Somers or whether the document was prepared at the direction of Mr. Kingston. However, in his brief, the petitioner describes this document as follows: "The disclosures regarding Mr. Somer's acts constituted violations of state rules and regulations relating to operations for Wisconsin Correctional Center Facilities." Given the record before it, the Commission cannot conclude that the document sent by the petitioner to Mr. Kingston is not a disclosure under §230.81(1)(a), Stats.¹

¹In its brief, the respondent quotes §230.81(1)(intro), Stats., for the concept that the law ""provides protection for disclosures to persons other than the employe's attorney, collective bargaining representative, legislator or supervisor."

Why would a law be enacted to protect an employe from retaliation from a supervisor for disclosing information to that supervisor? The law obviously provides protection for disclosure to other persons. The law in fact requires disclosure to the supervisor, so how can there possibly be an issue of retaliation?

The Commission does not accept the respondent's argument. The whistleblower law is designed to encourage employes to make disclosures by protecting them against retaliation. For example, if an employe makes a

The respondent's second objection to the petitioner's whistleblower claim is that the petitioner cannot invoke the whistleblower law because no disciplinary action was taken against him. Pursuant to §230.80(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 Commission has interpreted this language to mean that only those personnel actions which have a substantial or potentially substantial negative impact on an employe fall within the statute. Vander Zanden v. DILHR, 84-0069-PC-ER, 8/24/88; affirmed by Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. In Sadlier v. DHSS, 87-0046, 0055-PC-ER, 3/30/89, the Commission held that a decision to investigate an incident which could have lead to the imposition of discipline against the complainant was not itself a disciplinary action. Based upon the decision in Sadlier, the Commission concludes that methods used by the respondent in carrying out an investigation of the petitioner's work performance were not "disciplinary actions" as that term is used in the whistleblower law. Similarly, the decision to permit Mr. Schmidt, a union official, to carry out an investigation of the petitioner's conduct was not a disciplinary action. The oral reprimand, denial of a wage increase and denial of a promotion all fall within the statutory definition, however. Respondent's assertion that these actions did not "have anything remotely to do with retaliation for the disclosure of infor-

disclosure of "mismanagement" under the law to the immediate supervisor in the manner provided in §230.81(1)(a), the supervisor passes this disclosure to a higher level, the agency processes the disclosure in a manner consistent with the procedure outlined in §230.82, the agency finds the information to be true and the supervisor is disciplined as a consequence of the disclosure, the law protects the employe from retaliation by the supervisor. The language of §230.83(1) specifically prohibits retaliation by a "supervisor."

mation" is a contention which cannot serve as a basis for dismissal at this stage of the proceedings.

The record is simply inadequate for the Commission to reach a conclusion as to the petitioner's remaining allegations: that respondent failed to adequately prepare him for a deposition and that on numerous occasions, Mr. Somers had stated that he was out "to get" the petitioner. The circumstances of these events may bear on the determination of whether they constitute "disciplinary actions."

Based upon the above analysis, the respondent's motion to dismiss must be granted in part and denied in part as to case no. 90-0157-PC-ER.²

Case No. 91-0047-PC

This matter was filed with the Commission on April 18, 1991, at the fourth step of the non-contractual grievance procedure. The body of the grievance filed at the first step read as follows:

Harassment--from the time of my first contact with Officer Somers at McNaughton CC, I have been subject to harassment by him. This harassment includes, but is not limited to, officer Somers soliciting statements from others on the subject of whether I have been harassing him. Officer Somer's attempts in this regard have been reported to me, and I have passed them on to all levels of personnel in the Department. However, no action has been taken to eliminate this problem, and although the Department has recognized the need to instruct Officer Somers desist, it has neglected to do so. This is in violation of the Division/Department of Corrections Policy on harassment. The Department has also engaged in groundless investigation of me on repeated occasions. The Department has withheld from me information it has obtained in the course of its investigations, despite my requests and my representative's requests to be provided with the same, in violation of my due process rights to confront my accusers and adequately prepare an answer to them. Furthermore, the Department's investigation continues in the form of interviews of third parties, at which I have not been allowed to be present or cross-examine. This investigation is allegedly in response to a complaint by Officer Somers against the Department of Corrections for racial discrimination; the contents of the file partially revealed to me are primarily unsupported allegations of misconduct on my part, unrelated to either my relationship with Officer Somers' complaint. The above actions suggest that the true purpose of Officer Somers and the investigation

²The respondent has not raised any timeliness objections to the petitioner's whistleblower claim.

is the harassment of your grievant and the destruction of his career.

Retaliation--Your grievant reported and imposed a recommended discipline against Officer Somers for having failed with another, to complete a timely and effective search of an escaped inmate's belongings as instructed. Ultimately, this discipline resulted in no action taken against either of the officers involved. However, from that moment, Officer Somers has undertaken the activities outlined in the paragraph above. Statements reported to me by others are that Officer Somers intends to have me fired. The Department later investigated an incident regarding inmate urine samples. This investigation has been satisfactorily concluded. However, some three months following this conclusion, the Department reopened its investigation without disclosing why or by what authority it did so. In its investigation of the discrimination claim by Officer Somers, the Department's activities, rather than being fair and impartial investigation, show every appearance of being retaliation against your grievant for having dared to attempt to perform a supervisory function by disciplining his officers. The above actions, and other similar to it, constitute a violation of Wisconsin whistle blower's statute, Section 230.80, et. sec., Wis. Stats., in that these actions are an arbitrary and capricious exercise of departmental power.

The grievance was denied at the first three steps. Petitioner sought to amend his grievance on May 22, 1991, by filing the same materials as were filed on that date relative to Case No. 90-0157-PC-ER.

Respondent's motion to dismiss is based on the argument that there was no written policy prohibiting the conduct alleged by the petitioner.

In his brief on respondent's motion, the petitioner described the scope of his grievance as including the following allegations:

1. That Mr. Somer's and respondent's conduct violated respondent's written policy prohibiting harassment and hazing of employees.
2. That by initiating a second investigation in August of 1989 of petitioner's conduct in April of 1989, respondent violated §264.2(a) of the "Personnel and Employment Relations Directive" which states, in part: "When a possible infraction of a work rule occurs, the supervisor or other designated management representative will immediately investigate the situation to establish the facts."
3. That respondent improperly applied "state policy regarding lateral transfers for positions of promotion:"

The Division of Corrections had adopted a policy regarding requests for permissive employment consideration to vacant positions. Nevertheless, the Division promoted James Boorman as Superintendent of McNaughton Correctional Center via a lateral transfer in violation of the existing Division policies on that subject. Mr. Boorman took the position which Mr. Flannery had applied for and was on promotional list for at the time.

4. That respondent violated §230.12(7), Stats., by failing to adjust petitioner's compensation despite granting him an exceptional performance award effective July 1, 1990.

5. That respondent violated §230.19, Stats., when it refused to promote him to the position of Superintendent, McNaughton Correctional Center.

The Commission's jurisdiction over non-contractual grievances is based on §230.45(1)(c), Stats., which provides that the Commission shall: "Serve as final step arbiter in the state employe grievance procedure established under s. 230.04(14)." According to §230.04(14), Stats., the Secretary of the Department of Employment Relations "shall establish, by rule, the scope and minimum requirements of a state employe grievance procedure relating to conditions of employment."

The Secretary of DER has established the scope of the grievance procedure in §ER 46.03, Wis. Adm. Code:

(1) Under this chapter, an employe may grieve issues which affect his or her conditions of employment, including any matter on which the employe alleges that coercion or retaliation has been practiced against the employe except as provided in sub. (2).

The Secretary has further limited the scope of matters which may be grieved to the Commission at the fourth step of the non-contractual grievance procedure. Section ER 46.07, Wis. Adm. Code, provides:

(1) If the grievant is dissatisfied with the decision received from the appointing authority or designee at the third step ... the decision may be grieved to the commission only if it alleges that the employer abused its discretion in applying subch. II, ch. 230, Stats., or the rules of the administrator promulgated under that subchapter, subchs. I and II, ch. 230, Stats., or the rules of the secretary promulgated under those subchapters, or written agency rules, policies, or procedures, except that decisions involving the following personnel transactions may not be grieved to the commission:

(a) A written reprimand;

- (b) A performance evaluation; or
- (c) The evaluation methodology used by an employer to determine a discretionary pay award, or the amount of the award.

The respondent contends that the petitioner cannot invoke its policy regarding harassment and hazing (referred to in petitioner's grievance) because the petitioner "does not allege that the harassment was linked to a protected status or because harassment or hazing was directed at him because he was a new employee."

The respondent's policy on harassment in the workplace which was in effect at the time the petitioner filed his first step grievance in September of 1990 is embodied in an administrative notice dated February 12, 1987, issued by respondent's predecessor agency, the Division of Corrections in the Department of Health and Social Services.³ That policy reads, in part:

Any employee who engages in harassment of any other employee on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record violates state and/or federal laws.

* * *

In addition, the Division will not condone any form of conduct that might be considered abusive, disorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes. The Division believes harassment of any kind, including hazing, has no place in the workplace. Hazing disrupts the work environment, is a violation of this policy, will not be tolerated, and will be subject to appropriate discipline in accordance with this policy.

INTERPRETATION OF POLICY

Harassment

Offensive verbal or physical conduct constitutes harassment when this conduct 1) has the purpose or effect of creating an intimidating, hostile, or offensive working environment; 2) has the purpose or effect of unreasonably interfering with an individual's work performance; or 3) otherwise adversely affects an individual's employment opportunities.

"Sexual harassment" means sexual advances

³The Department of Corrections was created by the provisions of 1989 Wis. Act 31, effective January 1, 1990.

Hazing

Hazing includes persecuting or harassing with meaningless, difficult, or humiliating tasks or to initiate by exacting humiliating performances from or playing rough practical jokes.

Respondent filed an affidavit of Tara Ayres, an equal opportunity officer with respondent, stating that the written policy was "intended to define and prohibit harassment which was linked to protected status (race, sex or national origin, for example) and a type of harassment known as 'hazing' which is directed at new and inexperienced employees" and that it was not "intended or interpreted to proscribe conduct which was not directed at a protected status or which was not in the nature of hazing new employees." Petitioner responded by arguing that the policy indicates "on its face" that it applies to all employees and is not linked to any protected status.

The first sentence of the policy states that "harassment of any other employee on the basis of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record or conviction record violates state and/or federal laws." However, the policy goes on to state that, "in addition, the Division will not condone any form of conduct that might be considered abusive, disorderly, or disruptive, regardless of whether the form of conduct violates State and Federal laws and statutes. (Emphasis added.) Based upon this language and on the record before it, the Commission cannot conclude that the respondent's policy only prohibits harassment directed at an employee's protected status. In light of the fact that this matter is before the Commission on respondent's motion to dismiss for failure to state a claim and in light of the respondent's reliance on the affidavit of Ms. Ayres, the petitioner must be provided an opportunity to question Ms. Ayres so that a more complete record is created on which the Commission may interpret the policy if the respondent wishes to pursue its contention regarding the proper interpretation of the policy.

The second allegation raised in the petitioner's grievance is based on an alleged violation of §264.2(a) of the "Personnel and Employment Relations Directive" which refers to an immediate investigation of possible work rule infractions. The Commission agrees with the respondent's contention that the quoted sentence makes no reference to prohibiting an employer from conducting a second investigation after having closed an initial investigation.

However, the Commission cannot say that, as a matter of law, the petitioner could not show the respondent acted contrary to the provision by delaying the commencement of the second investigation. For that reason, the petitioner may pursue one aspect of his allegation that the directive was violated.

The petitioner's third and fifth allegations, as described in his brief, relate to the action of appointing Mr. Boorman rather than the petitioner to the position of Superintendent of the McNaughton Correctional Center. Petitioner claims that this action was inconsistent with "state policy regarding lateral transfers for positions of promotion" and was a violation of §230.19, Stats. Although the petitioner has not specifically identified the state policy in question, it is clear that his allegation relating to §230.19 is sufficient to provide a basis for review of the personnel action under the terms of §ER 46.07.

The final allegation raised by the petitioner is that respondent violated §230.12(7), Stats., by failing to pay him after granting him an exceptional performance award. The respondent argues that a grievance on this subject is specifically precluded by the language of §230.45(2), Stats:

Subsection (1)(c) does not apply to an employe who using the agency grievance procedure, grieves his or her dissatisfaction with the evaluation methodology and results used to determine any discretionary performance award or the amount of such an award. Any such employe grievance shall be settled on the basis of the appointing authority's decision.

Even if one could interpret this language to bar a fourth step grievance relating to an alleged non-payment of a *discretionary* performance award (DPA), it has no application to an *exceptional* performance award (EPA). The compensation provisions in §230.19(5)(d) and (7), Stats., distinguish these two compensation options and the limitation on grieving DPA's to the third step is reiterated in §230.19(5)(e). Therefore, the respondent has not advanced any argument which would prevent the petitioner from grieving the issue of whether he has been paid an EPA.

In reaching a decision regarding Case No. 90-0047-PC, the Commission has declined to consider petitioner's brief filed on July 22, 1991, nearly one month after the conclusion of a briefing schedule agreed to by the parties and set forth in a letter from the Commission dated May 22, 1991.

ORDER

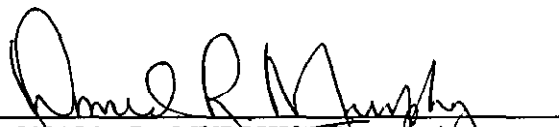
For the reasons set out above, the respondent's motions to dismiss are granted in part and denied in part. The parties will be contacted for the purpose of scheduling a status conference in these matters.

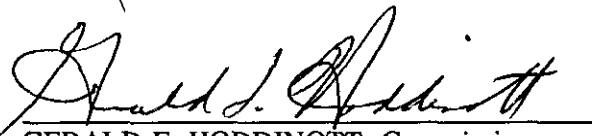
Dated: July 25, 1991

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner