

STATE OF WISCONSIN

PERSONNEL COMMISSION

**NATHANIAL PERRIEN,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**DECISION  
AND  
ORDER**

Case No. 95-0031-PC-ER

#### NATURE OF THE CASE

This is a complaint alleging discrimination on the basis of arrest and conviction record and retaliation for engaging in protected whistleblower and fair employment activities. A hearing was held on March 6 and 7, 1997, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on May 19, 1997.

#### FINDINGS OF FACT

1. In 1992, the Bureau of Correctional Enterprises (BCE), Division of Program Services, Department of Corrections, applied for and was awarded federal funds from the National Community Service Corps (NCSC). This funding was used to establish the Milwaukee Community Service Project (MCSP), and was sufficient to fund the MCSP for a period of one year. MCSP was intended to provide job skill training and work experience for probationers who did not have a high school education and who had a history of drug or alcohol problems.

2. During the time period relevant to this matter, BCE was also responsible for the Transitional Employment Program (TEP). TEP is a state-funded program which offers criminal offenders an opportunity to work for not-for-profit or public agencies to obtain job experience.

3. In 1992, the Chief of the Section of Enterprise Development within the Bureau of Correctional Enterprises was Arthur Besse. The TEP and MCSP programs were the responsibility of the Section of Enterprise Development. Herb Robinson was one of Mr. Besse's subordinates and worked as an Employment Coordinator in Milwaukee for the TEP program.

4. In 1992, Mr. Besse and Mr. Robinson hired complainant, who was on probation for a criminal offense, into a position in the TEP program. Their plan was to move complainant into the MCSP program as the Crew Leader when the program was established. Complainant was required to be a criminal offender in order to qualify for both the TEP and the MCSP positions.

5. The MCSP program staff was designed to include a Crew Chief, an Assistant Crew Chief, two half-time adult workers supplied by the Social Development Commission (a non-DOC quasi-public agency in Milwaukee) whose job it would be to mentor crew members, and a crew of eight probationers. The plan was to recruit the Assistant Crew Chief from the crew members, if possible. The crew members were young gang members with little education, little respect for authority, and little work experience.

6. On February 8, 1993, complainant was appointed to the MCSP Crew Chief position by Mr. Besse. This project position was classified at the Program Assistant 3 level. Complainant was informed by Mr. Besse that the project would end on September 30, 1994, due to the expiration of the federal funding. At the time of his appointment to this Crew Chief position, Mr. Robinson was complainant's lead worker, and Mr. Besse was complainant's first-line supervisor.

7. The SDC never provided any adult mentors for the MCSP crew. The reason given to MCSP was that the SDC was never able to recruit any qualified adult workers who were willing to supervise the type of young offenders on the crew for the pay that was offered, i.e., \$4.25 per hour.

8. Mr. Besse and Mr. Robinson had difficulty filling the Assistant Crew Chief position from the ranks of the crew members so, effective February 21, 1994, they

appointed Archie Shaw, an offender who was not a member of the MCSP crew, to the position. Mr. Shaw was referred to MCSP by his probation and parole agent. Mr. Shaw was terminated from the Assistant Crew Chief position on November 23, 1994, because he lost his driver's license, a requirement for the position. After Mr. Shaw's termination, Mr. Besse and Mr. Robinson offered the Assistant Crew Chief position to crew members recommended by complainant but none accepted.

9. When complainant was present at work, he did a good job motivating and supervising crew members.

10. In late 1993, complainant was absent from work for a week without notifying Mr. Robinson. When Mr. Robinson learned about this, he did not take any employment action against complainant or notify Mr. Besse but instead counseled complainant. This course of action was consistent with Mr. Robinson's usual practice.

11. The federal funding for the MCSP program expired on September 30, 1994. Mr. Besse had applied for additional federal funding but this application had been denied. When the federal funding expired, Mr. Besse used TEP funds to continue to fund a position for complainant. Effective October 3, 1994, complainant was appointed to a limited term employment (LTE) position by Mr. Besse funded with TEP dollars.

12. During 1994, Mr. Besse was promoted to a higher level position within BCE. Effective October 17, 1994, Mr. Robinson was appointed to Mr. Besse's Section of Enterprise Development Chief position. On an acting basis, Delois Ware, an Employment Coordinator in Milwaukee for the TEP program, handled many of Mr. Robinson's former duties as well as her own. While Ms. Ware was serving as complainant's lead worker, she received verbal complaints that complainant was frequently absent from the work site. Ms. Ware reported this to Mr. Robinson. Mr. Robinson requested that Ms. Ware investigate complainant's attendance. Ms. Ware discovered that complainant was frequently absent from the work site or tardy, and reported this in writing to Mr. Robinson. Mr. Robinson reported this to Mr. Besse.

The result of complainant's absences was that crew members were working unsupervised.

13. When it became apparent that there was too much work for Ms. Ware to handle alone, a decision was made to hire an LTE to fill the Employment Coordinator position formerly held by Mr. Robinson until it could be filled on a permanent basis. It was common knowledge in the Milwaukee TEP and MCSP offices that recruitment for this LTE position had been initiated.

14. Mr. Robinson is the pastor of a Christian church in Milwaukee. Chris Jackson is a member of this church and a church volunteer. Mr. Robinson was aware in late 1994 that Mr. Jackson's job with the Harambee Center would be ending, and that Mr. Jackson was actively seeking other employment. Mr. Robinson advised Mr. Jackson in late 1994 or early 1995 that a position in his work unit may be opening up. Mr. Jackson was aware at this time that Mr. Robinson worked for BCE. Mr. Jackson initiated contact with respondent DOC's central office and with BCE and obtained details about the recruitment for the LTE Employment Coordinator position from these contacts. Based on the details he received from these contacts, Mr. Jackson submitted an application and resume for the LTE Employment Coordinator position. Mr. Jackson has no criminal record.

15. In late 1994, Walter Beach was employed in a half-time LTE Client Services Assistant position in the TEP office. Mr. Robinson suggested Mr. Beach apply for the LTE Employment Coordinator position. Mr. Beach did apply for this LTE position. Mr. Beach is a former offender and Mr. Robinson was aware of this. Mr. Robinson did not promise the LTE Employment Coordinator position to Mr. Beach.

16. Mr. Robinson did not suggest to complainant that he apply for the LTE Employment Coordinator position. Complainant did not submit an application for this LTE position. Mr. Robinson did not promise the LTE Employment Coordinator position to complainant.

17. There were four candidates interviewed for the LTE Employment Coordinator position. These included three candidates who had submitted applications directly to BCE, i.e., Mr. Jackson, Mr. Beach, and Eloise Rowell; and one candidate who had submitted an application to, and was referred by, respondent's affirmative action office. Mr. Robinson served on the interview panel but did not indicate to other panel members that he was acquainted with Mr. Jackson. Ms. Ware, who also served on the interview panel, was not acquainted with Mr. Jackson prior to the interview and was not aware that he and Mr. Robinson had an association through Mr. Robinson's church. The members of the interview panel, including Ms. Ware, recommended that Mr. Jackson be appointed to the position. Mr. Jackson had ten years' experience as a youth counselor at Scott's Christian Youth Center. Part of his responsibilities in this position included counseling youthful offenders and helping them to find employment in the community. Mr. Jackson subsequently performed similar responsibilities for the Harambee Ombudsman Program.

18. Mr. Jackson was appointed to the LTE Employment Coordinator position effective January 30, 1995. Respondent's recruitment and selection process for this LTE position was consistent with the process respondent employs to fill LTE positions. Mr. Jackson competed for but was not the successful candidate for the permanent Employment Coordinator position.

19. In a letter to Steve Kronzer, Director, Bureau of Correctional Enterprises, dated November 10, 1994, complainant stated as follows:

Commencing this correspondence, I wish first to state; Thank you, for your support of our initial and current project's existence.

Ethically speaking, I've attempted to contact Herb (Emp. Supv.) and Art (Section Chief), of which both are not available this week. Marching on, I desire to mention that I have *much* respect, loyalty and commitment towards them and MCSP.

I have concerns in regards to this being appropriately (with respects to their stature) reciprocated! Regardless of where, I'd lie down and stake my life for the *mission* of 'MCSP'.

Being a Soldier and Ex-Ranger I operate MCSP accordingly, however as firm as I am towards corpsmembers, (terminated corpsmembers as well as successful completers bear witness) I'm also equitable in regards to MCSP.

There are a number of concerns I have regarding the operation of MCSP, yet not being disrespectful or distasteful, I simply want to have this on record. (If given the opportunity to correct and operate effectively the operations and positive results of MCSP will truly blossom!!)

Thank you for your time.

Complainant sent copies of this letter to Mr. Besse and Mr. Robinson.

20. Mr. Kronzer could not determine from the face of the letter what complainant was trying to communicate to him. As a result, he contacted Mr. Besse and asked him to follow up. Mr. Besse requested of Mr. Robinson that he find out from complainant what the concerns that he referenced in his letter were. Mr. Robinson contacted complainant and asked him what these concerns were. Complainant advised Mr. Robinson that he was concerned about the failure to fill the two adult worker mentor positions. Mr. Robinson reported this to Mr. Besse who reported it to Mr. Kronzer. Neither Mr. Kronzer, Mr. Besse, nor Mr. Robinson was upset by the letter although Mr. Robinson expressed the opinion that he would have preferred that complainant voice his concern using the "chain of command."

21. In January of 1995, complainant was absent from work for two weeks without providing the required notice or obtaining the required approval. Complainant was not disciplined. Complainant was given the opportunity to use accrued compensatory time to cover the absences.

22. As a result of these absences, Mr. Besse and Mr. Robinson decided that complainant's probation and parole agent should be contacted to determine if she had information which would assist them in determining what was interfering with his work. As a result of this contact, the agent ordered that complainant undergo a urinalysis to test for drugs or alcohol. Complainant's probation was not revoked as a

result of this contact. Complainant's agent expressed serious concern about the failure of MCSP to fill the other project positions.

23. On December 9, 1994, Mr. Besse, Mr. Robinson, Ms. Ware, Mr. Beach, and complainant met together as part of the BCE quarterly meeting. Mr. Robinson did not direct profanity at complainant or threaten him during this meeting or at any other time.

24. It is not Mr. Robinson's practice to use profanity and he has been observed requesting that others in his presence not do so.

25. Mr. Beach performed private detective services for complainant related to this matter and was not compensated by complainant for such services.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §§230.45(1)(b) and (1)(gm), Stats.
2. The complainant has the burden to show that he was discriminated against or retaliated against as alleged.
3. The complainant has failed to sustain this burden.

#### OPINION

The hearing issues established for this matter are as follows:

1. Whether or not the respondent discriminated against the complainant during the period from September, 1994, through December, 1994, on the grounds of arrest and conviction record if Herb Robinson failed to notify the complainant how and when to apply for the vacancy to be created when Robinson left his position even though Robinson had allegedly told two other people that information.

2. Whether or not the respondent discriminated against the complainant on the grounds of retaliation based either on activities protected under the Fair Employment Act or under the whistleblower law during the period from September, 1994, through December 1994, when Art Besse and Herb Robinson failed to replace complainant's assistant Archie Shaw.

3. Whether or not the respondent discriminated against the complainant on the grounds of arrest and conviction record during the same period as stated above when Art Besse and Herb Robinson allegedly harassed complainant by allegedly contacting his parole agent, Gladys Rozak, telling her complainant was acting strangely, thus motivating Ms. Rozak to make complainant take a urine drug test.

4. Whether or not the respondent retaliated against the complainant for whistleblowing after he wrote November 10, 1994, letter to Steve Kronzer when on or about December 9, 1994, Herb Robinson allegedly threatened complainant by warning him never to write to Mr. Kronzer again. Mr. Robinson is alleged to have stated something to the effect that "If you ever write to Steve Kronzer again I'll put my foot up your ass or choke you, Nathaniel."

5. Whether or not the respondent also discriminated against the complainant for engaging in Fair Employment activities (writing the November 10, 1994, letter mentioned in paragraph 4, above) when Mr. Robinson threatened the complainant on or about December 9, 1994.

#### Arrest/Conviction Record Discrimination

##### Issue 1

Complainant alleges that he was treated differently based on his arrest and conviction record in regard to the information provided to him relating to the filling of the vacant LTE Employment Coordinator position. Complainant has failed, however, to establish a prima facie case of disparate treatment. Although he has shown that he is a member of a protected class based on his conviction record and that an action was taken by his employer to his detriment, i.e., his employer did not take the initiative to provide information to him about how and when to apply for the vacancy, complainant has failed to show that the circumstances present here give rise to an inference of discrimination. The record shows specifically that one of the two people that complainant claims he was treated differently than in this regard, i.e., Walter Beach, also had a conviction record. The necessary conclusion from this is that the employer's action was not based on complainant's conviction record.



If complainant had succeeded in establishing a prima facie case of discrimination, the burden would then shift to respondent to articulate a legitimate, non-discriminatory reason for its actions. Respondent has contended that it did not notify Mr. Jackson or Mr. Beach “how and when to apply for the vacancy,” but rather informed them of the fact that a vacant LTE position existed; and that the existence of this vacant LTE position was common knowledge in the unit where complainant was employed and it was presumed that he was aware of it. This explanation is both legitimate and non-discriminatory on its face.

The burden would then shift to the complainant to show that the explanation offered by respondent was a pretext for discrimination. It is difficult to ascertain from the information provided by the complainant what his contention in this regard is. The record shows that Mr. Robinson did not advise either Mr. Jackson or Mr. Beach how and when to apply for the vacancy but simply advised them that a vacancy existed or was anticipated. These two individuals then took the initiative to determine how and when to apply for the vacancy and did apply. Complainant does not contend that he was not aware of the fact that this vacant LTE position existed, and the record does not reflect that respondent took any action to hide this information from complainant or mislead him in any way in regard to this vacancy. The record also shows that the existence of this vacant LTE position was common knowledge in the unit in which complainant was employed, and it appears from the record that those in the unit presumed that complainant would be aware of it. The different result here, i.e., the fact that Mr. Jackson and Mr. Beach applied for and were considered for the vacancy but complainant was not, appears to result not from any action on the part of respondent but instead from complainant’s failure to take the initiative to determine how and when to apply for the vacancy.

Complainant has failed to show discrimination here.

Issue 3

Complainant alleges that he was harassed due to his conviction record when Mr. Robinson contacted complainant's probation agent in relation to complainant's unauthorized absences. For our purposes here, it will be presumed that complainant established a prima facie case of discrimination. Respondent has contended that this contact was consistent with the rehabilitation component of complainant's position and actually constituted a lenient alternative to initiating discipline against complainant for his violation of respondent's attendance requirements. This explanation is legitimate and non-discriminatory on its face.

Complainant appears to be arguing that the agent's stated displeasure with respondent's failure to fill the other MCSP positions, which was expressed by her during discussions resulting from Mr. Robinson's contact with her, shows that respondent was treating complainant unfairly and demonstrates pretext. However, these seem to be two different matters. The record does not show that the agent perceived complainant's unauthorized absences not to have been a matter of legitimate concern from an employment perspective, or to have been justified in some way by the failure of respondent to have filled these other positions. She obviously took the matter seriously or she would not have ordered a urine test. The record also does not indicate that the contact by respondent with complainant's agent was so unusual under the circumstances present here that it would tend to demonstrate discriminatory animus on respondent's part. The position held by complainant was required to be filled by an *offender* and had a *significant rehabilitation component in addition to the traditional components of an employer-employee relationship*. This not only serves to place the contact with the agent in the proper perspective, but also to explain at least in part respondent's leniency in dealing with complainant's attendance problems. Complainant argues that this contact with the agent jeopardized his probationary status, but the record shows that a single contact such as this with an agent, and even one or two "dirty urines" would generally not serve as the basis for the revocation of probation. *Rather than demonstrating discrimination on the part of respondent, what*

this situation actually tends to show is that respondent was willing to ignore very serious deficiencies in complainant's performance, which, under normal circumstances, would lead to progressive discipline of an employee, in order to assist complainant in his rehabilitation efforts.

Complainant has failed to show discrimination in this regard.

#### Fair Employment Retaliation

Issues of FEA retaliation constitute all or part of Issues 2 and 5. An individual's protection against fair employment retaliation is set forth in §111.322, Stats., as follows:

**111.322 Discriminatory actions prohibited.** Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following: . . .

(2m) To discharge or otherwise discriminated against any individual because of any of the following:

(a) The individual files a complaint or attempts to enforce any right under s. 103.02, 103.10, 103.13, 103.28, 103.32, 103.455, 103.50, 104.12, 109.03 or 109.07 or ss. 101.58 to 101.599 or 103.64 to 103.82.

(b) The individual testifies or assists in any action or proceeding held under to enforce any right under . . .

(c) The individual files a complaint or attempts to enforce a right under s. 66.293 or 103.49 or testifies or assists in any action or proceeding under s. 66.293 or 103.49.

(d) The individual's employer believes that the individual engaged or may engage in any activity described in pars. (a) to (c).

(3) To discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice under this subchapter or because he or she has made a complaint, testified or assisted in any proceeding under this subchapter.

Complainant has offered as his protected fair employment activity the letter he directed to Steve Kronzer (See Finding of Fact 19, above). This letter does not satisfy any of

the requirements of a protected activity under §111.322, Stats., and, as a result, this aspect of complainant's charge must be dismissed.

### Whistleblower Retaliation

Issues of whistleblower retaliation constitute all or part of Issues 2 and 4.

Sections 230.80(2) and (8), Stats., require that, in order to constitute a cognizable act of retaliation, a "disciplinary action" must be taken with respect to an employee 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 employee'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.

Complainant contends that the allegedly retaliatory actions taken against him include the failure to fill Mr. Shaw's position after his termination, and the threat allegedly made to complainant by Mr. Robinson. Neither of these qualifies as a retaliatory action within the meaning of §230.80, Stats. As concluded below, the record does not show that the allegedly harassing remark under consideration here was made and, as a result, it is not necessary to determine whether this remark would constitute an act of verbal harassment within the meaning of the statute,<sup>1</sup> and increased workload due to a vacancy in a subordinate position does not rise to the level of a "penalty" comparable to those cited above.

Even if the actions cited by complainant qualified as "retaliatory actions" within the meaning of the whistleblower law, the record does not support complainant's

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<sup>1</sup> This language has been changed from that in the Proposed Decision and Order to more accurately reflect the basis for the Commission's decision of this matter.

allegation of retaliation here. This is so even if the presumption of retaliation set forth in §230.80(5), Stats., is applied here. Respondent has shown that it made every effort to replace Mr. Shaw after his termination, even offering the position to individuals recommended by complainant, but that its efforts were unsuccessful and their offers were not accepted. Complainant did not successfully rebut this showing. In addition, the record shows that Mr. Robinson did not make the threatening statement complainant alleged he made. The hearing testimony of Mr. Besse, Ms. Ware, and Mr. Robinson to the effect that this statement was not made, was very clear and consistent. In addition, the language of the alleged statement was shown in the record to be inconsistent with the language Mr. Robinson was known to use, and inconsistent with the tolerance shown by Mr. Robinson both before and after the Kronzer letter for complainant's attendance problems and lack of reliability. In contrast, the only testimony to the effect that the statement was made as alleged came from Mr. Beach, whose credibility was weakened by the fact that he was not chosen for the LTE *Employment Coordinator* position to which an acquaintance of Mr. Robinson's was appointed and for which Mr. Robinson served as a member of the interview panel.

Complainant has failed to show that he was retaliated against as alleged.

ORDER


This complaint is dismissed.

Dated: July 2, 1997

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STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
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 judicial 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