

STATE OF WISCONSIN

PERSONNEL COMMISSION

JEFF HOLUBOWICZ
Complainant,

v.

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

DECISION AND ORDER

Case No. 96-0136-PC-ER

Mr. Holubowicz filed a discrimination complaint on October 28, 1996. An Initial Determination was issued on December 12, 1996, which found No Probable Cause to believe that complainant was retaliated against as alleged in the complaint.

A conference was held on December 16, 1996, to finalize the hearing issue and to resolve discovery disputes. The results of the conference were memorialized in a letter ruling dated December 16, 1996. A portion of the ruling was that the hearing would go forward as scheduled for December 19, 1996, but the record could be held open to accommodate certain portions of the ruling on discovery issues. After evidence was taken at hearing, the parties concluded there was no need to hold the record open. The parties requested and were granted an opportunity to file briefs with the final brief received by the Commission on March 6, 1997.

The hearing issue agreed to by the parties is shown below. (*See* letter ruling dated December 16, 1996.)

Is there probable cause to believe that the respondent retaliated against the complainant on the basis of Occupational Safety and Health (OSH) reporting, and/or on the basis of whistleblower activities, and/or on the basis of activities protected under the Fair Employment Act (FEA) in regard to the following actions:

1. Denial on September 30, 1996, of request for position reclassification to Supervising Officer 2, or
2. Requirement to compete and interview for an Industries Supervisor 1 position on October 21, 1996.

FINDINGS OF FACT

1. Complainant is employed by DOC, as an Industries Supervisor 1, in the Bureau of Correctional Enterprises in the Division of Adult Institutions. His immediate supervisor is Chris Faulhaber, Chief of Prison Industries.

2. Complainant has engaged in OSH reporting activities. His evidence of such activities is included in Exh. C-8 (all pages)¹.

3. Complainant has engaged in whistleblower activities. His evidence of such activities is included in Exh. C-7 (all pages)²

4. Complainant has engaged in activities protected under the FEA by filing prior complaints with the Commission.³ Specifically, complainant filed case number 94-0030-PC-ER on March 3, 1994, alleging discrimination based on handicap, as well as retaliation based on participation in FEA and whistleblowing activities. An ID was issued on November 6, 1995, which found no probable cause to believe that the alleged discrimination occurred. Ultimately, the file was closed on November 14, 1996, after a post-hearing decision was issued favorable to respondent.

Reclassification Request

5. On February 21, 1996, complainant sent his supervisor (Faulhaber) a memo requesting reclassification of his position from Industries Supervisor 1, to Supervising Officer 2 (Exh. C-4). An updated statement of his position description (PD) was attached to the request. Mr. Faulhaber did not reply to the request within 30 days so complainant submitted the request to DOC's Bureau of Personnel by memo dated April 5, 1996 (Exh. C-4A). The Bureau of Personnel received his request on April 8, 1996 (Exh. C-2). The PD ultimately used for this reclassification request is in

¹ Exh. C-8 consists of various documents relating to complainant's OSH reporting. These exhibits were admitted based on the parties' stipulation (applicable to this hearing only) that such documents would be used to establish the dates of complainant's participation in the protected activities, as well as the date(s) upon which various DOC employees became aware of the protected activity.

² Exh. C-7 consists of various documents relating to complainant's whistleblower activities. These exhibits were admitted based on the parties' stipulation (applicable to this hearing only) that such documents would be used to establish the dates of complainant's participation in the protected activities, as well as the date(s) upon which various DOC employees became aware of the protected activity.

³ For purposes of this hearing, the parties stipulated that complainant's protected FEA activity included case number 94-0030-PC-ER.

the record as Exh. C4-X through C4-AF (also Exh. R-8), although at the time the PD was submitted it was not signed yet by Roberta Miller, as Personnel Manager.⁴

6. Sanger Powers, Jr. has headed the classification and compensation unit in DOC's personnel office since February 1991. He assigned one of his subordinates, Alison Scherer, to review complainant's reclassification request. He chose her for this assignment because although she was an experienced classification analyst she was new to DOC and did not know complainant. Mr. Powers felt a review by someone unfamiliar with complainant would produce the most impartial recommendation.

7. Ms. Scherer reviewed the materials submitted by complainant with his reclassification request, his official PD, the PD submitted for the reclassification request, the classification specifications (Class Spec) for Supervising Officer 2 (Exh. R-11 dated April 1990) and for Industries Supervisor 1 (Exh. R-9 dated July 21, 1996), as well as the PDs of other Supervisor Officer 2 positions. She performed an onsite audit of his position and spoke with complainant's supervisor to obtain clarifying information. She drafted her analysis which contained a recommendation that the reclassification request be denied. Her supervisor (Mr. Powers) reviewed the draft and agreed with the analysis and recommendation. The analysis was then forwarded to Hamdy Ezalarab in the form of a letter denying the reclassification request. Mr. Ezalarab was the Director of DOC's personnel office and he signed the denial letter under the date of September 30, 1996 (Exh. R-1).

8. Ms. Scherer was unaware prior to September 30, 1996, that complainant had participated in any activity protected under the FEA, or in any OSH reporting, or in any whistleblower activities.⁵ Mr. Powers was aware of the protected participation in FEA, OSH and whistleblower activities prior to receiving complainant's reclassification request. Complainant failed to establish that Mr. Ezalarab had prior knowledge about any of complainant's protected activities.

9. Ms. Scherer's classification analysis contains a description of complainant's position and its evolution (Exh. R-1, p. 1-2). The majority of his job duties were summarized accurately as shown below:

The primary job duties and responsibilities described in your July 2, 1996 (PD), which comprise 55% of the position's time, are developing,

⁴ Paragraph 5 of the Findings of Fact was amended to note Ms. Miller's signing capacity.

⁵ Complainant contends in his brief dated January 23, 1997 (p. 3, last paragraph), that Ms. Scherer testified she was aware of complainant's protected activities. However, she clearly testified she was unaware of the same prior to the reclassification decision. If complainant meant to suggest she testified to the contrary, he is mistaken.

implementing, and maintaining a transportation and storage program for statewide distribution of products and raw materials within the prison system and managing the Distribution Center and associated warehouse operations. In addition, your position supervises eight Industries Specialist positions. These duties and position responsibilities have not changed significantly from those on the November 17, 1991 (PD) in place when your position was last formally classified and you were appointed to it. The November 17, 1991 (PD) indicated that the position spent 70% of its time managing transportation and distribution center operations.

10. Ms. Scherer's analysis contains the following explanation for denying the reclassification request (Exh. R-1, p. 3-4):

The class specification for the Supervising Officer 2 class states:

This is responsible supervisory work as the supervisor of a correctional farm or center, or the assistant superintendent of a correctional center. Employees in this class are responsible for the supervision of the provision of security for inmates, staff and the public within a secure adult facility or for planning, directing and organizing a total correctional farm operation. Work is performed in accordance with established rules, regulations and policies under the general direction of a higher level security or management position.

Examples of work performed: Direct, supervise and review work of all correctional officers assigned to a shift, correctional center, farm or University of Wisconsin Hospital Security Unit; schedule all officers and insure that all posts are properly manned; make regular inspection tours of inmate dormitories, cell halls, buildings and grounds; act as chief security officer of the institution during evening hours and in the absence of the Security Director or designee; implement policies and procedures and interpret them to lower level officers and inmates; plan, direct and organize a total farm operation. . . .

According to the most recent PD submitted . . . your position does not meet any of the allocations identified within the class specification for the Supervising Officer 2 level. The position . . . does not supervise the provision of security for inmates, staff and the public within a secure adult facility, nor does the position direct and organize a total correctional farm operation. In addition, the position does not have responsibility to supervise and review the work of correctional officers assigned to a shift, correctional center, farm or University of Wisconsin Hospital Security Unit.

11. Complainant's request for reclassification was denied because respondent reasonably determined that his position did not meet the requirements stated in the Supervising Officer 2 Class Spec.

Interview Requirement

12. Complainant applied for promotion to the position of Industries Supervisor 2 - Metal Stamping on July 8, 1996. (Exh. C-3A-3B) He received notice of his examination results dated September 6, 1996 (Exh. C3J), and his name was included on the certification list of candidates eligible for interview. The certification list was dated September 6, 1996 (Exh. C17). Prior to September 6, 1996, the vacant position was reallocated to the lower Industries Supervisor 1 level pursuant to a survey and resulting new Class Spec effective July 21, 1996. The timing of this change is evidenced by the fact that the position classification noted on the certification list is "Industries Supv. 1 - Metal Stamping."

13. By letter dated October 14, 1996, respondent invited complainant to interview for the position on October 21, 1996 (Exh. C3). This invitation was extended due to the inclusion of his name on the certification list.

14. Literally just minutes before complainant's interview commenced on October 21, 1996, complainant spoke with his supervisor, Mr. Faulhaber. For the first time, complainant requested an opportunity to transfer to the vacant position without having to go through the interview process. Mr. Faulhaber indicated the interviews would go forward since "we're all here" and since Mr. Faulhaber did not know whether complainant was entitled to have his request granted under the particular circumstances of this hire. Complainant contends Mr. Faulhaber's decision to go forward with the interview was made in retaliation for complainant's participation in OSH reporting, FEA-protected activities, and whistleblower activities. Mr. Faulhaber was aware prior to the interview that complainant had engaged in OSH reporting activities and had made a whistleblower disclosure. Complainant failed to show that Mr. Faulhaber was aware of complainant's participation in activities protected under the FEA prior to complainant's interview.⁶

15. Respondent has written procedures which address when an employe may be considered for transfer without having to interview. Specifically, respondent's

⁶ At hearing, Mr. Faulhaber could not say whether he was aware prior to October 21, 1996, that complainant had filed a complaint in case number 94-0030-PC-ER. He indicated that if someone could tell him what that case was about, he could provide a better answer. Neither

Supervisor's Manual Chapter 301 (Exh. C-11) contains the following information on page 12-15 (emphasis shown is same as in the original):

VI. NON-CONTRACTUAL TRANSFER, REINSTATEMENT, OR VOLUNTARY DEMOTION.

STEPS TO BE FOLLOWED BEFORE FILLING NON-REPRESENTED POSITIONS FROM A CERTIFICATION LIST:

STEP 1: TRANSFER OR DEMOTION WITHIN THE EMPLOYING UNIT

For non-represented vacant positions, an appointing authority may fill the vacancy by transfer or demotion. At this step the option must initially be limited to represented or non-represented employees within the employing unit.

Use of the word "may" above means that it is up to the appointing authority's discretion to require an interview for transfer/demotion applicants. In other words, the appointing authority is not required to consider transfer/demotion applicants for a vacant position without an interview. The manual goes on to state that if "the appointing authority does not fill the position by transfer or demotion from within the employing unit" that other categories of employees may be considered. It is undisputed that complainant's situation would be covered by "STEP 1" above.

16. The practice of the Bureau of Correctional Enterprises (where the vacancy existed) is to require interviews for all candidates if a certification list exists, meaning that all certified candidates as well as all transfer/demotion candidates must be evaluated through the interview process. (Exh. C-10 A, as verified by Steve Kronzer testimony.)

17. Complainant cited a situation involving Donald England as evidence that individuals who were not known to engage in protected activities were treated better by respondent. Mr. England was a supervisor for respondent's Badger State Industries in a position which required travel. He had a health condition which made the required degree of travel difficult. He became aware of a new (vacant) position created within the same unit for work in the textile operation at the Green Bay Correctional Institution (GBCI). The new position would not require as much travel, so he requested an opportunity to demote to the new position.

the complaint filed nor the decision issued in the 1994 case were hearing exhibits. Neither party attempted to provide clarification for the witness.

18. Mr. England's position and the new (demotion) position were both supervised by Mr. Faulhaber (who also supervised complainant's position). Mr. Faulhaber discussed Mr. England's demotion request with Steve Kronzer, Director of the Bureau of Correctional Enterprises. Mr. Kronzer recommended that Mr. England's demotion request be granted due to Mr. England's medical restrictions on travel. The request was granted after respondent had announced the position for recruitment but prior to the creation of any certification list.

CONCLUSIONS OF LAW

1. (Based on the parties' stipulation pertinent to the probable cause hearing) complainant participated in activities which support the filing of a complaint on the basis of Occupational Safety and Health (OSH) reporting, pursuant to §101.055, Stats.

2. (Based on the parties' stipulation pertinent to the probable cause hearing) complainant participated in activities which support the filing of a complaint alleging a violation of the whistleblower law, pursuant to §230.80, et. seq., Stats.

3. (Based on the parties' stipulation pertinent to the probable cause hearing) complainant participated in activities protected under the Fair Employment Act which support the filing of a complaint alleging that he was retaliated against for engaging in those activities, pursuant to §111.322 (3), Stats.

4. It is complainant's burden to show that probable cause exists to believe that respondent violated his rights under the OSH reporting statute, under the whistleblower law, and/or under the Fair Employment Act.

5. Complainant failed to meet his burden in regard to any of the allegations raised in his complaint.

OPINION

This decision is issued pursuant to a probable cause hearing. As such, complainant has the burden to show that probable cause exists to believe the allegations raised in his complaint. "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. §PC 1.02 (16), Wis. Adm. Code.

The analytical framework applied in cases of discrimination and retaliation was discussed in *McDonald Douglas Corp. v. Green*, 411 U.S. 729, 93 S.Ct. 1817 (1973). This framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by

articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination or retaliation.

Generally speaking, in order to establish a prima facie case of retaliation complainant must establish the following three elements: 1) that he engaged in a protected activity, 2) that the employer subsequently took an adverse action against him and 3) that a causal link exists between the first two elements. *Acharya v. Carroll*, 152 Wis. 2d 330, 340, 448 N.W.2d 275 (Ct. App., 1989)

Complainant established the first element of his case by the parties' stipulation that he engaged in activities protected under the OSH reporting statute, under the whistleblower statute and under the FEA. He also established the second element by alleging the adverse actions⁷ of denying his reclassification request and of requiring him to interview for the Industries Supervisor 1 position.

Reclassification Denial - Remaining Legal Analysis

The potential retaliators in the reclassification denial include Alison Scherer, Hamdy Ezalarab and Sanger Powers, Jr. There is no indication in the record that Ms. Scherer was aware prior to the denial that complainant engaged in any protected activities and, in fact, she credibly denied such knowledge at hearing. There is no indication in the record that Mr. Ezalarab was aware that complainant engaged in any protected activities, nor was Mr. Ezalarab called as a hearing witness. Accordingly, complainant failed to establish that the roles played by Ms. Scherer or by Mr. Ezalarab in the reclassification denial were related to his participation in protected activities. Mr. Powers was aware of complainant's protected OSH reporting activities, FEA activities and whistleblower activities prior to the denial of the reclassification request. The Commission finds that complainant has established the third (and final) element of his prima facie case in relation to Mr. Powers' role in denying the reclassification request.

Respondent presented a nondiscriminatory reason for denying the reclassification request. Specifically, respondent contends the reclassification request was denied because the duties of complainant's position did not meet the requirements of the higher classification. Complainant disagreed with respondent's conclusion on

⁷ Based on the parties' stipulation the Commission does not consider or resolve in this decision whether the reclassification denial or the requirement to interview would meet the definition of disciplinary action under §230.80 (2), Stats.

the reclassification decision⁸, but he did not show that respondent's stated reason was a pretext for discrimination. For example, he did not show that respondent's decision was unreasonable or that respondent applied the Class Spec requirements more stringently for him than for employees who had not engaged in protected activities.

Interview Requirement - Remaining Legal Analysis

The alleged retaliator in the decision to require complainant to undergo an interview in October 1996, was Chris Faulhaber. Prior to complainant's interview, Mr. Faulhaber was aware of complainant's participation in activities protected under the OSH reporting statute and under the whistleblower statute. However, the record is insufficient to establish that Mr. Faulhaber was aware of complainant's participation in activities protected under the Fair Employment Act. Accordingly, complainant established the third element of his prima facie case regarding OSH reporting and whistleblower activities, but not as to his participation in activities protected under the FEA.

Respondent explained that complainant was required to participate in the interview process due to the following non-discriminatory reasons: a) complainant was ineligible to request hiring consideration without an interview at the time he applied for the job as a promotion, b) the earliest date complainant was eligible to request transfer consideration without an interview would have been when the vacant position's classification was lowered pursuant to the reallocation transaction, c) complainant did not request an opportunity for transfer consideration without an interview until minutes before his interview began at which time Mr. Faulhaber was unaware of the correct procedure to follow, and d) as it turns out, Mr. Faulhaber's decision to go forward with complainant's interview was consistent with respondent's practice of requiring all candidates to go through the interview process if a certification list had been generated.

Complainant argued that respondent's above-noted reasons are pretext on the grounds that the certification list was not generated until September 1996, and complainant's right to request consideration without an interview arose in July 1996, the effective date of the reallocation decision which lowered the classification of the position. The major problems with this argument are: a) the record does not indicate that the alleged retaliator knew the position's classification was lowered prior to the

⁸ Complainant filed a separate case under Ch. 230, Stats., regarding the correctness of respondent's decision to deny his reclassification request (case number 96-0130-PC). This note is amended to reflect that the Commission dismissed case number 96-0130-PC on respondents'

date the certification list was generated, b) respondent had posted the position for transfer prior to accepting applications for competition and the record does not indicate that respondent would have had an obligation to post the position for transfer a second time, and c) complainant waited until minutes before his interview started before requesting an opportunity to transfer without an interview.

Complainant contended that respondent's above-noted reasons were a pretext for discrimination. He points to Mr. England's situation as support for his contention. Mr. England's situation, however, was significantly different. A certification list had not been generated when Mr. England was allowed to demote to the new position. Further, Mr. England's request was based on health concerns and resulting medical restrictions on travel. Respondent, accordingly, had legal obligations to consider Mr. England's request pursuant to §§111.34 and 230.37(2), Stats. Similar legal considerations did not exist in complainant's situation.

Complainant's Request to Disregard Respondent's Post-Hearing Brief

Complainant requested (on p. 2 of written arguments dated March 6, 1997), that the Commission disregard respondent's post-hearing brief "on the grounds that the brief was untimely filed and is improperly captioned to the case number." Details of his request are shown below:

I was required to file my brief by 1-27-97 as the record of hearing shows. The respondent had thirty days to file their brief. On 2-28-97 I received a fax transmission (Exhibit A) that was for "cases nos. 94-0030-PC-ER" and I received a mailed copy at my home address on 3-3-96 of this same document. This fax receipt is beyond the 30 days and this case number has nothing to do with case #96-0136-PC at issue.

Therefore, I request that the Personnel Commission rule to disallow use of respondent's brief and use the record and complainant brief to form its decision and order.

The hearing examiner read each party's brief on or near the date it was received by the Commission. Accordingly, if complainant's request was for the purpose of having the examiner issue a decision without first reading respondent's brief, the request came too late. The examiner further notes that the due dates of all briefs were to be measured by postmark date, not by actual date of receipt. The due date for respondent's brief was February 27, 1997, leaving the examiner to conclude that complainant's receipt on the

motion for summary judgment on 2/12/97, and denied Mr. Holubowicz' petition for rehearing on 3/12/97.

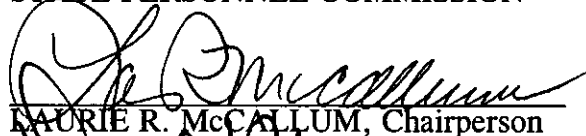
following day was not later than envisioned by measuring due dates by postmark. Further, neither the date of receipt nor the incorrect captioning impaired complainant's ability to meet his timetable for filing a response. In fact, complainant's response was filed before his due date.

ORDER

That respondent's actions are affirmed and this case is dismissed.

Dated: April 24, 1997.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

JMR
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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