

STATE OF WISCONSIN

PERSONNEL COMMISSION

HOWARD M. SLOAN,
Complainant,

v.

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

RULING

Case Nos. 98-0107, 0117, 0150-PC-ER

These cases are before the Commission to determine whether they should be dismissed due to complainant's failure to prosecute. Both parties were provided an opportunity to file written arguments, with the briefing schedule ending on November 27, 1998. The facts recited below are made to resolve the present ruling and are undisputed by the parties.

FINDINGS OF FACT

1. The complaint in case number 98-0107-PC-ER (hereafter, the First Case) was filed with the Commission on May 28, 1998, and relates to a ten-day suspension in August 1997. Complainant alleged in this complaint that imposition of the suspension constituted age and sex discrimination in violation of §111.321, Stats.; retaliation for participating in activities protected under the Fair Employment Act (FEA) in violation of §111.322(2m), Stats.; retaliation for participating in activities protected under the Occupational Safety and Health (OSH) Act in violation of §101.055(8), Stats.; and retaliation for participating in activities protected under the Whistleblower Act in violation of §230.83, Stats.

2. The complaint in case number 98-0117-PC-ER (hereafter, the Second Case) was filed with the Commission on June 15, 1998, and relates to a letter respondent sent him on April 8, 1998. The nature of respondent's letter is difficult to summarize and, accordingly, the text is shown below:

Several staff at this institution have attempted on numerous occasions during the past year and before to contact you for a variety of business reasons (work

location site, set up training, set up investigatory meeting, deliver disciplinary letter, overtime, etc.), and they were unable to do so. We have tried in good faith to contact you using current means, but the P. O. Box and beeper number are not adequate. Even the certified mail we send to you is not picked up, and thus it is returned to us.

As an employer, it is imperative that we be able to contact you or any of our employees in case of an emergency or to provide basic job instructions. Because you are in a vigil officer position which can work at either OCI job site, it is even more critical that we are able to contact you quickly to inform you which job site to report to. This is a written directive that you provide me with your current home address and zip code by April 30, 1998. You are also directed to give us a telephone number (not a beeper #) where we can reach you. Pursuant to OCI Policy and Procedure 320.03, we will need this telephone number by April 30, 1998.

Complainant alleged in this complaint that respondent's April 8, 1998 letter constituted age, race, creed, sex and sexual orientation discrimination in violation of §111.321, Stats.; retaliation for participating in activities protected under the FEA in violation of §111.322(2m), Stats.; retaliation for participating in activities protected under the OSH in violation of §101.055(8), Stats.; and retaliation for participating in activities protected under the Whistleblower Act in violation of §230.83, Stats.

3. The Commission sent complainant a letter dated June 16, 1998, concerning the First Case. The letter text is shown below in pertinent part:

I spoke to you on June 2, 1998 and explained that there might be problems with the timeliness of your complaint . . . In a letter dated June 4, 1998, you were notified of a conference call to address the occupational safety and health (OSHA) basis of your complaint. At the scheduled time . . . you were unavailable for the conference call and I left a message on your answering machine. You did not get back to me. On June 12th, I left another message on your answering service, requesting you to return my call immediately because there was urgency about the OSHA basis of your complaint. To date, I have not heard from you.

Based on your failure to respond, I assume that you do not wish to pursue this case. If this assumption is incorrect, then you must indicate in writing a) your desire to continue with the case and b) respond to the following questions, all by June 26, 1998.

- 1) Describe your occupational safety and health reporting activities that serve as the basis for this claim.
- 2) On what date did you make your occupational safety and health report and to whom did you provide the report?

If you do not respond as noted by June 26th, I will recommend that your case . . .
. be dismissed at an upcoming Personnel Commission meeting.

4. The Commission sent complainant a separate letter on June 16, 1998, concerning the Second Case, to schedule a telephone conference on June 24, 1998, at 1:00 p.m. He did not appear for the conference call.

5. Complainant contacted the Commission by telephone on June 26, 1998. The Commission followed-up with a letter dated July 2, 1998, which pertained to the First and Second Cases. The text of this letter is shown below in relevant part.

In a telephone conversation on June 26, 1998, you indicated that you missed your two scheduled conference calls because you had been out of town and just . . . received your correspondence in these cases. You agreed to waive the time . . . lines for processing the occupational safety and health reporting (OSHR) basis for your complaints. In a separate telephone conversation on June 29, 1998, . . . DOC's attorney, David Whitcomb, also agreed to waive the OSHR time limits. . . . Enclosed is an agreement to waive the time lines. Sign and return it immediately.

In addition, you need to supply additional information before the Commission can take further steps to investigate your claim . . . Respond completely to the following questions/requests . . . by August 3, 1998 . . .

Case No. 98-0107-PC-ER (First Case)

1. Describe your occupational safety and health reporting activities that serve as the basis for this claim. On what date did you make your occupational safety and health report and to whom did you provide the report. Provide a copy of the report.
2. You included whistleblower retaliation as a basis for your complaint. What did you do that you believe is protected against retaliation based on whistleblowing? If you made a disclosure, when and to whom did you make your disclosure? What information did you disclose? Provide a copy of your disclosure . . .

3. You included fair employment retaliation as a basis for your complaint. For your information, fair employment retaliation refers to discriminating against an employee because he or she opposed any discriminatory practice or because he or she made a complaint under the Fair Employment Act (FEA) . . . What fair employment activity did you engage in that you believe is protected . . . and when did this occur?
4. You included "Age" discrimination as a basis for your complaint. Why do you believe that respondent gave you the 10 day suspension because of your age?
5. You included "Sex" discrimination as a basis for your complaint. Why do you believe respondent gave you the 10 day suspension because of your sex?
6. Provide a copy of your 10 day suspension letter.

Case No. 98-0117-PC-ER (Second Case)

1. Describe your occupational safety and health reporting activities that serve as the basis for this claim. On what date did you make your occupational safety and health report and to whom did you provide the report? Provide a copy of the report.
2. You included whistleblower retaliation as a basis for your complaint. What did you do that you believe is protected against retaliation based on whistleblowing? If you made a disclosure, when and to whom did you make your disclosure? What information did you disclose? Provide a copy of your disclosure.
3. You included fair employment retaliation as a basis for your complaint. What fair employment activity did you engage in that you believe is protected against retaliation and when did this occur?
4. You included "Age" discrimination as a basis for your complaint. Why do you believe that respondent issued you the April 8, 1998 letter because of your age?
5. You included "Sex" discrimination as a basis for your complaint. Why do you believe that respondent issued you the April 8, 1998 letter because of your sex?
6. You included "Creed" discrimination as a basis for your complaint. What is your creed? Why do you believe that respondent issued you the April 8, 1998 letter because of creed?
7. You included "Sexual Orientation" discrimination as a basis for your complaint. What is your sexual orientation? Why do you believe that respondent issued you the April 8, 1998 letter because of your sexual orientation?

Failure to answer a Commission request for information may result in the imposition of the sanctions (penalties) set forth in §PC 2.05(4)(b), Wis. Adm. Code:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing . . .

6. Complainant did not respond to the letter described in the prior paragraph. On August 7, 1998, the Commission sent him a letter by certified mail. The letter pertained to the First and Second Cases, and stated in relevant part as noted below (with the same emphasis shown as in the original letter):

The Personnel Commission previously wrote to you on July 2, 1998 and asked you to sign and return an agreement to waive the time lines and to provide information regarding the above discrimination/retaliation complaints. To date, we have received no response.

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence dated July 2, 1998. Your response must be **received** by the Commission with 20 calendar days of the date of this certified letter. If you do not file your response with the Commission within the 20 day time period (**by August 27, 1998**), I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person . . .

If you have any questions, please feel free to call me.

7. The complaint in case number 98-0150-PC-ER (hereafter, the Third Case) was filed with the Commission on August 7, 1998, and relates to a ten-day suspension imposed on a date not specified by complainant. Complainant alleged in this complaint that imposition of the suspension constituted sex and sexual orientation discrimination in violation of §111.321, Stats.; as well as retaliation for participating in activities protected under the Whistleblower Act in violation of §230.83, Stats.

8. On August 11, 1998, the Commission sent complainant an acknowledgement letter concerning the Third Case. The letter included the following questions for complainant to answer by September 14, 1998:

1. When did Catherine Farrey give you "10 days off and a direct order not to discuss the issues further?" Provide a copy of any related documents.
2. Is this "10 days off" different from the 10 day suspension you refer to in (the First Case)?
3. To whom are you referring when you say:
 - a. "so-called accusers," and
 - b. "lobbied the employees at the worksite?"
4. You included "Sex" discrimination as a basis for your complaint. Why do you believe that the adverse incidents you identify are attributable to your sex?
5. You included "Sexual Orientation" discrimination as a basis for your complaint. Why do you believe that the adverse incidents you identify are attributable to your sexual orientation?
6. You included whistleblower retaliation as a basis for your complaint. What did you do that you believe is protected against retaliation based on whistleblowing? If you made a disclosure, when and to whom did you make your disclosure? What information did you disclose? Provide a copy of your disclosure . . .

Failure to answer a Commission request for information may result in the imposition of the sanctions (penalties) set forth in §PC2.05 (4)(b), Wis. Adm. Code:

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing . . .

If you have any questions about this letter, contact me at (608) 266-1995.

9. The Commission received three letters from complainant on August 27, 1998. One letter was undated and referenced case number 98-0117-PC-ER (the Second Case). The other two letters were dated August 25, 1998, and stated that they were written in response to the Commission's letter dated August 7, 1998, but failed to reference any case number. Included with one of the letters was complainant's signature waiving the time limits for the

OSH portion of his complaints. Also included with one of the letters was a copy of a 10-day suspension letter dated 8/6/97, which states that the suspension was imposed for intimidating and threatening behavior on complainant's part and for failing to be truthful during an investigation.

10. Collectively, the three letters from complainant (referenced in the prior paragraph) were confusing. There is no information in any of the letters as to why he believed discrimination occurred on the bases of **age, sexual orientation or creed**. Trying to piece the information provided in the letters, it appears to the Commission that he provided information relating to the **OSH Retaliation claim¹**, the **Whistleblower claim²**,

¹ It appears that the basis of the **OSH Retaliation claim** is two union grievances attached to complainant's undated letter which referenced case #98-0117-PC-ER; as summarized below:

- 11/28/97 grievance filed by complainant regarding an alleged lack of staff training to use lifesaving devices called Scott Air Packs.
- 10/24/96 grievance filed by complainant on the union's behalf regarding respondent's alleged failure to relieve staff from work to obtain (apparently required) hepatitis vaccinations.

² It appears that the basis of the **Whistleblower claim** includes the following:

- In 1997, complainant as a union steward, assisted Sergeants Lambeau and Stacy in filing "complaints" that personnel manager Dennis Feggstad had made direct inquires of the Sergeants' physicians without contacting the Sergeants beforehand which complainant viewed as an "intrusion" into the Sergeants' personal medical histories. (This information was provided in the letter dated 8/25/98, which did not reference a case number.) **Complainant did not provide a copy of the "complaints," as had been requested in the July 2nd letter.**
- On September 15, 1996, complainant filed a grievance (copy of first page but not of the additional page(s) was attached to the undated letter which referenced case number 98-0117-PC-ER) alleging an illegal activity. Specifically, complainant alleged that on 8/29/96, Captain James Spoerl directed complainant to use Captain Spoerl's wording on a "legal document" (a conduct report) and further directed complainant to sign the document.

the **FEA retaliation claim**³ and the **sex discrimination claim**⁴.

11. The Commission wrote to complainant on September 1, 1998, concerning the First and Second Cases. The text of the letter is shown below with emphasis the same as in the original document.

I have received three submissions from you . . . in response to my letter dated August 7, 1998. Two out of three of your letters did not refer to a case number. All in all, your submissions did not appear to respond to my questions.

I renew my request that you answer my letter dated July 2, 1998 (copy enclosed). The easiest way to provide responsive answers is to note question 1 and write your answer, then note question 2 and write your answer and follow this pattern for each and every question and each case number. Number any attachments and refer to them by number in the body of your letter.

I have enclosed the face sheets (of the two letters dated August 25th). I do not know to which cases these correspond. Please note the case number on each sheet and return them to me.

³ It appears that the basis of the **FEA retaliation claim** was assistance he provided another employe in filing a "complaint" about Captain LaLiberte, as noted below (described in the text and some of the attachments to the undated letter which referenced case #98-0117-PC-ER):

- On 9/20/95, complainant acting as a union representative for Paul Wright, filed a grievance which referenced the FEA. The stated concern was that Captain LaLiberte allegedly preached his own religious views to staff and inmates and, on one occasion, made disparaging remarks about Officer Stephenson's religious beliefs.
- On 11/30/95, there was another grievance filed concerning the same topic. There is no indication from the document, however, that complainant was involved.

⁴ It appears that the basis of the **sex discrimination claim** is conversations which complainant had with Trish Carlson (as described in the dated letter without a reference to a case number) in which he declined to answer her questions about his dating availability and the dating availability of other staff. Complainant contends Ms. Carlson was angry because he would not answer her questions. He apparently believes her anger formed the basis for her "lies about me" in an investigation. This is the same investigation, which lead to complainant's 10-day suspension.

Your answers to my July 2nd letter and request in paragraph 3 of this letter are due at the Personnel Commission no later than *September 14, 1998*. In light of the fact that you provided unresponsive answers to my letter of August 7th, again, I will recommend that your case be dismissed for lack of prosecution if your response continues to be unresponsive and is not received by September 14th.

Please call me if you have any questions.

12. Complainant filed a response to the September 1st letter (see prior paragraph) on September 14, 1998, with his answers to the questions posed in the July 2nd letter (regarding the First and Second Cases – see ¶5 above). His response also included answers to the August 11, 1998 (regarding the Third Case – see ¶8 above). His response is summarized below.

As to the First Case, complainant appeared to confirm that his OSH Retaliation claim was as noted in footnote #1. He said his involvement with Captain LaLiberte's alleged "religious preaching" formed the basis for his whistleblower claim (which was different from the Commission's impression – see footnote 2). He said the FEA retaliation claim was based on his same involvement with Captain LaLiberte, as well as his role in helping Sgts. Lambeau and Stacy voice concerns about perceived intrusion into their medical histories (which was different from the Commission's impression – see footnotes 2 and 3). Complainant stated that he felt age discrimination occurred on the part of Catherine Farrey. He also indicated that his claim of sex discrimination was based on "the information I provided to you on August 25, 1998" and on the "LaLiberte incident provided to you today, under case no. 98-0150-PC-ER." He still did not include a copy of the medical-intrusion complaints.

As to the Second Case, complainant said the protected OSH activity was the "same as cited under 98-1150-PC-ER (sic)." This reply makes no sense because the Third Case does not involve a claim of OSH Retaliation. In response to the questions about the bases for his whistleblower, FEA retaliation, age and sex claims, complainant responded: "See my letter to you of August 25, 1998 and #'s 6 under 98-1150-PC-ER and #'s 2 and 3 under 98-0107-PC-ER." The response makes no sense as none of the August 25th letters reference those case numbers and none of the letters have numbered paragraphs. In response to the question about the basis for his creed claim, complainant responded: "This is referred to in my letter to you of August 25, 1998. The question is not so much, what is my creed, but rather that I believe the parties, here principally Catherine Farrey, Dave Lemke, Tom LaLiberte and Dennis Feggestad believe my creed to be different from theirs and their behavior in the investigations is

retaliatory for my attempts to point out their harassment of employees and inmates in issues related to religion and creed.” In response to the question about the basis for his sexual orientation claim, complainant referenced the “incidences of Tricia Carlson and Cathy Smith and their questions about my personal habits and also the behavior of Tom LaLiberte.” He had not explained up to this point in time any such conversations with Cathy Smith. The reference to Tom LaLiberte is explained below.

As to the Third Case, complainant said the 10-day suspension was imposed in April 1998, yet he provided no documentation to support this date. He identified the “so-called accusers” and the employees who “lobbied” at the work site. Complainant indicated that his claim of sex discrimination was based on Cathy Smith and Tricia Carlson asking complainant about his dating habits, without any mention of a claimed role by Tom LaLiberte (which is inconsistent with his answers regarding the Second Case). Complainant responded as follows in regard to the basis for his sexual orientation claim: “I believe that events in early 1998 point up to this. I was standing in the control area waiting to be relieved to go home. Another employee walked up to me and said, before you go home how about a little of this. After his comment, he made a whistling noise, closed his fists and made a pulling action on both sides of his hips. I took this to be some type of sexual innuendo. Captain Tom LaLiberte was standing in the area checking out other employees and gave what I would call a hearty laugh. I believed this to be concurrence with this suggestive act and I believe that LaLiberte believes me to be gay.” In response to the basis for his whistleblower claim complainant referenced his discussion with Paul Wright, an apparent reference to the 9/20/95 matter noted in footnote 3.

13. The Commission sent complainant a letter on September 18, 1998, regarding all three cases. The letter first summarized the investigative procedures followed by the Commission and noted that “we are still at the second step with your case; i.e., attempting to clarify your complaints.” The letter went on to summarize the investigator’s understanding of the allegations raised in each of the three complaints and asked complainant to confirm whether the investigator’s summary of each case was correct. The investigator also requested in regard to the Third Case a copy of the suspension letter. The investigator noted that complainant’s response was due by October 1, 1998.

14. The Commission received a letter from complainant on October 1, 1998, which contained no reference to any case number. The letter failed to indicate whether the investigator’s summary of each of the three cases was correct. Complainant’s letter further

failed to include a copy of the suspension letter requested in connection with the Third Case. Instead, complainant provided information (some appeared to be newly-raised allegations) without reference to any particular case number. Nor was it apparent from the information complainant provided whether he agreed or disagreed with the investigator's summary of each case.

15. The Commission sent complainant a certified letter on October 21, 1998, pertaining to all three cases. The letter text is shown below in pertinent part.

The Personnel Commission previously wrote to you on September 18, 1998 and asked you four questions regarding the above discrimination/retaliation complaints. To date, you have not responded to these questions (your letter dated October 1, 1998 did not answer the four questions).

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence. Your response must be received by the Commission within 20 calendar days of the date of this certified letter. If you fail to respond within the 20 day time period, I will recommend that your case be dismissed for lack of prosecution . . .

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

16. The 20-day deadline expired on November 10, 1998, without the Commission receiving any contact from complainant.

17. The next letter Complainant sent the Commission was dated and received on November 11, 1998. In this letter, complainant stated his agreement with the investigator's understanding of the allegations raised in each of the three complaints. He also provided a copy of the 10-day suspension letter dated August 6, 1997 (related to the First Case). He has never provided a copy of the April 1998 disciplinary letter, which was the alleged subject of the Third Case. He never provided a copy of the "complaints" about perceived management

intrusion into some employee's medical history. Complainant raised new allegations in the letter including additional bases for his OSH Retaliation claim, as noted below:

- On 10/16/95, I filed an abnormally hazardous task report about an inmate placing bodily fluids into mail being sent out of the institution. In management's resolution response, they said, "Management will strongly encourage use of gloves."
- On 2/28/96, I filed a grievance about the refusal of security director Dave Lemke's refusal to stock the housing units with latex gloves. Many employees complained that these were wholly lacking and that there was no back up supply . . .
- In another situation, a nurse at OCI approached me about a situation. I was supportive of her writing an incident report and making the issue known for resolution. In the type of incident area on the form, she checked other and qualified this by adding, "Putting inmates' health in jeopardy and refusal to obey doctor's orders per RN while on call" . . .

18. The Commission wrote to complainant on November 11, 1998, pointing out that his letter of November 11, 1998 was filed late. He was provided a period of 15 days to file written arguments as to why his complaint should not be dismissed for lack of prosecution, followed by a 7-day period for respondent to file a written response. The complainant filed written arguments that the Commission received on November 19, 1998, by letter of the same date. Respondent did not file written arguments.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over these cases pursuant to §§230.45(1)(b), (g) and (gm) Stats.
2. It is complainant's burden to show that his complaints should not be dismissed for lack of prosecution.
3. Complainant failed to meet his burden with respect to all allegations arising under the FEA in case numbers 98-0107-PC-ER, 98-0117-PC-ER and 98-0150-PC-ER.
4. Complainant failed to meet his burden with respect to all allegations raised in case number 98-0150-PC-ER.

5. Complainant met his burden with respect to the OSH and whistleblower retaliation claims in case numbers 98-0107-PC-ER and 98-0117-PC-ER, however he failed to establish that no sanction should be imposed with regard to these claims.

OPINION

Complainant first contends that the 20-day period for his response to the Commission's letter dated October 21, 1998, should commence with the day he received the certified letter and not with the date of the Commission's letter. This argument has been considered and rejected by the Commission in prior cases. *King v. DHSS*, 88-0007-PC-ER, 5/29/91; *Block v. UW-Madison Extension*, 88-0052-PC-ER, 7/14/89; and *Jackson v. DHSS*, 87-0149-PC-ER, 3/10/88.

The Commission also notes that if complainant is claiming confusion as to when the 20-day period commenced, such claim is disingenuous. He received a prior 20-day letter (see ¶6 of the Findings of Fact) which noted that his response was due within 20 days of the date of the Commission's certified letter. The same time measurement was recited in the final 20-day letter dated October 21, 1998 (see ¶15 of the Findings of Fact). He knew or at least should have known that the 20-day period commenced with the date of the Commission's letter.

The complainant also contends he has been under care of physicians due to stress caused by his work situation. He indicates he was forced to take "some leave" apparently during the 20-day response period. He provides insufficient detail to conclude that the stress he experienced prevented him from picking up the certified letter, which he admittedly knew was at the post office waiting for him. Similarly, he failed to show that the stress prevented him from filing a timely response to the Commission's letter of October 21, 1998.

The Commission is aware that individuals proceeding *pro se* may be confused about the investigative process. The letters sent to complainant addressed this concern by listing specific questions in language that was easy to understand. When complainant's responses continued to be confusing and to some extent contradictory, the Commission's next letter summarized everything for complainant and yet he again failed to respond by the due date. Simply stated,

he has failed to reasonably cooperate with the Commission's attempts to process his own discrimination complaints.

The remaining question is whether complainant's conduct is sufficiently egregious to warrant dismissal of his cases. The Commission answers this question in the affirmative for all claims raised under the FEA. The first reason for this conclusion is that §111.39(3), Stats. specifically mandates dismissal for a complainant's failure to timely respond to a 20-day certified letter. The second reason is that complainant failed to timely respond to the final 20-day letter (as noted in ¶16 of the Findings of Fact).

The issues surviving the above analysis are the claims of:

- 1) Whistleblower retaliation based on complainant's acting as a union steward on 9/20/95, when he assisted Paul Wright to file a grievance about Captain LaLiberte's religious preaching.
- 2) OSH retaliation based on complainant's participation in the following activities:
 - a) 11/28/97 grievance filed by complainant regarding an alleged lack of staff training to use lifesaving devices called Scott Air Packs,
 - b) 10/24/96 grievance filed by complainant regarding respondent's failure to relieve staff from work to obtain hepatitis vaccinations,
 - c) 10/16/95 abnormally hazardous task report filed by complainant about an inmate placing bodily fluids into mail being sent out of the institution.
 - d) 2/28/96 grievance filed by complainant about the refusal of security director Dave Lemke's refusal to stock the housing units with latex gloves.
 - e) On an unspecified date, complainant helped a nurse at OCI write an incident report. In the report the nurse checked other and qualified this by adding, "Putting inmates' health in jeopardy and refusal to obey doctor's orders per RN while on call."

Neither the Whistleblower nor the OSH retaliation statutes contain a provision similar to §111.39(3), Stats. Instead, lack of prosecution issues in regard to OSH retaliation and Whistleblower claims are analyzed under §PC 2.05(4)(b), Wis. Adm. Code⁵, which provides as shown below:

⁵ Complainant specifically had been warned about the sanctions available under the code in prior Commission letters (see ¶5 and 8 of the Findings of Fact).

If a complainant fails to answer or to produce requested information necessary for an investigation, the commission may dismiss the complaint or make an appropriate inference and issue an initial determination. In the alternative, at any hearing arising out of the complaint the hearing examiner or commission may exclude any evidence which should have been offered in response to the discovery request.

The Commission believes complainant's actions warrant imposition of sanctions. A review of past decisions provides guidance as to which sanction to impose here. In the case of *Benson v. UW System (Whitewater)*, 98-0004,0014-PC-ER, 8/26/98, the Commission imposed dismissal as a sanction under the code where, among other things, the complainant filed no response to a request for information. In the case of *Wentz v. DOT*, 94-0056-PC-ER, 10/24/94, the complainant provided a description of two alleged statements but refused to say who made the statements or when they were made. As a sanction, the Commission imposed an inference at the investigative stage that the two alleged statements were not made. In the case of *Jackson v. DOC*, 94-0115-PC-ER, 3/7/96, the complainant's representative submitted a written letter by the due date but the letter was unresponsive to the questions asked by the Commission. The sanction imposed in *Jackson* was to foreclose complainant from presenting additional information at the investigative stage.

As to the Third Case, complainant has never provided a copy of the alleged April 1998 suspension letter despite repeated requests. Accordingly, (and in accord with *Benson*) it is appropriate to dismiss the remaining allegations of OSH and Whistleblower retaliation.

As to the First and Second Cases, the circumstances are less egregious than existed in the *Benson* case because here the Commission's final letter was answered but one day late. The present circumstances are more egregious than existed in the *Jackson* case because prior to complainant's failure to timely respond to the Commission's final letter (see ¶16 of the Findings of Fact), he already had been unresponsive to prior letters (see ¶¶6 and 14 of the Findings of Fact). The Commission concludes the appropriate sanction is to impose an inference at the investigative stage that respondent had no knowledge of the events which complainant named as the bases for the Whistleblower and OSH retaliation claims. The noted inference will have the effect of issuing an initial determination in the First and Second Cases

finding there was no probable cause to believe that the alleged retaliation occurred. The initial determinations will be sent to the parties in a mailing separate from this ruling.

ORDER

Case number 98-0150-PC-ER is dismissed for lack of prosecution. All claims arising under the FEA in case numbers 98-0107-PC-ER and 98-0117-PC-ER are dismissed for lack of prosecution. An inference is imposed in case numbers 98-0107-PC-ER and 98-0117-PC-ER that respondent was unaware of complainant's participation in any activity disclosed as a basis for his OSH and Whistleblower Retaliation claims.

Dated: February 10, 1999.

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.)

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