

**RANDY RYKAL,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
AGRICULTURE, TRADE AND  
CONSUMER PROTECTION,**  
*Respondent.*

**RULING  
ON MOTION  
TO DISMISS**

Case No. 01-0008-PC-ER

This complaint was filed with the Commission on January 18, 2001. Complainant alleges violation of the whistleblower law, subch. III, ch. 230, Stats. Respondent has filed a motion to dismiss the matter as untimely filed and for failure to state a claim. The parties have filed written arguments and the following findings are undisputed unless otherwise indicated and are made solely for the purpose of resolving the respondent's motion.

#### FINDINGS OF FACT

1. At all times relevant to this matter, complainant has worked as a Meat Safety Inspector for respondent. His supervisor is Kenneth Larivee, Meat Safety Supervisor.

2. The complainant's position is covered by a Bargaining Agreement between the Wisconsin State Employees Union and the State of Wisconsin.

3. In April of 2000, complainant filed a letter with respondent that complainant identified as a whistleblower disclosure. By letter dated June 9, 2000, respondent informed complainant of the results of the investigation that arose from the disclosure.

3. Negotiating Note No. 18 to the 1999-2001 Bargaining Agreement is a memo to all state agency heads from the Secretary of the Department of Employment Relations relating to the reimbursement of travel expenses. It reads in part:

Similarly, if a specific reimbursement expense is in dispute, only that amount should be withheld pending resolution of the dispute. Those amounts not in dispute should continue to be processed in a timely manner

4. Complainant periodically submits expense vouchers for reimbursement of expenses incurred during the course of his employment.

5. It normally takes approximately 4 weeks (2 pay periods) for DATCP to process the expense vouchers.

6. On June 20, 2000, complainant submitted an expense voucher for the period of June 1<sup>st</sup> through June 20<sup>th</sup>

7. On July 10, 2000, complainant and Mr. Larivee had a telephone conversation regarding the voucher.

8. Complainant subsequently resubmitted the June voucher as requested.

9. During a telephone conversation with complainant on July 31, Mr. Larivee refused to process the voucher or to send it forward.

10. Complainant submitted an expense voucher for July on August 8, 2001

11. On August 23, 2000, Mr. Larivee questioned one or more of the items on complainant's July expense voucher

12. On September 1, 2000, Mr. Larivee returned the expense vouchers for June (a second time) and July of 2000 to complainant. They were returned as attachments to Mr. Larivee's letter dated August 23<sup>rd</sup>. The June voucher was returned because of a dispute regarding a single lunch expense, while the July voucher was returned because of a dispute regarding a single breakfast expense.

13. During September, complainant made phone calls to Bureau Chief Jim Larson and to Elizabeth Kohl, Deputy Administrator of the Division for Food Safety, and asked that his two vouchers be processed.

14. During October, complainant resubmitted the vouchers with a letter responding to Mr Larivee's concerns.

15. On October 16, 2000, complainant filed two first-step contractual grievances regarding his request for expense reimbursement. One grievance related to the June voucher, the other related to the July voucher. Complainant identified the following as "relief sought" for each of the grievances:

Make the employee whole. Expense account to be reviewed in a timely manner and processed for payment, per the contract. 1.5% interest paid to the employee in addition to claimed expenses. Employee to be free of discrimination and a hostile work environment.

16. Respondent ultimately paid the amounts reflected (\$234) in complainant's June and July expense vouchers on November 27, 2000.

17. Complainant filed a complaint (01-0008-PC-ER) of whistleblower retaliation with the Personnel Commission on January 18, 2001, stating, in relevant part: "My complaint is that my supervisor caused my monthly expense accounts (sic) to be held up."

#### CONCLUSION OF LAW

Complainant has failed to state a claim under the whistleblower law, subch. III, ch. 230, Wis. Stats.

#### OPINION

Once an employee engages in, or is perceived as engaging in, an action protected by the whistleblower law, §230.83(1), Stats., provides that retaliatory action may not be initiated, threatened or administered. "Retaliatory action" is defined in §230.80(8), Stats., as a "disciplinary action taken because of" a protected activity. "Disciplinary action" is defined in §230.80(2), Stats., as follows:

"Disciplinary action" means any action 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.

This language was analyzed in *Vander Zanden v. DILHR*, Outagamie County Circuit Court, 88 CV 1223, 5/25/89; affirmed by Court of Appeals, 88 CV 1223, 1/10/90. In *Vander Zanden*, the court reviewed a decision of the Personnel Commission concluding that an action by the state agency was not a disciplinary action under the whistleblower law. The circuit court's decision included the following language:

The commission examined the language of the statute and also applied the maxim *ejusdem generis*. This rule of statutory construction applies not only when a general term follows a list of specific things, but also where, as here, a list of specific words follows a more general term, *Swanson v. Health and Social Services Dept.*, 105 Wis. 2d 78, 85, 312 N.W.2d 833 (Ct. App. 1981). The rule provides that the general term applies only to things that are similar to those specifically enumerated. All of the enumerated disciplinary actions or penalties have a substantial or potentially substantial negative impact on an employee. The limitations imposed on Plaintiff's contacts with the Oshkosh Job Service office, while perhaps annoying and perhaps an example of poor management practices bordering on childishness, do not rise to the level of a penalty or a disciplinary action akin to those enumerated in §230.80(2). The common understanding of a penalty in connection with a job related disciplinary action does not stretch to cover every potentially prejudicial effect on job satisfaction or ability to perform ones' job efficiently. Plaintiff was not the "victim" of retaliation. His disclosure resulted in no loss of pay, position, upgrade or transfer or other consequences commonly associated with job discipline.

Complainant alleges that the respondent retaliated against him for previous whistleblower activities when it delayed processing his travel reimbursement requests for June and July of 2000.<sup>1</sup>

Respondent has moved to dismiss this complaint for failure to state a claim. The Commission analyzes such a motion according to the procedure set forth in *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731-32, 275 N.W. 2d 660 (1979):

For the purpose of testing whether a claim has been stated pursuant to a motion to dismiss under sec. 802.06(2)(f), Stats., the facts pleaded must be taken as admitted. The purpose of the complaint is to give notice of the nature of the claim; and, therefore, it is not necessary for the plaintiff to set out in the complaint all the facts which must eventually be proved to recover. The purpose of a motion to dismiss for failure to state a claim is the same as the purpose of the old demurrer - to test the legal sufficiency of the claim. Because the pleadings are to be liberally construed, a claim should be dismissed as legally insufficient only if "it is quite clear that under no conditions can the plaintiff recover." The facts pleaded and all reasonable inferences from the pleadings must be taken as true, but legal conclusions and unreasonable inferences need not be accepted.

The sole basis<sup>2</sup> for respondent's motion to dismiss for failure to state a claim is the argument that a delay in the payment of two travel vouchers does not constitute a "disciplinary action."

Although it was not noted in the briefs of the parties, the Commission addressed a substantially identical question in *Bruflat v. Docom*, 96-0091-PC-ER, et al., 7/7/98. In *Bruflat*, the complainant alleged that his travel vouchers for two months had not been processed. The Commission held:

A delay in processing a travel voucher does not have the permanence or the long-term impact of a reduction in base pay or a failure to increase

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<sup>1</sup> Other alleged conduct by respondent that is referenced in complainant's brief opposing respondent's motion is the subject of a second whistleblower complaint, Case No. 01-0052-PC-ER, and will not be addressed in the context of the present case.

<sup>2</sup> In its reply brief, respondent conditionally waived its earlier contention that complainant had failed to engage in a protected activity under the whistleblower law. (Respondent's Reply Brief, page 4)

base pay, two penalties cited in §230.80(2), Stats., as constituting "disciplinary actions" within the meaning of the whistleblower law. In addition, such an action is not equivalent to the permanent loss of a day's pay which was concluded by the Commission in *King v. DOC*, 94-0057-PC-ER, 3/22/96, to constitute such a disciplinary action. This allegation is not entitled to protection under the whistleblower law.

In the present case, the complainant's expense vouchers were processed and paid before he filed his complaint with the Commission. On November 27, 2000, complainant was paid the amounts reflected on his June and July vouchers. He filed his complaint on January 18, 2001. The complaint does not arise from the denial (or constructive denial) of the travel vouchers. It arises solely from the alleged processing delay. The Commission is unaware of any reason to deviate from its previous ruling in *Bruflat* and declines to do so.

In light of the conclusion that the delay in processing complainant's expense reimbursement requests is not a "disciplinary action" within the meaning of §230.80(2), Stats., it is unnecessary for the Commission to address respondent's argument that this complaint was untimely filed.

ORDER

Respondent's motion is granted and this matter is dismissed for the failure to state a claim.

Dated: June 28, 2001 STATE PERSONNEL COMMISSION

Laurie R. McCallum / jmr  
LAURIE R. McCALLUM, Chairperson

KMS:010008Cru11

Judy M. Rogers  
JUDY M. ROGERS, Commissioner

Parties:

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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