STATE OF WISCONSIN PERSONNEL COMMISSION

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WISCONSIN FEDERATION OF TEACHERS,

Appellants,

v.

Administrator, DIVISION OF PERSONNEL,

Respondent.

Case No. 79-306-PC

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INTERIM DECISION AND ORDER

This matter was filed with the Commission on November 5, 1979, by a representative (Mr. Allwardt) of the appellant's union "[o]n behalf of all library associates and librarians in the state classified service." The following allegations were raised:

1. The library associate series is assigned to salary scale 13-1 and this assignment is inappropriate and inconsistent with the concept of equal pay for equal work and responsibility as required by Chapter 230 of Wisconsin Statutes.

2. The librarian series is also inappropriately assigned. When compared with teachers of equal training and experience, the librarians are consistently assigned to lower salary classifications.

3. We believe the librarian series may be so assigned due to a societal practice of discrimination against women since this is primarily a female occupation.

At the prehearing conference on January 14, 1980, the respondent delineated four separate jurisdictional issues:

1. Whether or not Mr. Allwardt has standing to raise the issues contained in the appeal letter dated October 31, 1979.

2. Whether or not the Commission has jurisdiction under s.230.44(1)(a) - i.e., no decision has been made, and even if a decision has been made there is no jurisdiction.

3. Whether or not the case is moot - i.e., a survey which has been requested is being conducted.

4. Whether or not the appeal is timely.

The parties agreed to hold the matter in abeyance pending completion of the library survey, which was a statewide survey of library positions that resulted in the adoption of new class specifications as well as the reallocation of many of the surveyed positions. Pursuant to appellant's letter to the Commission dated November 19, 1981, that expressed the appellant's desire to proceed with the matter, a briefing schedule was established regarding the jurisdictional objections. Briefs were filed.

A. Subject Matter Jurisdiction

Respondent argues that none of the provisions of ss.230.44 and .45, Wis. Stats., grant the Commission the authority to hear the matters appealed.

The only two statutory paragraphs that might be considered as justifying the assertion of jurisdiction over this matter are ss.230.44(1)(a) and .45(1)(b), Wis. Stats. The former provision specifically refers to "actions and decisions of the administrator under s.230.09." However, prior decisions of the Commission support the conclusion that as long as the Personnel Board must approve of the assignment of a pay range or rate to a classification, the pay range is not appealable as a decision of the administrator. In Holmblad v. Hart, Case No. 76-229 (2/23/77) the Commission ruled that it lacked jurisdiction to hear an appeal regarding the classified service compensation plan. In the more recent case of Ziegler & Hilton v. DP, Case Nos. 80-34-PC and 79-358-PC (12/8/80) the Commission found it lacked the authority to hear the issue of the correctness of certain classification standards that were established, pursuant to s.230.09(2)(am), Wis. Stats., by the administrator "subject to the approval of the board." Given the role of the Personnel Board in approving the pay scale at issue in the instant appeal, there is no "decision of the administrator" that is appealable under s.230.44(1)(a), Wis. Stats.

Section 230.45(1)(b), Wis. Stats., provides that the Commission is to "[r]eceive and process complaints of discrimination under s.111.33(2)," which in turn provides, in part:

> [The Wisconsin Fair Employment Act] applies to each agency of the state except that complaints of discrimination or unfair honesty testing against the agency as an employer shall be filed with and processed by the personnel commission under s.230.45(1)(b).

Respondent argues that as long as it was not acting as an employer, its conduct relating to assigning a salary range cannot provide grounds for a discrimination complaint. However, such a narrow reading of the term "employer" would bar all discrimination complaints under that paragraph regarding actions of the administrator affecting anyone other than the employes of the Division of Personnel, which is clearly inconsistent with the remedial nature of Subch. II, Ch. 111, Wis. Stats. In addition, there are several cases interpreting the comparable language found in Title VII of the Civil Rights Act of 1964. While the Act [at 42 U.S.C. s.2000e(b)] defines employer in terms of "a person engaged in an industry ... and any agent of such a person," the requirement

> "is not that the defendant be an employer in the conventional sense; it suffices for purposes of Title VII that he 'control[s] some aspect of an individual's compensation, terms, conditions, or privileges of employment.'" Hannahs v. Teachers' Retirement Sys. 26 FEP Cases 527, 532 (S.D. N.Y., 1981) (Citations omitted.)

In another recent case, a district judge further explained the liberal construction to be given to the definition of employer:

> "For Title VII purposes, it is not necessary for individuals or the council to have total control or ultimate authority over hiring decisions. If the involvement is sufficient and necessary to the total employment process, the individual is considered an employer." Rivas v. State Board, 27 FEP Cases 715, 716 (D.C. Colo., 1981)

In Rivas, the court denied defendant's motion to dismiss the discrimination claims against the College Council and its members, even though the State Board held ultimate authority to approve the Council's hiring decisions.

Based upon the language of Subch. II, Ch. 111 as well as case law interpreting Title VII, the Commission concludes that the respondent falls within the intended use of the term "employer" as used in s.111.33(2), Wis. Stats.

B. Mootness

Respondent also argues that due to the intervening library survey, the classifications and pay scales complained of are no longer in effect and the appeal is moot. There is no dispute that the Library Associate classification and the Librarian Series were abolished at some time after the appellant filed this matter with the Commission. However, a subsequent change in the classification structure or pay scale does nothing to undermine the allegation that the prior structure and/or scale was discriminatory. Therefore, the controversy cannot be considered moot. See Watkins v. DILHR, 69 Wis. 2d 782, 12 FEP Cases 816 (1975) and EEOC v. New York Times Broadcasting Service, Inc. 13 FEP Cases 813 (6th Cir. 1976).

C. Timeliness

Respondent's third jurisdictional objection is based on the date that the Personnel Board approved the classifications in dispute. Respondent points out that the Library Associate classification that was in effect at the time of the instant appeal became effective late in 1969 and that the Librarian classifications became effective in 1973.

In the instant matter, the allegedly discriminatory violation occurred in a series of related acts during the entire period that the old Library Associate and Librarian classification levels were in effect. The persons holding positions in these series were paid bi-weekly, with each payment representing a basis for an allegation of sex discrimination due to unequal pay. The facts in this matter show that the November 5, 1979 letter constitutes a timely filing of a charge of

discrimination on the basis of a continuing violation, Dobbins v. DHSS, Case No. 81-91-PC (6/3/81); Jenkins v. Home Ins. Co., 24 FEP Cases 991 (4th Cir., 1980); thereby permitting the Commission to review the underlying assignment of salary levels to the classifications in questions.

D. Standing

The final jurisdictional objection raised by the respondent is that the appellant lacks standing to pursue this matter. The letter of appeal/complaint was filed by the Wisconsin Federation of Teachers "[o]n behalf of all library associates and librarians in the state classified service." There is no dispute that the WFT is the exclusive bargaining agent for the employes in these positions.

Nothing within the language of Subch. II, Ch. 111, Wis. Stats., would appear to prevent a labor organization from filing a complaint on behalf of its members. Specifically, s.111.36(1), Wis. Stats., refers only to the authority of DILHR (and, therefore, the Commission) to receive complaints charging discrimination. The statute does not limit the right to file such complaints other than imposing a 300 day time limit action. Subsequent references in s.111.36(2m), Wis. Stats., to the "person filing the complaint" are clearly not legislative attempts to preclude the filing of a discrimination complaint by an organization.

Respondent suggests that the language of s.227.064, Wis. Stats., should be construed as barring the appellant's case:

> 227.064 Right to hearing. (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
>
> (b) There is no evidence of legislative intent that the interest is not to be protected;

(c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

(d) There is a dispute of material fact.

However, even if the respondent could show that the appellant union's "substantial interest" was not injured, this statute must be read "[i]n addition to any other right provided by law."

Numerous cases brought under Title VII of the Civil Rights Act of 1964 have found that a labor union does have standing to assert a claim of employment discrimination on behalf of its members. In International Woodworkers of America v. Chesapeake Bay Plywood 659 F. 2d 1259 (4th Cir., 1981) the court applied the standards announced in Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed 2d 343 (1974) in concluding that the union, though not asserting any injury to itself as an entity, complied with constitutional standing requirements. A union's standing, however, has been limited so as not to include any requests for individualized relief:

> "[W]e have no difficulty in finding standing in the union to represent its members who have allegedly suffered from discriminatory employment practices insofar as injunctive and declaratory relief is claimed. The union does not, however, have standing to seek, on behalf of the class, back pay or other individualized forms of monetary relief." RWDSU, Local 194 v. Standard Brands, Inc., 540 F 2d 864, 13 FEP Cases 499, 500, (7th Cir., 1976)

In addition to the (limited) standing recognized under Title VII matters, case law from Wisconsin indicates that the appellant union has standing before the Commission in this matter. In Wisconsin's Environmental Decade, Inc. v. PSC, 69 Wis. 2d 1, 230 N.W. 2d 243 (1974), the court announced a two step test for determining standing: whether the "petition alleges injuries that are a direct result of the agency action" and "whether the interest asserted is recognized by law." WED, 69 Wis. 2d 1, 13-14. In the present matter, the union

has stated that the alleged discrimination affected (injured) its members whenever they were paid under the salary plan in force for the old Library Associate and Librarian classifications. Appellant has also indicated that the interest it asserts in alleging discrimination is recognized under both s.230.09(2)(b), Wis. Stats., and Subch. II, Ch. 111, Wis. Stats.

Therefore, on the basis of the applicable law, the Commission concludes that appellant union has standing, on behalf of its members, to obtain a finding of discrimination, but lacks standing to seek damages.

ORDER

This matter shall be processed by the Commission as a charge of discrimination upon submission of a notarized complaint form within 30 days of the date of this Order. Once a new case number is assigned to the discrimination charge, Case No. 79-306-PC should be dismissed. Failure to timely submit the complaint form will also result in dismissal of this appeal.

Dated: April 2, 1982 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

JAMES W. PHILLIPS, Commissioner

KMS:ers

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