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 GEORGE LUNDEEN,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 ADMINISTRATION,
 Respondent.
 Case No. 79-PC-ER-107
 * * * * *

DECISION
AND
ORDER

This matter is before the Commission on respondent's objection to subject matter jurisdiction. In a charge of discrimination filed with the Commission on July 18, 1979, the complainant alleged that he was denied employment by the respondent as a Superintendent of Buildings and Grounds 3 on July 16, 1979. He further alleged that he was discriminated against because of his age, 66-1/2 years. In an Initial Determination issued December 31, 1980, the investigator found probable cause to believe that discrimination occurred.

The respondent's objection to jurisdiction, see letter from Edward Main dated June 23, 1981, is based on the fact that at the time of the alleged discrimination the appellant was over the age of 65, and §111.32(5)(b)1, Wis. Stats., limits the protection of the law against discrimination because of age to persons between the ages of 40 and 65.

The Initial Determination dealt with this question in the following finding:

"3. Wisconsin Statutes, Section 111.32(5)(b), provides for protection from age discrimination for those between 40 and 65 years of age. However, the federal Age Discrimination in Employ-

ment Act was amended in 1978 to protect those up to 70 years of age from discrimination. 29 USC, Sec. 631(a). A memorandum of November 1, 1979, by Wisconsin's Attorney General stated that the Wisconsin Statutes were "preempted by the ADEA prohibition against age discrimination." Therefore, statutes such as §41.11 for compulsory retirement, and §41.09(11) for age 55 protective occupations retirement must now be read as extending protection to age 70. Thus, §111.32(5)(b), should also be considered as now covering those between 40 and 70 years of age, including complainant."

"Pre-emption" is the concept that "when Congress passes a law in that field of legislation common to both federal and state governments, the act of Congress supersedes all inconsistent state legislation." 16 Am Jur 2d Constitutional Law §291. The act of Congress does not serve to amend the state law, however, but merely supersedes or controls the conflicting state law. Public Service Commn. v. New York C.R. Co., 193 App. Div. 615, 185 N.W.S. 267 (1920); affd., 230 N.Y. 149, 129 NE 455 (1920).

Consequently, the various state statutes involved here cannot be considered to have been constructively amended by the ADEA. The effect of pre-emption is not to create a new right under state law but rather to resolve a conflict between state and federal law by recognizing the supremacy of the federal law. The memorandum from the attorney general had the effect of advising state agencies as employers that because of the changes in the ADEA, they could no longer rely on state laws on mandatory retirement, that to do so might lead to federal liability under the ADEA, and that the agencies should abide by the ADEA.

The Commission as an administrative agency has only those powers conferred on it by the legislature in statutory enactment. American Brass Co. v. Wisconsin State Board of Health, 245 Wis. 440, 15 N.W. 2d 27 (1944).

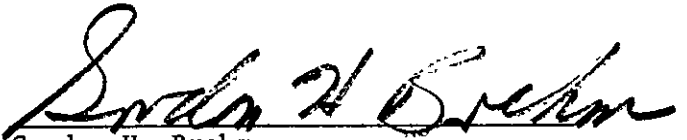
Therefore, the Commission must conclude that since §111.32(5)(b)1, Wis. Stats., limits the definition of discrimination because of age to apply only to persons between the ages of 40 and 65, the complaint on its face fails to allege discrimination which is recognized under Wisconsin law, and therefore this Commission lacks jurisdiction over the subject matter of the complaint.

ORDER

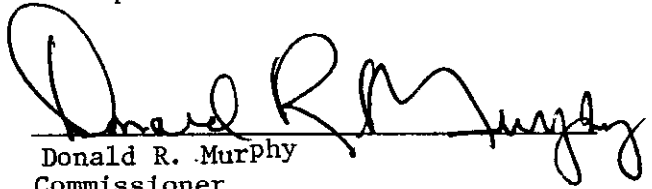
This complaint is dismissed for lack of subject matter jurisdiction.

Dated 5 aug, 1981

STATE PERSONNEL COMMISSION

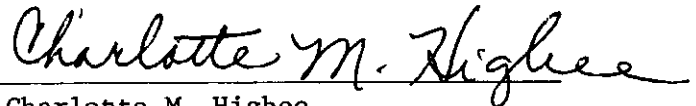


Gordon H. Brehm
Chairperson



Donald R. Murphy
Commissioner

DISSENT:



Charlotte M. Higbee
Commissioner

AJT:mew

Parties:

Mr. George T. Lundeen
6333 Masthead Drive
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