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ANITA COWIE and BETH DECKER,  
 Complainants,

v.

Secretary, DEPARTMENT OF  
 HEALTH & SOCIAL SERVICES,  
 Respondent.

Case Nos. 80-PC-ER-115  
 80-PC-ER-114

\* \* \* \* \*

DECISION  
 AND  
 ORDER

NATURE OF THE CASE

These are consolidated complaints of discrimination with respect to which there was an initial determination that there was no probable cause to believe that discrimination had occurred. Hearings were held pursuant to s.PC 4.03(3), Wis. Adm. Code to review that determination.

FINDINGS OF FACT

1. At all relevant times prior to their layoffs, as set forth below, the complainants were employed by the respondent in the classified civil service as teachers at the Wisconsin Correctional Institution - Green Bay (WCI-GB).

2. In the first half of 1980, the Division of Corrections began planning a shift in emphasis at WCI-GB from high school diploma programs to vocational programs, including GED and adult basic education, due in part to a change in the demography of the institutional residents to fewer juveniles, and correspondingly less interest in and need for high school diploma programs. This planning included an intention to reduce some of the programs in adult basic education and GED, including business education.

3. During this period, the Division tentatively planned that this change in emphasis would be accomplished as part of an anticipated budget cut in the next biennium. In June 1980, the Division notified Mr. Slinger, the WCI-GB

education director, of the planned change and indicated that it was likely that two or three positions would be eliminated.

4. Mr. Slinger gave some preliminary thought to this prospect. However, before he began any definite planning along these lines, the Division advised the institution in August 1980 that due to an impending 4.4% budgetary reduction it would be necessary to effect certain layoffs and that the WCI-GB education department would have to layoff 4 employees.

5. The staff at WCI-GB, primarily Mr. Slinger and the superintendent, Mr. Clusen, met to determine what layoffs would be recommended to the Division.

6. The ultimate recommendations for layoff and rationales therefore determined by the institution were as follows (see memo dated 8/19/80 from Clusen to Ellsworth, Appellants' Exhibit 1):

a. Auto Mechanics. This area was selected because there were two teachers in the area and the program could continue to operate with one teacher at a reduced level of service. Mr. Woelfel was tentatively identified for layoff as the least senior auto mechanics teacher.

b. Social Studies. This was part of the high school diploma program which was being de-emphasized. Eleanor Larsen, a woman in her fifties, was the least senior employe in this certification, but the institution recommended that she be exempted from layoff, at least in part, for affirmative action purposes, in order to retain more women and to promote a more balanced work force.

c. Business Education. This also was part of the high school diploma program which was being de-emphasized. Ms. Decker, the only teacher certified in business education, was identified as the employe scheduled for layoff.

d. Guidance Counseling. This area was responsible for the Basic Education Laboratory (BEL) coordinator position. It was anticipated that these duties and

responsibilities could be spread out among other teachers and supervisors.

Gene Slavik and Eleanor Larsen were the two teachers certified in this area.

Ms. Larsen was the least senior but since she was recommended for an exemption from layoff, Mr. Gene Slavik was identified as the teacher scheduled for layoff.

7. Prior to submitting the aforesaid recommendations under cover of the 8/19/80 memo, the institution tentatively had identified physical education for deletion. However, the institution had been allocated special funds to hire four limited term employes as physical education teachers, who could also serve as dormitory counselors. The institution felt that if they had identified the physical education certification for layoff, it would have been necessary to have laid off the four limited term employes first, and this was considered undesirable because of the resultant overall depletion of the institution's resources.

8. Subsequent to the August 19, 1980, recommendations by WCI-GB, the Division finalized a layoff plan which was approved by the administrator, Division of Personnel pursuant to s. Pers 22.06, Wis. Adm. Code, and which is reflected in Respondent's Exhibit 1.

9. Pursuant to the aforesaid layoff plan, the following employes were notified of their layoffs effective September 30, 1980:

- a. Auto Mechanics - Robert Woelfel
- b. Guidance Counselor - Gene Slavik
- c. Business Education - Beth Decker
- d. Social Studies - Richard Hearden

10. With the exception of Mr. Woelfel, who was on a medical leave of absence, the teachers identified for layoff had a conference with, and initiated by, Mr. Clusen when they received their written notice of impending layoff.

11. In his meeting with Ms. Decker on September 5, 1980, Mr. Clusen read the letter providing notice of layoff (Complainants' Exhibit 6) and told her that there

was no one at the institution that she could bump.

12. In his meeting with Mr. Slavik, on the same date, Mr. Clusen told him that he had bumping rights and that he should explore what other jobs at the institution that he could bump into, and that he should consult with his supervisor as to what he was certifiable in and what he would be able to teach.

13. The August 22, 1980, list of WCI-GB education staff (Respondent's Exhibit 2) lists Ms. Decker as certified in Business Education (DPI) and Secretarial Science (BVTAE), and Mr. Slavik as certified in Guidance Counselor (DPI), 4-8th Grade Sociology (DPI), Sociology (DPI), High School Principal (DPI), and Guidance Counselor (BVTAE).

14. Following transmittal of notice of layoff to the initial group of employees as set forth above, Mr. Slavik bumped Ms. Cowie, who was certified in and had been teaching math, and Mr. Heardon bumped Ms. Hutchison, who was certified and teaching in a number of areas, including social studies.

15. The teachers who ultimately were laid off as a result of the 4.4% budget cuts were Mr. Woelfel, Ms. Hutchison, Ms. Decker, and Ms. Cowie.

16. Shortly after their layoffs, Ms. Cowie and Ms. Decker were rehired by the institution on a limited term employment (LTE) basis to teach the courses they previously had taught. This was made possible by a supplemental appropriation received by the Division which did not affect the institution's need to have effected the permanent staff cuts as set forth above.

17. The management at WCI-GB believed, during the period when the decisions were made with regard to the layoffs, based on information provided by the Division of Corrections, that pursuant to the WFT contract only one exemption from layoff could be exercised. This interpretation of the contract was shared by the DHSS Bureau of Personnel and Employment Relations and the Department of Employment Relations.

18. With respect to the contractual coverage of the bumping process, it was the respondent's interpretation that the employe exercising his or her bumping rights could only bump another employe if that employe was teaching at a minimum, more than 50% in the area of the bumping employe's certification or eligibility for certification.

19. The contract between the state and the WFT which is applicable to the positions in question provides at Art. IX, Sec. 3, para. 240 (Complainant's Exhibit 2) as follows:

"Within any employing unit, any employe ... upon notice of layoff ... may bump the least senior employe in the same class or lower class in the same series for which the bumping employe is certified or eligible for a provisional certificate or a 3 year license (teachers), qualified and capable of performing without any trial period, as determined by the employer, in accordance with the most recent training and experience description advertisement to fill the position and/or the most recent class specification ..."

20. Prior to her layoff, Ms. Cowie had been teaching 6 math courses, including a basic math course for VTAE credit. In 3 of her other courses, some of the students were earning VTAE credits and some were not.

21. At the time Mr. Slavik bumped Ms. Cowie, he had no math certification as such but he did have a certification in upper elementary education which permitted him to teach math courses that did not earn the students high school or VTAE credits.

22. After Mr. Slavik bumped Ms. Cowie, he did not take over her basic math course but did assume the other 5 courses. However, the students who had been taking these courses for credit were assigned to other teachers.

23. Mr. Slavik had not been qualified to have bumped Ms. Cowie under the provision of the contract cited above inasmuch as he was not "qualified and capable of performing without any trial period, as determined by the employer, in accordance with the most recent training and experience description advertisement to fill the position and/or the most recent class specification ..."

24. At no time prior to their layoffs did either Ms. Cowie or Ms. Decker suggest to anyone in management that they were certified or certifiable in any alternative areas, nor did they indicate to management any intention to attempt to bump anyone.

25. Immediately prior to the layoffs in question, WCI-GB had 55 professional employees (this category includes teachers) of whom 8 or 15% were female, as compared to 50% female in the relevant labor market. The Division of Corrections affirmative action plan goal for WCI-GB for fiscal year 1981 was to maintain the proportion of professional women at 15%. See Complainant's Exhibit 4.

26. At the time of their layoffs, Ms. Decker was 57 and Ms. Cowie was 63.

27. There is probable cause to believe that the respondent discriminated against Ms. Cowie because of her age and sex with respect to her layoff.

28. There is not probable cause to believe that the respondent discriminated against Ms. Decker because of her age and sex with respect to her layoff.

#### CONCLUSIONS OF LAW

1. These cases are properly before the Commission pursuant to s.230.45(1)(a), stats.

2. The complainants have the burden of demonstrating that there is probable cause to believe that they were discriminated against as to age and sex with respect to their layoffs pursuant to s. PC 4.03, Wis. Adm. Code.

3. The aforesaid burden has been satisfied as to Case No. 80-PC-ER-115 (Cowie) and has not been satisfied as to Case No. 80-PC-ER-114 (Decker).

#### OPINION

These cases involve the question of whether there is probable cause to believe that the respondent discriminated against the complainants. While the complainants have the burden of establishing probable cause it is of course not the same as establishing that discrimination did occur.

It is argued that the record supports an inference that the decision to cut Ms. Decker's area was part of a plan by the respondent to get rid of her, presumably because of her age and sex. The Commission cannot agree. The decision to reduce programs in the high school diploma area and to emphasize GED and vocational areas was made in Madison long before the 4.4% budget cut requirements were known. Furthermore, even though Ms. Decker's classes included some non-high school degree students, many of them were taking the courses as electives and for self-improvement as opposed to part of a GED or vocational program. See deposition of Mr. Slinger, pp. 20-21.

It also is argued that the failure to exempt more women from layoff is probative of discrimination. This may be correct in the abstract, but it must be evaluated in connection with all of the related circumstances.

First, the DHSS contract interpretation was that there was only one exemption available at WCI-GB in effecting these layoffs. Alternative contract interpretations could be made, but the one followed by respondent was arguably correct and it was undisputed on this record that DER concurred in this interpretation. Second, the institution recommended an older woman teacher for the one exemption that was understood to have been available.

It also is argued that the respondent failed to give Ms. Decker as much information about possible alternatives, specifically, alternative certifications, as it did Mr. Slavik. However, the records maintained at the institution showed that Ms. Decker was certified in only one area, whereas Mr. Slavik was certified in several. This was consistent with Mr. Clusen's indication to Ms. Decker that there was no one at the institution she could bump while suggesting to Mr. Slavik that he explore his options.

With respect to Ms. Cowie, the same comments obtain with respect to the respondent's failure to have exercised another exemption on her behalf. However,

in her case there is an additional factor having to do with the respondent having permitted Mr. Slavik to bump her. Pursuant to Art. IX, Sec. 3A, the bumping employe must be:

"... certified or eligible for a provisional certification or a 3 year license (teachers), qualified and capable of performing without any trial period, as determined by the employer, in accordance with the most recent training and experience description advertisement fo fill the position and/or the most recent class specification ..."  
Complainant's Exhibit 2.

Following his bump of Ms. Cowie, Mr. Slavik was unable to teach her basic math course or any of the students taking courses for credit. Mr. Slinger in essence admitted on adverse exemination that Mr. Slavik had not been qualified to bump Ms. Cowie under the above contract clause. See tape of hearing held March 29, 1982.

While certainly the Commission lacks the authority to administer the contract, it can consider whether the respondent complied with the contract in determining whether there is probable cause to believe that discrimination occurred. Compare, Sherkow v. Wis. Dept. of Public Instruction, (7 FEP Cases 1527, 1533 W.D. Wis. 1978).

The respondent argues that the fact that Ms. Cowie's layoff was not taken to arbitration is dispositive that there was no contract violation, and is in effect res judicata. However, the basic elements of res judicata are not present. See 2 Am Jur 2d Administrative Law s.501.

In the opinion of the Commission, the evidence presented on this record including particularly that the institution had an underutilization of professional women, that the layoff of Ms. Cowie contributed to that underutilization as well as to the failure to meet established affirmative action goals, and that Mr. Slavik was permitted to bump Ms. Cowie when he was essentially admittedly unqualified under the labor contract, supports a determination that there is probalbe cause to believe that the respondent discriminated against Ms. Cowie on the basis of her age and sex.




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ORDER

The case of Decker v. DHSS, 80-PC-ER-114 is dismissed upon a determination that there is no probable cause to believe that discrimination occurred. The case of Cowie v. DHSS, 80-PC-ER-115 is to be scheduled for a hearing on the merits.

Dated: May 28, 1982 STATE PERSONNEL COMMISSION

  
DONALD R. MURPHY  
Chairperson

  
LAURIE R. McCALLUM  
Commissioner

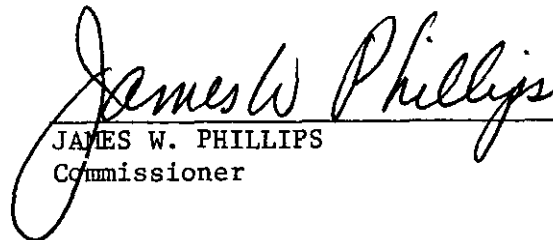
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