STATE OF WISCONSIN PERSONNEL COMMISSION

JERRY D. SCHAEFFER,

Appellant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS

Respondent.

Case No. 82-PC-ER-30

INTERIM DECISION AND ORDER

This matter is before the Commission on respondent's motion to dismiss filed September 20, 1984. Both parties have filed briefs on the motion. The motion to dismiss relates primarily to the question of whether this Commission has jurisdiction over this complaint of discrimination. This is the third time this matter has come before the Commission for a decision on jurisdiction.

Initially, the Commission dismissed this complaint for lack of subject matter jurisdiction on March 14, 1984. A copy of that decision and order is attached hereto. Following a petition for rehearing by the complainant, the Commission issued another decision and order on April 25, 1984, a copy of which also is attached hereto.

The complaint of discrimination filed herein on March 24, 1982, sets forth, in part, that the complainant had "been notified that I will be terminated on 6 April 1982," from the national guard and alleges discrimination on the basis of handicap.

In its first decision on jurisdiction, the Commission focused solely on the complainant's status as a "technician" and concluded that since this

was federal and not state employment, it lacked jurisdiction under §111.375(2), Stats., since the employer was not a state agency.

The Commission's "DECISION AND ORDER ON PETITION FOR REHEARING" entered April 25, 1984, included the following:

> In examining its subject matter jurisdiction, the Commission considered only Mr. Schaeffer's employment status as a technician. The Commission concluded that this employment did not make Mr. Schaeffer an employe of the State of Wisconsin, noting that 32 U.S.C. §709(d) provides: "A technician employed under subsection (a) is an employe of the Department of the Army ... and an employe of the United States." (emphasis supplied)
>
> In his petition for rehearing, Mr. Schaeffer points out, as material, that he had a dual status until his termination as both a federal civil service technician and a National Guard member. The Commission in its decision did not consider whether his status as a member of the Guard would provide a basis for the Commission's subject matter jurisdiction.
>
> The question of whether military members of the National Guard are federal or state employes was addressed specifically by the United State Supreme Court in Maryland v. United States, [381] U.S. 41, 48, 85 S. Ct. 1293, 1298 (1965):
>
> > "It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employes of the States, and so the courts of appeals have uniformly held. See n. 5, supra." (emphasis supplied)

The Commission went on to hold that it had jurisdiction over so much of the complaint as charges that the complainant's status as a military member of the guard was terminated because of handicap.

In its current motion, the respondent presents a number of arguments. Initially the respondent argues that the Commission is barred from hearing this case by the Supremacy Clause of the United States Constitution:

> Article I, Section 8, Clause 16, of the US Constitution specifically confers on the Congress of the United States the power to "provide for organizing, arming, disciplining, the Militia...."

Pursuant to that delegation of power, the Congress enacted 10 U.S.C. Sec. 271, "Ready Reserve: Continuous screening," making retention of an officer beyond 20 years of service in the National Guard discretionary with the Adjutant General. The National Guard Bureau, the agency under Departments of the Army and Air Force charged with implementing the requirements of the Congress, has enacted or delegated to the service secretaries, 10 U.S.C. Sec. 3015, implementation of the screening process in NGR 635-102/ANGR 35-06.

Under Article VI of the US Constitution, the so-called Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;....shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The black letter law answer, then, is that "where Congress has legislated upon a subject which is within its Constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded, and any state legislation on the subject <u>is void</u>. The relative importance to the state of its own law is not material when there is a conflict with a valid federal law; <u>any state law</u>, however clearly within the state's acknowledged power, <u>which interferes with</u> or is contrary to <u>federal law must yield</u>." (Emphasis added.) Am. Jur. 2d, Const. L. Sec. 291. (citations omitted); <u>also, see generally</u>, Secs. 77, 80 and 288-93.

Thus, any authority upon which the state might rely is invalidated by the Supremacy Clause. The State Personnel Commission is foreclosed from lawfully acting further in this matter. It is that simple and that clear.

In the Commission's opinion, the Supremacy Clause has no application to this case. The respondent has not pointed out any specific state law that interferes with any federal law. The entire text of Article I, Section 8, Clause 16, of the Constitution, is as follows:

> The Congress shall have power ... To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as my be employed in the service of the United States, <u>reserving to the</u>

> States respectively, the appointment of the officers, and the authority of training the militia according to the discipline described by Congress. (emphasis added)

This clause clearly reserves to the states the authority for personnel administration within the national guard. While Congress may have legislated the process to be followed in this area, the respondent's action terminating the complainant's guard membership appears to have been well within that authority reserved to the states in the underlined portion of the Constitution.

The respondent's second contention is that the complaint is barred because the complainant failed to avail himself of available administrative remedies, citing the Federal Rehabilitation Act of 1973, Sec. 504, and possible review by the Board for Correction of Military Records under 10 U.S.C. 551 et seq.

The respondent has not cited any authority for the proposition that it is necessary to exhaust available administrative remedies as a prerequisite to seeking administrative recourse pursuant to the Fair Employment Act (sub-chapter II of Chapter 111) before this Commission. The Commission is unaware of any such authority, and does not believe such exhaustion is necessary.

The respondent's third argument (in summary) is that "THE FINDING OF JURISDICTION BY THE STATE PERSONNEL COMMISSION IS BASED ON PRECEDENT WHICH IS INAPPLICABLE OUTSIDE OF TORT LIABILITY AND HAS BEEN EXPRESSLY OVERRULED BY ACT OF CONGRESS; THE FINDING SHOULD BE REVERSED AND THE COMPLAINT DISMISSED." Respondent's brief, p.11.

In its April 25, 1984, decision, the Commission relied on the Supreme Court decision in Maryland v. United States, 381 U.S. 41, 48, 85 S.Ct. 1293, 1298 (1965), and in particular the following part of the opinion:

> It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employes of the States, and so the courts of appeals have uniformly held. See n. 5, supra. (emphasis supplied)

In that case, the Court held that civilian caretakers or technicians were not federal employes for purposes of the Federal Tort Claims Act (FTCA). The respondent points out that:

> In 1968, Congress amended the technicians act to make technicians federal employes. 32 USC sec. 709(d). In 1981, the Guard members were encompassed under the protection of the FTCA by P.L. 97-124 (21 Dec 81), 28 USC sec. 2671. p.12

However, the change of the law with respect to technicians has little, if any, materiality to the question of whether guard members are state employes for the purpose of the Wisconsin Fair Employment Act. Compare, Gnagy v. United States, 634 F.2d 574 (U.S. Court of Claims, 1980), which considered the question of whether a military member of the National Guard was a federal employe for purposes of the Back Pay Act, 5 USC 5596. The Court held that "... such a person is a state employe, rather than a federal employe...." 634 F.2d at 575. It rejected the argument that the holding in Maryland v. United States:

> ... was eroded by the enactment of the National Guard Technicians Act of 1968 (the act). There is no merit to this argument. The act granted federal employe status only to civilian technicians employed by the National Guard. The act did not alter the state employe status of military members of the Guard. That this was so was made clear in the legislative history of the act.... 634 F.2d at 578.

Since the Gnagy decision, the Congress has amended 28 USC 2671 to extend the coverage of the FTCA to guard members while engaged in training and exercises:

> 'Employe of the government' includes officers or employes of any federal agency, members of the military or naval forces of the

> United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504 or 505 of title 32....

In the opinion of the Commission, the extension of the FTCA in this manner does not alter the fundamental character of guard members as state employes, which rests on the framework provided by the Constitution. This was discussed by the Court in Gnagy v. United States, as follows:

> The holding in Maryland v. United States regarding the employment relationship arising from membership in a National Guard unit not active in federal service rests, in part, on article I, section 8, clause 16 of the United State Constitution. Clause 16 reads:
> [The Congress shall have Power * *]
>
> > To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.] [Emphasis supplied.] 634 F.2d at 578.

This is a basic reservation of the power of appointment to the states which is not impinged by the extension of FTCA coverage to guard members. See 53 Am Jur 2d Military, and Civil Defense §31:

> The Constitution of the United States gives to Congress power to provide for calling out the militia to execute the laws of the Union, suppress insurrection, and repel invasions, and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

The respondent also cites a number of federal cases for the general proposition that federal courts should be reluctant to review military decisions. While it is of interest that in Schlessinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed. 2d 610 (1975), cited by the respondent, the Supreme Court did review on the merits the plaintiff's challenge to his

discharge from the Navy on the ground of unconstitutional discrimination based on sex in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the Commission's role here is not the same as a federal court reviewing a decision by the United States military establishment.

The decision complained of in this case is that of a state agency acting under powers reserved to the states by the United States Constitution. The decision falls squarely within the coverage of the Wisconsin Fair Employment Act. The legislature has included as an "employer" under the act "... the state and each agency of the state...,"§111.32(6)(a), Stats. It has included in the compilation of prohibited discriminatory actions the termination of employment because of handicap, §§111.322(1), 111.321, Stats. If the legislature had not wished the Department of Military Affairs to be subject to the Fair Employment Act in making the kind of decision here in question, it could have exempted it from coverage, in whole or in part. This it did not do.

The respondent also presents arguments concerning the sovereign immunity of the United States. The federal government is not a party to this matter, nor is any jurisdiction being asserted as to it. The Commission can discern no issue of federal sovereign immunity in this proceeding.

Finally, the respondent argues that the complainant has failed to "state a claim upon which relief can be granted since no constitutional rights have been infringed by the non-retention of complainant in the National Guard." p.16. The Commission cannot discern that the complainant has raised any such claim, nor would such claim be cognizable under the only jurisdictional basis for this matter, the Wisconsin Fair Employment Act. Therefore, this argument is inapposite.

The Commission wishes to emphasize at this stage of this proceeding there has been no claim that there is any conflict between a specific substantive federal law or regulation governing national guard personnel and the Wisconsin Fair Employment Act.[1]

The Commission will address such a claim if and when it arises.

ORDER

The respondent's motion to dismiss filed September 20, 1984, is denied.

Dated: Nov 7, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jmf

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Jerry D. Schaeffer
6400 Westgate Road
Monona, WI 53716

Raymond A. Matera
Major General/Adjutant General
Dept. of Military Affairs
P. O. Box 8111
Madison, WI 53708

---

[1] An example of this would be a federal age restriction in conflict with §111.33, Stats., which governs age discrimination.

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * *
*
JERRY D. SCHAEFFER, *
*
Complainant, *
*
v. *
*
Adjutant General, DEPARTMENT *
OF MILITARY AFFAIRS, *
*
Respondent. *
*
Case No. 82-PC-ER-30 *
*
* * * * * * * * * * * * * * * *

DECISION
AND ORDER ON
PETITION FOR
REHEARING

This matter is before the Commission pursuant to §227.12, Stats., on the complainant's petition for rehearing filed April 2, 1984. The respondent has been afforded an opportunity to reply.

In a decision and order dated March 14, 1984, and served March 16, 1984, the Commission dismissed this complaint of handicap discrimination for lack of subject matter jurisdiction.

In that decision, the Commission noted that Mr. Schaeffer had been employed as a "technician" in accordance with 32 U.S. Code §709. This law requires that a technician such as Mr. Schaeffer "... be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position," 32 U.S.C. §709(b), and, in the event of separation from the Guard, that he "... shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned." 32 U.S.C. §709(e)(1), which is what occurred in Mr. Schaeffer's case.

In examining its subject matter jurisdiction, the Commission considered only Mr. Schaeffer's employment status as a technician. The Commission

concluded that this employment did not make Mr. Schaeffer an employe of the State of Wisconsin, noting that 32 U.S.C. §709(d) provides: "A technician employed under subsection (a) is an employe of the Department of the Army ... and an employe of the United States." (emphasis supplied)

In his petition for rehearing, Mr. Schaeffer points out, as material, that he had a dual status until his termination as both a federal civil service technician and a National Guard member. The Commission in its decision did not consider whether his status as a member of the Guard would provide a basis for the Commission's subject matter jurisdiction.

The question of whether military members of the National Guard are federal or state employes was addressed specifically by the United State Supreme Court in Maryland v. United States, 318 U.S. 41, 48, 85 S. Ct. 1293, 1298 (1965):

> "It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employes of the States, and so the courts of appeals have uniformly held. See n. 5, supra." (emphasis supplied)

The provision in the federal statutes at 32 U.S.C. §709(d) cited above, which provides that a technician is an employe of the United States, was not enacted until subsequent to this decision, and it applies only to technicians.

In light of the definitive holding of the Supreme Court set forth above, the Commission must conclude that it committed a material error of law in its March 14, 1984, decision, by failing to consider Mr. Schaeffer's status as a military member of the Guard, and by failing to conclude that it had jurisdiction over so much of this matter as charges that the

complainant's status as a military member of the Guard was terminated because of his handicap.

It must be stressed that the Commission continues to lack jurisdiction over so much of this complaint as relates to the complainant's status as a technician. Thus there is a question whether any decision favorable to the complainant with respect to his status as a Guard member could possibly affect his status as a technician.

ORDER

The complainant's petition for rehearing is granted on the basis of a material error of law in the March 14, 1984, decision. The foregoing decision shall serve as a modification of the March 14th decision. The March 14th order is vacated and the following is substituted in its place: So much of this complaint as relates to Mr. Schaeffer's status as a technician is dismissed for lack of subject matter jurisdiction. The Commission will retain jurisdiction over, and will proceed to investigate, so much of this complaint as relates to Mr. Schaeffer's status as a military member of the National Guard.

Dated: April 25, 1984 STATE PERSONNEL COMMISSION

AJT:jat

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Jerry D. Schaeffer
6400 Westgate Road
Monona, WI 53716

Raymond A. Matera
Major General/Adjutant General
Department of Military Affairs
P.O. Box 8111
Madison, WI 53708

STATE OF WISCONSIN PERSONNEL COMMISSION

JERRY D. SCHAEFFER,

Complainant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

Case No. 82-PC-ER-30

DECISION AND ORDER

This matter is before the Commission for a determination as to the Commission's subject matter jurisdiction.

In this complaint of discrimination, Mr. Schaeffer alleges that his employment was terminated because of handicap.

Mr. Schaeffer was employed as a "technician" pursuant to 32 U.S. Code §709:

> (a) Under regulations prescribed by the Secretary of the Army ... and subject to subsection (b) of this section persons may be employed as technicians in -
>
> (1) the administration and training of the National Guard; and
>
> (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.
>
> (b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.
>
> (c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.
>
> (d) A technician employed under subsection (a) is an employe of the Department of the Army ... and an employe of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.
>
> (e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned -

> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

In accordance with the provisions of the foregoing statute, the complainant was terminated from his position of employment as a technician when he was separated from the Wisconsin Army National Guard ("guard") as a result of action taken by a Board for Selective Retention ("Board"), convened under the authority of National Guard Regulation (NGR) No. 635-102 published by the United States Department of the Army. The foregoing regulation provides for specially-constituted boards to determine which guard officers who have more than 20 years of qualifying service for retired pay will be retained in the guard. The regulation gives state adjutants general the authority to either approve or disapprove the board's determinations. See NGR 635-102, paragraph 6, page 2.

The Commission only has jurisdiction over this matter to the extent that the complainant's employer was a state agency. See §111.375(2), Wis. Stats.

32 U.S.C. §709(d) explicitly provides: "A technician employed under subsection (a) is an employe of the Department of the Army ... and an employe of the United States." The complainant was terminated from his employment as a technician because of the operation of federal law, 32 U.S.C. §709(a)(1). The board of officers which determined that the complainant should not be retained in the guard was convened pursuant to the federal authority of NGR 635-102. Finally, while the Adjutant General had the authority and responsibility to approve or disapprove the decision of the retention board, that authority and responsibility emanated from the federal government under NGR 635-102, paragraph 6.

Under all of these circumstances, it must be concluded that the complainant was in essence a federal employe, and that any actions of the Adjutant General, the Department of Military Affairs, or the Wisconsin Army National Guard in connection with the termination of the complainant's employment were taken as agents of the United States government. Compare, Washington State National Guard v. Washington State Personnel Board, 379 P. 2d 1002, 1005 (1963):

> "The fact that these Air Defense Technicians were appointed and dismissed by the Adjutant General of the State of Washington, who is a state employe, is beside the point. In the employing and dismissing of the technicians, he is acting as an agent of the federal government in a direct line of delegated authority from the Secretary of the Army. It is an authority and an agency with which the Washington State Personnel Board cannot interfere."

ORDER

This complaint is dismissed for lack of subject matter jurisdiction.

Dated: March 14, 1984 STATE PERSONNEL COMMISSION

DONALD R. MURPHY, Chairperson

AJT:jat

LAURIE R. McCALLUM, Commissioner

DENNIS P. McGILLIGAN, Commissioner

Parties:

Jerry D. Schaeffer
6400 Westgate Road
Monona, WI 53716

Raymond A. Matera
Major General/Adjutant General
Department of Military Affairs
P.O. Box 8111
Madison, WI 53708