

STATE OF WISCONSIN

PERSONNEL COMMISSION

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

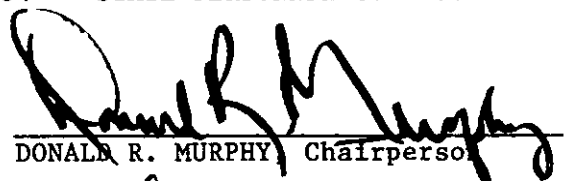
Under all of these circumstances, it must be concluded that the complainant was in essence a federal employe, and that any actions of the Adjutant General, the Department of Military Affairs, or the Wisconsin Army National Guard in connection with the termination of the complainant's employment were 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

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