STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD L. PAUL,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 82-PC-ER-69

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of race discrimination in violation of the FEA (Fair Employment Act) (Subchapter II, Chapter 111, Stats.), with respect to complainant's non-appointment to the position of Institution Security Director 1 (ISD 1) at the Mendota Mental Health Institution. This proceeding has had a long and involved history, in part due to complainant's termination from another position while this matter has been pending, and litigation relating to that and other matters. The Commission entered its decision and order with respect to the merits on March 30, 1993, but retained jurisdiction "for the purpose of dealing with the remedial phase of this proceeding." p. 9. The parties have been unable to agree on the remedy to which complainant is entitled, and have submitted the matter to the Commission to decide, on the basis of a fact stipulation and briefs, the stipulated issue of to "what remedy, if any, is complainant entitled." Conference report dated September 8, 1994. The Commission assumes that any matters not briefed are not disputed.

As a result of the aforementioned decision on the merits and the parties' fact stipulation (which incorporates by reference that decision), the facts are not in dispute.[1] The Commission will not recite all the facts here, but incorporates by reference the facts set forth in the stipulation and its attachments, and the facts found in its March 30, 1993, decision on the merits.

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[1] The parties have waived an evidentiary hearing by not requesting same within seven days of the filing of the reply brief (December 27, 1994), see paragraph 16, stipulation.

To summarize briefly what occurred in this case, complainant, who is white, applied and was examined for an ISD-1 vacancy at MMHI. Complainant was certified on the basis of his exam score and was rated second by the appointing authority following post-certification interviews. The candidate who rated first, and who ultimately was appointed to this position, had not scored high enough on the exam to have been certified on a strictly competitive basis. However, he was certified on the basis of his minority status under the "expanded certification" program. It was stipulated that the minority candidate's certification under expanded certification was illegal because it had not been effected in accordance with §230.03(4m), Stats., since respondents had determined underutilization by reference to the percentage of minorities in the state population as a whole rather than "in that part of the state labor force qualified and available for employment in such classification." id. The Commission held that the final hiring decision was discriminatory, rejecting certain contrary arguments by respondents.

With respect to remedy, the Commission concluded that "since it is clear that complainant would have been appointed to this position in the absence of respondents' discrimination, he is entitled to appointment to this or a similar appropriate position upon the next vacancy, if qualified at that time, plus back pay and benefits less mitigation. March 30, 1993, decision, p. 7. Respondent DHSS contended complainant was no longer qualified for such a position because of his intervening discharge for cause from his Correctional Officer 6 (CO 6) position at another institution, which discharge had been upheld on appeal. The Commission addressed this contention as follows:

> [I]t does not necessarily follow that because appellant was discharged for cause sometime before June 19, 1986, he will not be eligible for appointment to an ISD 1 position sometime in 1991 or later. Such a result is not required by the civil service code, although s. ER-PERS 6.10, Wis. Adm. Code, provides:
>
> > [t]he administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:
> >
> > * * *
> >
> > (4) Who has been dismissed from the state service for cause, and the action is requested by the appointing authority; (emphasis added)

> There is an insufficient basis in the record before it for the commission to conclude that appointment is not an appropriate remedy, and therefore, this will be included in the order. (footnotes omitted) Decision, pp. 7-8.

The Commission concluded that complainant was entitled to the following remedy, and entered the following order:

> 4. As a remedy, respondents are ordered:
>
> a) To appoint complainant to the position in question or an appropriate comparable position on the next available vacancy, if he then is qualified;
> b) To compensate complainant for back pay and benefits, subject to mitigation as provided for in s. 111.39(4)(c), Stats., and as discussed above;
> c) To cease and desist from discriminating against complainant in a like manner in the future.
> d) To pay complainant the reasonable attorney's fees incurred by him in connection with this proceeding, see Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984).
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> ORDER
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> This matter is remanded to respondent for action in accordance with this decision. The Commission will retain jurisdiction for the purpose of dealing with the remedial phase of this proceeding. The Commission will enter a final order once the specific details of the remedy have been determined.* Id., pp. 8-9.
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> * The parties are directed to consult to attempt to reach agreement on remedy and to advise the Commission within 30 days of the service of this order as to the status of those negotiations. The Commission will retain jurisdiction until the matter of remedy is resolved, and will conduct a hearing on remedy if necessary.

Respondents now concede complainant is entitled to back pay for the difference between his CO 6 salary at KMCI and what he would have been paid as an ISD-1 at MMHI for the period July 25, 1982 (the effective date of appointment to that position) and July 30, 1987 (the effective date of complainant's discharge from employment in his CO 6 position at KMCI). Therefore, this part of the remedy is not in dispute.

However, respondents point out that the position in question was converted in 1984 from an ISD-1 to a CO 6 (subsequently reallocated to Supervising Officer 2), and that the candidate who had originally been appointed to this position in lieu of complainant had left the position and ultimately replaced in 1984 by another person, who has continued to occupy

the position to the present. Respondents therefore argue that appointment to the original at MMHI is not an appropriate remedy. The Commission agrees that it would be inappropriate to remove this incumbent in order to provide an appointment for complainant. This conclusion is part of the Commission's original order in this case, which was cast in terms of appointing complainant "to the position in question or an appropriate comparable position on the next available vacancy." (emphasis added). Id., p. 8. While there is no per se barrier to removing an incumbent as part of a remedy under the FEA,[2] given the time elapsed since the hiring in question and the fact that the current incumbent did not benefit from respondents' illegal use of expanded certification, displacement of the current incumbent would not be appropriate, see, e.g., Daines v. City of Mankato, 754 F. Supp. 681, 54 FEP Cases 41, 59 (D. Minn. 1990).

Respondents also contend there have been no vacancies in any comparable positions since the entry of the Commission's March 30, 1993, order, and therefore complainant would not have been entitled to an appointment of this nature during this time frame. Since the parties have submitted this case for decision on the issue of remedy on the basis of the fact stipulation, there is nothing in the fact stipulation to contradict respondent's contention concerning the lack of comparable positions, and complainant has the burden of proof on all factual issues, the Commission must concur with respondents' contention in this regard.

Respondents further argue that there is no liability for back pay beyond July 30, 1987, because of the following facts:

1) Complainant was terminated for cause (subsequently upheld on appeal) effective July 30, 1987;

2) Section ER-Pers 6.10(4), Wis. Adm. Code, provides that the DMRS administrator may refuse to certify an applicant who "has been dismissed from state service for cause, and the action is requested by the appointing authority;"

3) The parties' stipulation provides that if an appropriate position became vacant, DHSS would request that DMRS act under §ER-Pers 6.10(4), to

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[2] Respondents' citation to §§230.43(1) and 230.44(4)(d), Stats., is inapposite, because the letter subsection only applies to an "appeal under this section [230.44]," and this case falls under the Commission's jurisdiction pursuant to §230.45(1)(b), Stats.

prevent complainant's certification because of his prior termination for cause from the classified service, and DMRS would in fact comply;

4) The parties' stipulation provides a basis for a conclusion that the reason for complainant's discharge "was directly related to the type of responsibilities he would be required to perform as an ISD-1 at MMHI." (Respondent DMRS brief, p. 10).

Again, complainant has the burden of persuasion with respect to establishing that which is necessary to recover the remedy he is seeking. Based on the stipulation on which the parties have agreed to submit the issue of remedy, the Commission concludes that complainant has failed to satisfy his burden of persuasion on this matter.

In his reply brief, complainant presents two arguments in opposition to respondents' contention on this point. First, he asserts as follows:

> Under the State Civil Service System an "employing unit" is the basic concept utilized to understand hiring, promotion, etc. It is defined thusly:
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> > (7) "Employing unit" means an agency or a functional, organizational or geographic unit within the agency which has been approved under s. 230.30, Stats., for the agency to use for any one or combination of the following: promotion, demotion, transfer, reinstatement, restoration, layoff and other related personnel transactions.
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> According to the 1985-86 and 1987-88 Edition of the Wisconsin Blue Book, KMCI was/is found within the Division of Corrections. While Mendota Mental Health Institution (MMHI) was/is found within the Division of Care and Treatment Facilities. At the very least, two (2), if not more, separate, distinct "employing unit(s)" are and have been involved. Assuming arguendo that Mr. Paul lost (re)instatement privileges because of his KMCI discharge for cause, it would have been only within the Division of Corrections; not within Division of Care and Treatment Facilities. (footnotes omitted) Complainant's Brief, p. 2.

The Commission cannot agree with this contention for two reasons.

First, laying to one side the appropriateness of taking official notice of the divisions within which MMHI and KMCI are located, see §227.45(3), Stats., their location in separate divisions would not establish they are separate employing units. Section ER-Pers. 1.02(7), Wis. Adm. Code, provides that an employing unit is either an agency (here DHSS) "or a functional, organizational or geographic unit within the agency which has been approved under §230.30, Stats., for the agency to use for any one or a

combination of the following ... personnel transactions." (emphasis added) There is nothing in this record showing that these divisions were ever approved as employing units pursuant to §230.30, Stats., which provides, inter alia:

> Each agency shall constitute an employing unit for purposes of personnel transactions, except where appropriate functional, organizational or geographic breakdowns exist within the agency. These breakdowns may constitute a separate employing unit for one or more types of personnel transactions under an overall employing unit plan if requested by the appointing authority of that agency and approved by the administrator. (emphasis added)

Furthermore, §ER-Pers 1.02(7), Wis. Adm. Code, only defines employing units with respect to personnel transactions which involve the employing unit concept. It does not provide an independent restriction on personnel transactions that do not involve employing units. For example, §ER-Pers. 11.02(2)(b), Wis. Adm. Code, provides:

> Competition under this subs. [promotional registers] may be limited and separate registers of qualified applicants under par. (a) may be established in the following order of preference:
>
> 1. Eligible persons employed within state service.
> 2. Eligible persons employed within an agency.
> 3. Eligible persons employed within an employing unit.

There is nothing in §ER-Pers 1.02(7) which limits competition to employing unit promotional; rather, if promotion is to be on an employing unit basis, reference to §ER-Pers 1.02(7) and §230.30 is appropriate to determine what the "employing unit" encompasses. In a similar vein, ER-Pers 6.10(4), Wis. Adm. Code, permits the removal of an applicant who "has been dismissed from the state service for cause." (emphasis added) This provision is not limited to dismissal from a position in the same employing unit.

Complainant also argues that it is significant that respondent DMRS never actually removed complainant's name from a certification list. This argument misses the point of respondents' position here. Respondents have established that there have been no "comparable" positions available; therefore, there would have been no occasion to have proceeded with the appointment process or to request a certification of eligibles or to take other action to fill such a position. What respondents' argument addresses is the

question of the extent of ongoing liability for back pay under such circumstances. The Commission's March 30, 1993, order required complainant's appointment to the next available vacancy, "if he then is qualified." Id., p. 8. Respondents' point is essentially that complainant lost his "qualification" for the position in question when he was discharged for cause from his KMCI employment under the circumstances found in the stipulation.

In conclusion, on the basis of the parties' stipulation and the applicable law, the remedy to which complainant is entitled is the difference between his pay as a CO 6 at KMCI and the pay he would have received as an ISD 1 at MMHI for the period of July 25, 1982 through July 30, 1987. Respondents have not contested the accuracy of Stipulation Exhibit 2, which appears to be complainant's accounting of the back pay to which he is entitled, plus interest, from the beginning of this period through June 30, 1994. Prorating this through July 30, 1987 (i.e., using 15/26 of the 1987 figures) provides a sum of $18,927.89. Additional interest must be added from June 30, 1994, until complainant is paid the total amount due, at the rate of 12% annual interest.[3] As discussed above, the record reflects that complainant in effect became "unqualified" for an appointment to the position in question or similar position once he was discharged for cause at KMCI, since the circumstances surrounding that disciplinary action on this record provide a basis for his removal from certification pursuant to §ER-Pers 6.10, Wis. Adm. Code. Therefore, complainant is not entitled to an appointment as part of the remedy.

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[3] See order entered September 21, 1994, which reflected the parties' stipulation that pursuant to §814.04(4), Stats., 12% interest would be paid from the date of the Commission's August 23, 1993, order until the date the amount due is paid.

FINAL ORDER

This matter is remanded to respondents for the payment of back pay as set forth above. Respondents are further ordered to cease and desist from discriminating against complainant in a like manner in the future.

Dated: January 25, 1995

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:rcr

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to

§227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.