STATE OF WISCONSIN PERSONNEL COMMISSION

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LLOYD PRILL,

Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYE TRUST FUNDS, and Secretary, DEPARTMENT OF HEALTH & SOCIAL SERVICES,

Respondents.

Case No. 85-0001-PC-ER

* * * * * * * * * * * * * * * *

FINAL DECISION AND ORDER

This matter is before the Commisison following the issuance of a proposed decision by the hearing examiner, a copy of which is attached hereto. The Commission has considered complainant's objections and arguments with respect thereto.

Complainant raised some initial objections to the proposed decision and order in the above case in a letter dated November 14, 1989. There were no disputes of fact contained in these objections, and the issues raised about the reduction in benefits were discussed on page 6 of the proposed order. There is no dispute that complainant's benefits were changed (reduced) as a result of the Benefit Improvement Bill (1983 Wis. Act 141) from what they would have been had there been no change at all. However, the issue in this case involved the questions of whether the information given by respondent was a misinterpretation of the statutes, and whether the information provided showed that there was probable cause to believe respondent had discriminated against the complainant on the basis of age.

In a letter dated November 23, 1989, complainant raised four additional objections which are responded to below.

1) Complainant contends that respondent put in exhibits 3 and 4 in violation of the Commission's requirement that a party provide exhibits it is going to use at the hearing to the opposing party at least 3 working days before the hearing. The record reflects that respondent submitted only 3 exhibits and that these were properly noticed to the complainant. Presumably, complainant is referring to Joint Exhibit 3 (1983 Senate Bill 568) and Joint Exhibit 4 (Senate Amendment 1 to 1983 Senate Bill 568). These exhibits were accepted into the record as joint exhibits, i.e. exhibits of both the complainant and respondent, without objection. In addition, 1983 Senate Bill 568 was identified by the complainant as a possible exhibit and, therefore, he was aware of the document (Joint Exhibit 3) prior to the hearing.

Neither complainant nor respondent specifically identified Joint Exhibit 4 prior to the hearing. However, complainant did identify 1983 Wis. Act 141 as a possible exhibit. Senate Bill 568 as amended by Senate Amendment 1 became 1983 Wis. Act 141. Senate Amendment 1 was also submitted without objection as a joint exhibit. It was the final language contained in 1983 Wis. Act 141, and its interpretation which were the focus of the hearing. SB 568 and Senate Amendment 1 provided legislative history on how the law was developed, and, in and of themselves, did not prejudice either party

2. Complainant objected to not being allowed to enter 1983 Senate Bill (SB) 175 in the record while respondent was allowed to introduce a letter from the Attorney General (Respondent's Exhibit 2) which made

reference to SB 175. Senate Bill 175 was never passed into law. It was the predecessor in a previous 1983 legislative floor session to Senate Bill 568 which was passed. Consequently, the language of Senate Bill 175 was not relevant to the issue in the hearing, except to provide legislative history on the development of the Benefit Improvement Bill (Wis. Act 141). Appellant tried to use specific language from SB 175 concerning the exclusion of employes who reach age 55 prior to January 1, 1985, from the formula reduction provisions applied to protective occupation employes. This language was not relevant to the issue (other than to provide legislative history) because the provision was removed from Senate Bill 568 by Senate Amendment 1 and therefore, was not a part of the law that was passed (Wis. Act 141). This is important to the relevancy objection concerning SB 175, since the language referred to by complainant in SB 175 was not contained in 1983 Wis. Act 141, which was the focus of the hearing.

3. Complainant contends that he was not allowed to question witnesses fully concerning his Exhibit #1 (Department of Employe Trust Funds Benefit Brochure). The line of questioning was objected to on the basis that the witness had already answered the question. The hearing examiner indicated to the complainant that some of the questions were repetitive and noted that complainant did not agree with the interpretation of the language being given by the witness. The hearing examiner indicated that witnesses were to be questioned to establish facts and that if complainant wished to argue facts or whether the interpretation was correct, he would have an opportunity at the end of the hearing to make such arguments. However, reasking a

witness similar questions to try and get the witness to agree with his interpretation or point of view was not considered appropriate once the witness had answered a given question and any subsequent questions concerning the witness' interpretation of the wording of the Exhibit.

4. The complainant raised an objection to the fact that respondent was allowed to use parts of Senate Bill 175 at a hearing before the U.S. Equal Employment Opportunities Commission (EEOC) but he was not allowed to use SB 175 or any part of it. (The Commission assumes that complainant is referring to his hearing before the Personnel Commission when he refers to not being allowed to use SB 175). The Commission is not aware of the circumstances, and is not bound by what was done (procedurally) in another forum. This is the first time this issue has been raised, and even if it had been raised (and explained) previously, it would have no bearing on the proceedings before the Personnel Commission relating to admission of documents and relevancy to the issue established for hearing.

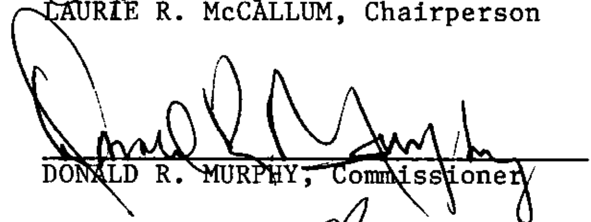
ORDER

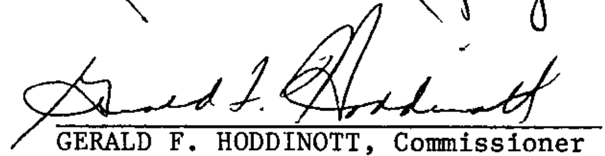
The attached proposed decision and order is incorporated by reference and adopted as the final disposition of this matter by the Commission, and this charge of discrimination is dismissed.

Dated: December 15, 1989

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

GFH:gdt
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STATE OF WISCONSIN PERSONNEL COMMISSION

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Secretary, DEPARTMENT OF        *
EMPLOYE TRUST FUNDS, and        *
Secretary, DEPARTMENT OF        *
HEALTH & SOCIAL SERVICES,       *
                                *
               Respondents.     *
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PROPOSED
DECISION
AND
ORDER

NATURE OF THE CASE

This case is an appeal of a supplemental initial determination finding of no probable cause pursuant to 230.45(1)(b).

Complainant originally filed his age discrimination complaint with both the U.S. EEOC (Equal Employment Opportunities Commission) and the Commission. The Commission deferred processing of the complaint and informed the parties that it would adopt the EEOC determination on probable cause and allow complainant to appeal a negative determination. EEOC stated that they would not process the action further because it "was unable to substantiate the allegations of discrimination."

Subsequently, complainant appealed the no probable cause issued by EEOC and raised some additional matters. As a result, the Commission issued a supplemental initial determination which allowed the original complaint to be amended and found no probable cause to believe complainant had been discriminated against on the basis of age.

The issue the parties agreed to for the hearing held as a result of complainant's appeal of the no probable cause finding was:

> "Whether there is probable cause to believe respondent DETF discriminated against the complainant based on age with respect to advice given to him by DETF counselors regarding the effects on him of the Benefit Improvement Bill."

The parties filed briefs based on the schedule set at the conclusion of the hearing.

FINDINGS OF FACT

1. The complainant, Lloyd Prill, was employed prior to his retirement on December 29, 1984, as an Officer 3 in the gatehouse at the Dodge Correctional Institution. For retirement purposes, the complainant is a protective occupation employe covered by Social Security.

2. On March 9, 1984, the following provisions of 1983 Wisconsin Act 141 (Benefit Improvement Bill) in relevant part took affect:

> "40.23(2m) The following provisions apply only to participate who are participating employes after the effective date of this subsection
>
> * * * *
>
> (e)3. For each participant subject to titles II and XVIII of the federal social security act, for service as a protective occupation participant, 2%, <u>except that the 2% factor shall be reduced for all years of creditable service by 0.0125 for each calendar quarter-year that elapses after the calendar year in which the participant attains age 55, excluding all calendar years prior to 1985</u>, and before the termination date of employment as a protective occupation participant, but the factor may not be reduced to less than 1.6% and the reduction may not reduce the retirement benefit to less than the benefit payable if the participant had retired 12 months earlier than the effective date of the annuity. (Emphasis added)

* * * *

3. Prior to passage of 1983 Wisconsin Act 141 the formula factor applied in determing monthly benefits was 2% regardless of whether the employe worked past the normal retirement age for protective occupation employes of 55. Normal retirement age refers only to the age at which full

retirement benefits are payable without an actuarial reduction of the formula factor.

4. In early May 1984, complainant received his copy of the Trust Fund News, a newsletter published by the Department of Employe Trust Funds (DETF). (Complainant's Exhibit #4.) The newsletter generally covered the changes in retirement provisions contained in 1983 Wisconsin Act 141. In part it stated:

> * * * *
>
> "The above formula factors will be reduced for protective occupation employes who continue to work in a protective position past age 55. For instance, for a protective employe with social security coverage who works one year after the year in which he or she attains age 55, the formula factor will be 1.95%, not 2.0%."
>
> * * * *

5. The complainant testified that on May 21, 1984, he called and talked to an unidentified DETF employe concerning his retirement benefits. Complainant stated he was told that if he worked past December 8, 1984, (the end of the last payroll period for calendar year 1984), his pension benefits would be subject to a reduction. Since respondent did not put in any evidence concerning this testimony, it will be assumed at the probable cause stage that the content of the conversation is as testified to by the complainant.

6. On June 14, 1984, complainant received a pamphlet entitled "Formula Benefits" which in part stated" "Note: Starting in 1985, the formula factor is reduced by .0125% for each quarter of protective work after 1984 or the calendar year in which you reach age 55 if that year is after 1984...." (Complainant's Exhibit #1.) Complainant's formula factor was 2.0%. The reduction in the formula factor could not cause it to go below 1.6%.

7. Complainant's birthdate is April 17, 1929.

8. On July 2, 1984, complainant called DETF and talked to James Burant who informed him that the could work until the end of December without having a reduction in his pension (formula factor).

9. Complainant received a Retirement Annuity Estimates dated June 25, 1984, which outlined the benefits he would receive under various retirement options. (Complainant's Exhibit #6.) These estimates were revised by DETF on November 28, 1984, to include consideration of qualifying military service. (Complainant's Exhibit #7.)

10. In a letter dated November 23, 1984, Mr. Robert Duecher of DETF provided complainant the following information: (Joint Exhibit #1).

* * * *

> "If you terminate employment no later than March 30, 1985 and begin your retirement annuity no later than March 31, 1985, your formula factor would be the full 2%. If you continue to work beyond March, 1985, your formula factor would be reduced. However, <u>this does not mean that your retirement annuity would decrease</u>. Your annuity would continue to increase as you continued to work. The relative increase in benefit is indicated on page 4 of the enclosed material.
>
> If you were to continue to work until January of 1986, your monthly benefit would be $20.00 to $30.00 higher than a January 1985 annuity. If you would like a detailed annuity estimate for January of 1986, please provide me with your estimated salary for 1984 and 1985.
>
> If you want to cancel the annuity application form you submitted in October, submit a written notice to this department.

* * * *

The enclosed material referred to is a DETF document entitled "Over Age 55 Retirement for Protectives" which in part (page 4) provided a table showing how monthly benefits would be affected by working past age 55.

CONCLUSIONS OF LAW

1) This matter is properly before the Commission pursuant to §230.45(1)(b) and §111.33(2), Stats.

2) The respondents are employers within the meaning of §111.32(3), Stats.

3) The complainant has the burden of proving that there is probable cause to believe that respondents discriminated against the complainant on the basis of his age with respect to information provided him by DETF counselors.

4) Complainant has not satisfied his burden of proof.

DISCUSSION

In hearings involving probable cause, the standard of proof is not as stringent as the preponderance of evidence standard required at a hearing on the merits. The standard of proof required for a finding of probable cause is "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination has been or is being committed (§PC 1.02(16), Wis. Adm. Code).

The evaluative process used by the Commission in making this determination is based on the decision in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP CAses 965 (1973). In McDonnell-Douglas, the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case. In a case alleging age discrimination, this may be accomplished by showing: 1) that complainant was within the age group protected by the Wisconsin Fair Employment Act; 2) that complainant was adversely affected by the employer's action which is the subject of the complaint; and 3) there is evidence age was not treated neutrally in the employer's action. If the complainant succeeds in establishing a prima facie case, the burden of proceeding then shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employer's action. Once this is accomplished, the complainant must then be given a fair opportunity to show that the employer's stated reasons for the action were in fact a

pretext for a discriminatory action. The ultimate burden of persuading the trier of fact that the respondent employer intentionally discriminated against the complainant remains at all times with the complainant, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981).

In the instant case, complainant meets the first element in establishing a prima facie case in that he was over 40 years of age which is within the age group protected by the Wisconsin Fair Employment Act.

The second element in establishing a prima facie case involves complainant showing that he was adversely affected by respondent's action. Complainant contends that his benefits (pension) were reduced to a point below what they would have been had there been no reduction in the formula factor below 2.0%. In addition, complainant contends that DETF was misinterpreting the statutes namely §40.23(2m)(e)3 to his detriment.

There are several matters here the parties disagree on. First, complainant's position is that a reduction in his formula factor is synonomous with a reduction in his benefits (pension). Respondent's position is that while the formula factor would be reduced the actual dollar amount of his retirement benefit (pension) would go up because of the affect of additional years of service and a higher annual salary resulting from negotiated wage adjustments. Complainant counters this argument with the fact that his benefits would not increase as much as they could if there were no reduction in the formula factor.

While these arguments are not overly persuasive, the Commission will assume for purposes of argument that complainant has shown he was adversely affected. The issue of misinterpretation of statutes will be discussed later in this decision.

The third element in establishing a prima facie case is evidence that age was not treated neutrally in the employer's action. There is no evidence on this record that complainant was given different information than any other state employe who was similarly situated. Other than the fact that the complainant was nearing retirement age, and therefore asked questions about the impact of the Benefit Improvement Bill, there is no indication on the record that he was treated differently than any other employe who would have asked the same questions. Since the DETF retirement counselors probably deal almost exclusively with questions of employes who are over 40 years of age, it is difficult to conclude that complainant was treated differently solely because of his age.

For purposes of this decision, however, the Commission will assume, arguendo, that complainant has established a prima facie case. The respondent now has the opportunity to articulate legitimate, non-discriminatory reasons for their actions.

In this regard, respondent indicates that the language of the statutes preclude an interpretation other than that which they gave to complainant. To support this, respondent presented in evidence an opinion from the Attorney General (Respondent's Exhibit #2) concerning whether the formula reduction applied to all years of creditable service or just those years after January 1, 1985. The Attorney General opined on August 8, 1984 that ".... It appears that the language of the statute and the legislative history both mandate a conclusion that all years of creditable service are affected by the reduced multiplier...." In addition, the Attorney General stated ".... The clause "excluding all calendar years prior to 1985" limits the calendar quarter years used as a basis for the reduction to those

occurring after December 31, 1984, but does not limit the requirement that all years of creditable service are reduced."[1]

Complainant indicates that the following language in 40.23(2m)(e)3 "... after the calendar year in which the participant attains age 55, excluding all calendar years prior to 1985, ..." (Emphasis added) exempts him from the formula factor reduction because he turned 55 prior to 1985 and all those years are excluded. The respondent argues that the key language in 40.23(2m)(e)3 is "... the 2% factor shall be reduced for all years of creditable service by 0.0125% for each calendar-year quarter that elapses after the calendar year in which the participant attains age 55, excluding all calendar years prior to 1985..." (Emphasis added)

The plain language reading of the entire provision of 40.23(2m)(e)3 would seem to indicate that if there is any formula reduction it would apply to all years of creditable service. In reviewing the legislative history of 1983 Wisconsin Act 141 (1983 Senate Bill 568), it is noted that the formula factor reduction provisions actually started with 1983 Senate Bill 175. Substituted Amendment 1 to SB175 provided an exemption from the formula reduction for protective occupation participants who reached age 55 prior to January 1, 1985. However, SB175 failed to pass pursuant to Senate Resolution 2.

The issue of benefit improvements, including formula reduction, was brought up again in the next session as 1983 Senate Bill 568. In its initial form, SB568 contained the same exclusion provision as SB175.

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[1] The Attorney General opinion specifically addresses 40.23(2m)(e)4 which relates to protective occupation employes not covered by Social Security (namely fire fighters). Complainant is covered under 40.23(2m)(e)3 which includes protective occupation employes covered by Social Security. Both of these sections have identical language related to reduction in the formula factor.

However, substitute amendment 1 (Joint Exhibit #4) to SB568 deleted this provision. Specifically, the amendment called for the deletion of the following language related to applicability "for participants who became 55 years of age on or after January 1, 1985"; and added the following language; "excluding all calendar years prior to 1985." SB568 with these amendments became 1983 Wisconsin Act 141.

It seems clear from this that had the legislature intended to exclude certain protective occupation employes from the formula reduction (namely those employes who turned 55 prior to 1/1/85) they would not have had to have made any changes in the language of the bill. The change eliminated the exclusion and provided that any reduction would be based on whether an employe who was 55 years old worked beyond January 1, 1985, or the beginning of the calendar year following his/her 55th birthday.

The reasons given by respondent for the statutory interpretation are legitimate and non-discriminatory in that a plain language reading of the statute, the legislative history, and an attorney general's opinion supports these interpretations. In addition, testimony given during the hearing, as well as the information contained in formal documents issued by DETF which address this issue, show that the same information was provided to anyone who raised the same issue as complainant. Finally, even if the information given to complainant had been incorrect, there is nothing to indicate complainant was given incorrect information because of his age.

Complainant now has a full opportunity to show that these reasons are a pretext for discrimination. In this regard, the complainant has identified a number of different answers he received to questions he asked of DETF during 1984. The Commission is sensitive to the frustrations and confusion that these matters must have caused the complainant. However,

the DETF letter to complainant dated 11/23/84 (Joint Exhibit #1) laid out the issues and options available to him. While it would have been better to have given that information when complainant made his first inquiry, the corrected information was still made available to him prior to his final decision to retire.

ORDER

The Commission finds that there is no probable cause to believe respondent discriminated against complainant on the basis of age with respect to the advice given him by DETF counselors regarding the effects of the Benefit Improvement Bill on him, and this complaint is dismissed.

Dated: ______________________________,1989 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner

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