

STATE OF WISCONSIN

PERSONNEL COMMISSION

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EDWARD AMES, *

Complainant, *

v. *

Chancellor, UNIVERSITY OF *

WISCONSIN - MILWAUKEE *

Respondent. *

Case No. 85-0113-PC-ER *

* * * * *

FINAL
DECISION AND ORDER
ON THE
MERITS

NATURE OF THE CASE

Complainant filed three complaints of discrimination on the bases of sexual orientation and arrest record with regard to denial of reinstatement to two positions at the University of Wisconsin-Milwaukee (UW-M), Nos. 85-0113-PC-ER, 86-0123-PC-ER and 86-0124-PC-ER. An investigation found "no probable cause" as to these cases, and complainant appealed that determination and a hearing was held. The Commission entered an order on May 5, 1988, pursuant to complainant's request, dismissing No. 86-0124-PC-ER and the allegation of sexual orientation discrimination as to No. 86-0123-PC-ER. In a subsequent order entered June 7, 1988, the Commission denied respondent's petition for rehearing which objected to the aforesaid dismissals.

On August 9, 1988, the examiner issued a proposed decision and order on probable cause, finding probable cause as to arrest record and no probable cause as to sexual orientation in No. 85-0113-PC-ER, and no probable cause as to No. 86-0123-PC-ER. In subsequent correspondence, counsel for the parties pointed out that said proposed decision overlooked the fact that the parties had stipulated before the hearing that it was to

address the merits of these cases as well as the issue of probable cause. Counsel also submitted additional arguments on the merits. Accordingly, this supplemental decision addresses the merits of 85-0113-PC-ER, the Commission having been informed that attempts at settlement have been unsuccessful.

DISCUSSION

At the stage of a determination on the merits, the evidence must be viewed from the standpoint of the "preponderance of the evidence" test:

...the required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty by the greater weight or clear preponderance of the evidence.... Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971).

The decision on probable cause discussed the difficulty presented by the fact that the work rule violation in which complainant was involved was intertwined with criminal activity that led to his arrest. It was pointed out that it was "possible that in his testimony Mr. Kohel simply was not making any distinction between the arrest and the conduct underlying the arrest...." p. 7.

In the most recent arguments submitted by complainant on August 24, 1988, he contends that "Mr. Kohel admitted that, as a general matter, he believed that the arrest record of a job applicant 'could be' a factor in an employer's hiring decision."

The testimony referred to is as follows:

- Q. ...is it your position that because of the dangerous machines that [FRW 3] workers sometimes use that a decision not to hire someone who had been arrested for marijuana possession would be justified?
- A. I don't think it would be justified. I would consider it in the operations of our department, but I don't think it would be very important during an interview process.
- Q. O.K., but it would be a factor that would be considered, would it not?

A. It could be.

The Commission cannot agree with complainant's characterization of this testimony. Mr. Kohel's response to the question was that he did not think it would be justified to consider a marijuana arrest in connection with a hiring decision. He added that it would be considered "in the operations of our department." This is consistent with respondent's contention that its concern was with the on-the-job work rule violation, not with the arrest per se.

Another argument complainant makes is that Mr. Kohel "did not deny having told a UW-M equal rights investigator to not inform the complainant that he had relied on the complainant's arrest as the basis for his no-hire decision." While this is technically correct, this testimony, like much of the other testimony, is fraught with ambiguity.

The Personnel Commission investigator, who was called by complainant, testified that Mr. Kohel had told her that he had considered the "marijuana incident," (emphasis supplied) among other things, in his hiring decision. She also testified as follows with regard to Mr. Kohel's statement to the UW-M equal rights investigator:

[Direct]

Q. Again, Ms. Bastien, were you aware of a report by a previous investigator named Mary Kearney which stated that Loren Kohel had asked her not to tell Ed Ames that he had relied on the 1981 marijuana incident in his decision not to hire Ed Ames?

A. I became aware of it after I reviewed the file in P. J's office. (emphasis supplied)

When complainant subsequently called Mr. Kohel adversely, he testified as follows:

Q. Do you remember telling her [Kearney] you did not want her to tell Ed Ames that you considered his marijuana arrest in the hiring decision?

A. Well, I considered it a confidential personnel matter.

Q. So you may have said that?

A. I may have said that. (emphasis added)

These questions and answers illustrate the blurring together in this record of the fact there was a work rule violation and the fact there was an arrest as a result of that conduct. This is also present in another part of Mr. Kohel's adverse examination:

Q. You, of course, are familiar with the fact that your hiring decision has been investigated by at least two people, one a local investigator from the equal opportunity office, and one Barbara Bastien, and they both say, in the words of Barbara Bastien, both earlier today and in her report, that you took Ed's marijuana arrest into consideration. You don't dispute that, do you?

A. I considered it, because, still, I remembered it.

Q. So it was a factor in your hiring decision, correct?

A. Yeah, to some degree, but it was not the determining factor.

Q. Do you think the incident was significant?

A. I believe it was, as far as a work rule violation, I believe it was significant.

Q. Had Ed not been arrested for marijuana possession, would his chances of being hired by you have been better?

A. I really didn't consider that as a serious part of my decision. I looked at the qualifications, what they each had to offer.

Q. But, and yet it was a factor, was it not? You testified to that --.

A. At some point, I mean at some degree, I don't know what degree it was. It's just that I still remember that, that's all. (emphasis added)

These questions to Mr. Kohel mischaracterize Ms. Bastien's testimony that he had referred in his statements to reliance on a "marijuana

incident" by calling it a "marijuana arrest." This was followed by a question referring to "the incident" and another reference to "arrested."

Another factor militating against a conclusion that the arrest, as such, entered into Mr. Kohel's decision, is his testimony, quoted above, that he made a distinction between the work rule violation and the arrest:

"Q. Do you think the incident was significant?

A. I believe it was, as far as a work rule violation, I believe it was significant." (emphasis supplied)

This is consistent with his other testimony, discussed above, that in general terms he did not think it would be justified to consider a marijuana arrest in a hiring situation, but that it could be considered in terms of departmental operations.

Complainant contends that the other reasons given by Mr. Kohel for his decision were pretextual. The Commission disagrees. With respect to qualifications, Mr. Tucker had more extensive experience which outweighed the fact that complainant's experience as a facilities repair worker was at UW-M. As to Mr. Kohel's reservations about complainant's performance, it does not follow that because complainant's immediate supervisor gave him satisfactory or better evaluations that there was something specious in Mr. Kohel having some reservations about complainant's performance. Opinions and approaches to performance evaluations can vary among supervisors. For example, Mr. Kohel testified that his practice when arriving at a work site was to first note who was working and who was not working, and that he was not favorably impressed with complainant in this regard, although not to the point where he felt the need to override the performance evaluations prepared by complainant's supervisor. Finally, as discussed in the decision on probable cause, the Commission rejects the contention that there

was anything pretextual about respondent's reliance on the work rule violation associated with the marijuana incident in making its decision.

In conclusion, based on the entire record, and particularly the interrelationship between the arrest and the work rule violation, and how this was played out in the testimony, the Commission cannot find under the preponderance of the evidence test that Mr. Kohel was motivated by complainant's arrest when he elected to hire someone else rather than to reinstate complainant to the position in question.

While the Commission concludes respondent did not discriminate against complainant with regard to this transaction, in the event this conclusion were to be disturbed in further proceedings, the Commission notes that, assuming the arrest per se had been considered, this is a case where complainant would not be entitled to back pay or an appointment as part of a remedy, because the record would support a finding, regardless of the allocation of the burden of proof on this issue, that complainant would not have received the appointment even if respondent had not relied on his arrest.

Therefore, the Commission adopts findings 1-6 and 9-11 set forth in the proposed decision on probable cause issued August 9, 1988 (attached) as its findings on the merits as to this case (No. 85-0113-PC-ER), and adds the following additional finding:

Mr. Kohel's decision to appoint Tucker rather than complainant for the Facilities Repair Worker 3 (FRW 3) position in August 1984 was motivated by the following factors:

- a) He (Kohel) considered Tucker to be better-qualified by virtue of greater and more extensive experience;

b) He had not been overly impressed by his observations of complainant's work habits during his employment at UW-M, notwithstanding complainant's generally favorable performance evaluations;

c) He was concerned about complainant's work rule violation that occurred when he was smoking and possessing marijuana on the job in 1981, but he was not concerned about the associated arrest itself.

The Commission adopts proposed Conclusions of Law #1 and #2 and makes the following additional Conclusions of Law on the merits:

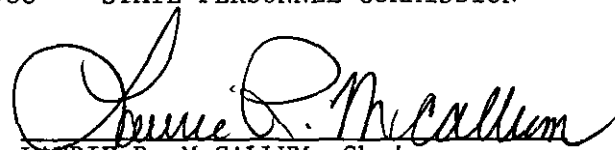
3. Complainant's burden of proof on the merits is to establish the necessary facts to a reasonable certainty by the greater weight or clear preponderance of the evidence. Reinke v. Personnel Board, 53 Wis. 2d 123, 137, 191 N.W. 2d 833 (1971).


4. Complainant having failed to sustain said burden, it is concluded that respondent did not discriminate against complainant when it decided to appoint someone else rather than to reinstate him to the FRW 3 position in question.

FINAL ORDER

This charge of discrimination, No. 85-0113-PC-ER, is dismissed.

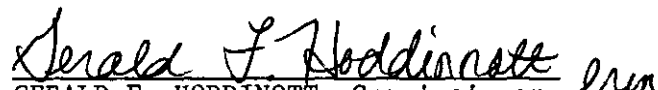
Dated: December 23, 1988 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:jmf
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Attachment


GERALD F. HODDINOTT, Commissioner *ern*

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