STATE OF WISCONSIN PERSONNEL COMMISSION

LEROY RUDIE,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 87-0131-PC-ER

DECISION ON MOTION TO DISMISS AS UNTIMELY

This charge of age discrimination with respect to wages was filed September 15, 1987. An initial determination was issued on April 12, 1990, concluding there was "no probable cause" to believe discrimination had occurred. Complainant appealed this initial determination. On August 16, 1990, respondent filed a motion to dismiss on the ground the charge was untimely filed, and both parties have filed briefs.

For purposes of deciding this motion, the Commission will assume the facts alleged by complainant. Among other things, complainant contends that he is earning $12.83 per hour compared to $13.484 for another Officer 6 who is 19 years younger and who has less time in service and time in class. He also alleges that in 1985, three Officer 5's received two in grade pay steps to compensate them for receiving less than some of their subordinates, and since one of the three was promoted to Officer 6 in February 1987, he now is paid more than complainant.

In his brief in opposition to the motion to dismiss, complainant alleges that he was unaware of any discrimination until the first week in August, 1987, when

he learned in a casual conversation with another Officer 6 that his salary was more than complainant's, and that this acted as a catalyst for him to inquire into the salary structure of the other Officer 6's.

At a prehearing conference held on July 26, 1990, the parties stipulated to the following issue:

> Whether there is probable cause to believe respondents discriminated against complainant on the basis of his age in regard to the manner in which equity awards were made.

In support of its motion to dismiss, respondent asserts that equity awards were granted to certain correctional officers in June 1985 and June 1986, and that none have been granted to officers since that time. Respondent asserts that since the complaint was filed more than 300 days after the last equity award was granted, it is untimely under §230.44(3), stats., arguing as follows:

> In Sprenger v. UW Green Bay, 85-0089-PC-ER, 1/24/86, the Commission held that the time limit for filing a charge of discrimination under the FEA begins to run when the facts that would support a charge of discrimination are apparent or should be apparent to a similarly situated person with a reasonably prudent regard for his or her rights. Complainant alleges that he learned of a pay discrepancy between himself and a less senior officer during a "casual discussion" in August, 1978.
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> Prior to that time, however, Complainant was plainly aware of his own salary. He was also in a position to identify officers less senior and/or younger than himself. Finally, information involving the salary of such officers was available to him as public records under the open records law. Kimble v. DILHR, 87-0061-PC-ER, 2/19/88.
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> Complainant's lack of diligence is scrutinizing or raising objections to his salary cannot be relied upon to avoid the jurisdictional time limit for filing this complaint.

In applying the test set forth in Sprenger, the key question in the factual context of this case is whether "the facts which would support a charge of discrimination were ... apparent [or] would ... have been apparent to a similarly situated person with a reasonably prudent regard for his or her rights,"

(footnote omitted), during the period when the other officers received their equity awards in 1985 and 1986. The gravamen of complainant's charge of discrimination is that younger, less senior officers in the same classification were being paid at a higher rate, and that this violates the Fair Employment Act prohibition against age discrimination. At the time the younger officers' salaries were increased by equity awards (while complainant's salary was not), it seems clear that these facts would not have been known to complainant unless he asked under the open records law for information about the salaries of the younger Officer 6's with whom he worked. The question then under the Sprenger test is whether a person with a reasonably prudent regard for his or her rights in complainant's situation would have made such inquiry. In the Commission's opinion, the answer must be no. Complainant at that time had no apparent reason to have believed he was being paid less than other Officer 6's who were younger and who had less seniority. That being the case, why would he have felt the need to make such an inquiry? The implication of respondent's position on this matter is that any state employe in the protected age category (40 or over) would be required constantly to be making inquiries into the salary structure of younger employes in his or her classification and with less seniority to ensure that they weren't being paid more. Such a requirement would go far beyond what a person with a reasonably prudent regard for his or her rights would do. This is not a situation where complainant himself was affected by a discrete transaction which directly affected him such as a denial of a discretionary performance award which perhaps would have alerted him to the possibility that younger officers might be moving ahead of

him in connection with his rate of pay.[1] Rather, this case involves equity awards made to other officers to deal with specific salary compression problems affecting them. These transactions did not involve complainant and he had no reason to have been aware of them, but they caused his salary to be lower than his younger colleagues.

There is another way in which this case is distinguishable from Sprenger. The latter case involved a specific transaction (a layoff) which affected the employe himself. In this case, complainant is concerned about his salary status, which under the circumstances involved here constitutes a "continuing violation." Complainant is alleging in effect that respondent is paying him less than it should, that this is occurring on an ongoing basis, and that respondent has failed or refused to rectify the situation, specifically by failing or refusing to have given him an equity award. See Jenkins v. Home Ins. Co., 24 FEP Cases 990, 992 (4th Cir. 1980):

> [T]he Company's alleged discriminatory violation occurred in a series of separate but related acts throughout the course of Jenkins' employment. Every two weeks, Jenkins was paid for the prior working period; an amount less than was paid her male counterparts for the same work covering the same period. Thus, the Company's alleged discrimination was manifested in a continuing violation which ceased only at the end of Jenkins' employment.

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[1] Cf. Cozzens-Ellis v. Wis. Personnel Comm., 155 Wis. 2d 271, 274, — N.W. 2d — (Ct.App.1990):

> Under sec. 230.44(1)(d), an employee appeals from a "personnel action" alleged to be illegal or an abuse of discretion. If a person is denied a promotion, the "action" appealed from is the denial, not a later event stemming from it. This interpretation is consistent with the focus of the appeal on the nonpromotion of the appellant rather than the promotion of another person.

In a similar vein, respondent in the instant case is attempting to focus on a transaction involving another employe for limitations purposes.

Since this case involves a continuing violation, the complaint was timely filed, although §111.39(4)(c), stats., limits potential back pay liability to a date two years prior to the filing of the complaint.

ORDER

Respondent's motion to dismiss filed August 16, 1990, is denied.

Dated: Sept 19, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner