STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM DALTON,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 87-0168-PC-ER

DECISION AND ORDER

This matter is before the Commission on a jurisdictional issue.

On December 7, 1987, complainant filed a complaint of discrimination alleging both age and handicap discrimination and providing the following explanation:

> On 11-23-87 I was terminated from Housekeeping job at [Brown County] Mental Health, there reason I could not be taught anymore skills and they want younger men. I'm 63 yrs. old. This job is suppose to be a training job with pay of 75¢ hr. I was doing exactly the same job as those getting $7.90 hr.
>
> They have re-hired a younger man in my place who knows all there is to know about housekeeping.
>
> A job was posted for ship & rec. clerk which I have experience in, but they would not consider me for.
>
> I was told 1 wk. ago I should act as a father & teacher as I was the oldest.
>
> Also ask for meeting with Director Rob Cole, but beings I'm prison inmate they will not listen.
>
> Am requesting re-instatement on my old job or another with Br. County.
>
> Also asking for all back wages due to this un-justified termination.

After reviewing the complaint and indicating that it raised jurisdictional issues, the complainant responded to a series of written questions. The following facts appear to be undisputed.

FINDINGS OF FACT

1. At all relevant times, complainant was an inmate at Sanger B. Powers Correctional Center (SPCC).

2. SPCC and the Brown County Mental Health Center (BCMHC) entered into agreement on June 8, 1987 "for the purpose of establishing a meaningful work experience training program by Brown County Mental Health Center for pre-release inmates housed at Sanger B. Powers Correctional Center." Pursuant to that agreement, the SPCC agreed to:

1.) Provide selected inmates to participate in the Work Training Program not to exceed 10 placements at any given time.

2.) Provide work clothing, work shoes or boots suitable for performance.

3.) Provide a bag lunch.

4.) Provide and transport selected inmates to and from the prescribed station in accordance with the pre arranged work schedule.

5.) Provide on site monitoring and periodic performance review.

6.) Provide a monthly statement of inmate hours and wages of each inmate participating in the program during that monthly period of time.

The agreement called for BCMHC to:

1.) Provide meaningful work experience projects for pre-release inmates that will assist in identifying with and learning good work habits and job responsibilities.

2.) Provide daily on site instructional supervision.

3.) Provide workmans compensation.

4.) Provide all necessary tools, equipment safety equipment, etc. which is necessary to perform all required tasks.

5.) Provide work performance references to perspective employers.

6.) Provide salary reimbursement to The State of Wisconsin, Division of Corrections of all inmates wages for actual hours worked at a rate of __.75__ per hour per inmate on a monthly basis.

The agreement also provided, in relevant part:

[BCMHC] reserves the authority in determining the daily job tasks and nature of work to be performed by inmates. Final approval will be by the Superintendent of the Sanger Powers Correctional Center. All job tasks identified must be of non-routine department provided services.

* * *

No inmate participant is to be classified as or considered to be a permanent party employee.

* * *

The Sanger Powers Correctional Center reserves the right and authority to suspend and or terminate any and/or all inmate placements without notice if deemed necessary by the direction of the Superintendent.

3. Complainant contends that a Sergeant McNally of SPCC determined that complainant was to work at BCMHC, that a Rose Kuczynski of the BCMHC decided that the complainant would no longer work there and that Sergeant McNally informed the complainant of this conclusion.

CONCLUSION OF LAW

The complainant is not an employe under the Fair Employment Act.

OPINION

This complaint raises two issues: whether the complainant was an "employe" for the purposes of the Fair Employment Act and, if so, whether he was employed by respondent's SPCC or by the BCMHC.

The respondent contends that the complainant was not an employe of either SPCC or of BCMHC but had been placed by SPCC at BCMHC "as an inmate worker on an off-grounds worksite."

In Richards v. DHSS, 86-0086-PC-ER, 9/4/86, the Commission concluded it lacked jurisdiction over a complaint filed by an inmate who alleged

discrimination based on conviction record with respect to actions taken by the prison's education director. Complainant contended that the alleged actions by the education director, including removal of overtime pay for inmate legal clerks and development of a policy not to pay wages to inmates for time spent away from their institution jobs, were discriminatory. The Commission cited the decision of the United States Equal Employment Opportunity Commission in Case No. 86-7 (4/18/86), 40 FEP Cases 1892, 1893-94:

> However, these individual factors must be considered in light of the total circumstances of the relationship between the Charging Party and the Respondent.
>
> That relationship arose from the Charging Party's having been convicted and sentenced to imprisonment in the Respondent's correctional institution. The primary purpose of their association was incarceration, not employment. Consequently, the Respondent exercised control and direction not only over the Charging Party's work performance but over the Charging Party himself. The conditions under which he performed his job were, thus, functions of his confinement to the Respondent's institution under its control. While the Charging Party received monetary compensation for his work, that compensation was minimal and, arguably, the greater consideration was the opportunity to earn "good time" credits toward reducing his sentence. Finally, although the Charging Party was not required to work for the Respondent, his very job flowed from his incarceration and was dependent on his status as a prison inmate. Considering these circumstances as a whole, we are persuaded that the reality of the work relationship between the Respondent and the Charging Party was not one of employment. Therefore, we find that, while the Respondent is an employer within the meaning of the Act, the Charging Party was not an employee of the Respondent.
>
> Our finding in this regard is consistent with the Department of Labor's interpretation of the term "employee" under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 et seq. (1982). Section 3(e)(1) of that Act defines "employee" in virtually the same words as does Title VII. It is the position of the Department of Labor, which enforces the Fair Labor Standards Act, that in circumstances such as those presented by this charge, a prison inmate is not an employee of the prison:
>
> > Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the Act.

Department of Labor, Wage and Hour Division, Field Operations Handbook §10b29(a) (June 24, 1975).

In the present case, the complainant was participating in a pre-release work training program. Participating inmates were paid at an inmate wage rate of 75¢ per hour rather than the prevailing wage rate for such work. The inmates received on-site supervision and workers compensation coverage. However, they did not have access to an employe grievance procedure and the program agreement specifically provided that the inmates were not to be considered "permanent party employe[s]." The inmates were not provided any other benefits normally associated with an employment relationship. The inmates in the program were in no way accorded the same benefits and rights that are granted to the other persons at BCMHC who performed similar work.[1]

Under the circumstances, it cannot be said that the complainant inmate was in an employment relationship as required under the Fair Employment Act. Instead, the complainant's allegations have to do with his status as an inmate.

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[1] As a policy matter, if the BCMHC were considered an employer under the Fair Employment Act with respect to the complainant, any possibility of future work experience training program agreements would be placed in jeopardy.

ORDER

Because the complainant is not an "employe" for the purpose of the Fair Employment Act, this complaint is dismissed.

Dated: Sept 26, 1988 STATE PERSONNEL COMMISSION

KMS:rcr
RCR02/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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