STATE OF WISCONSIN PERSONNEL COMMISSION

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TIMOTHY LEAVITT,

Complainant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

Case No. 88-0094-PC-ER

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DECISION ON MOTION TO DISMISS ON GROUND OF FEDERAL PREEMPTION

This matter is before the Commission on respondent's motion to dismiss on the ground of federal preemption, filed October 22, 1990. Both parties have filed briefs.

This case involves a complaint of discrimination under the Wisconsin Fair Employment Act (FEA) alleging that respondent discriminated against complainant on the basis of handicap by refusing to hire him for a position in the state classified service as a Security Officer 2 at Truax Field because of his status as a recovering alcoholic, in violation of §111.322(1), stats.

In its most general sense, the principle of federal preemption involves the concept that:

> [N]o state can interfere with the free and unembarrassed exercise by the federal government of all powers conferred upon it. In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. (footnotes omitted) 16 Am Jur 2d CONSTITUTIONAL LAW §288, pp. 788-789.

Respondent's primary argument in support of its motion is set forth in its brief in summary as follows:

> It is difficult to envision a situation more clearly preempted by federal concerns than the selection of persons entrusted with safeguarding military aircraft vital to the national defense. The statutory and regulatory scheme partially outlined in the prior section leaves no legitimate question that the federal government has completely taken over the area of who should be selected to serve as security officers at the nation's military air bases. In seeking to become a security officer,

> Mr. Leavitt sought to fill a "noncritical-sensitive" position which federal regulations require to be filled with "great care" to avoid "an unacceptably adverse impact upon the national security" (32 C.F.R. §154.13). Plainly, the federal government has assumed exclusive control over the hiring decisions.

The provisions of federal law cited by respondent are Act. I, §§8 and 10, U.S. Constitution; 10 U.S.C. §§121, 8061, 8062; 32 U.S.C. §§101(6)(7); 50 U.S.C. §409(c); 32 C.F.R. §§154.13(a),(b),(1)(ii),(13),(E),(2). These provisions have to do with federal authority in the area of war and national defense, particularly the Air Force. They are for the most part general in nature. Respondent relies in particular on 32 C.F.R. §154.13, which provides, _inter alia_, as follows:

> (a) _Designation of sensitive positions_. Certain civilian positions within the Department of Defense entail duties of such a sensitive nature, including access to classified information, that the misconduct malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon the national security. These positions are referred to in this part as sensitive positions. It is vital to the national security that great care be exercised in the selection of individuals to fill such positions. Similarly, it is important that only those positions which truly meet one or more of the criteria set forth in paragraph (b) of this section be designated as sensitive.
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> (b) _Criteria for security designation of positions_. Each civilian position within the Department of Defense shall be categorized, with respect to security sensitivity, as either nonsensitive, noncritical-sensitive, or critical sensitive.
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> (1) The criteria to be applied in designating a position as sensitive are:
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> . . . .
>
> (ii) Noncritical sensitive.
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> (B) Security police/provost marshal-type duties involving the enforcement of law and security duties involving the protection and safeguarding of DoD personnel and property.
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> . . . .
>
> (E) Duties involving the design, operation, or maintenance of intrusion detection systems deployed to safeguard DoD personnel and property.
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> . . . .

(2) All other positions shall be designated as nonsensitive.

Notwithstanding that this regulation is restricted by its terms to "civilian positions within the Department of Defense," respondent contends that it applies to the position in question, which is uncontestedly a position in the Wisconsin classified civil service, and that the position is "noncritical sensitive" under this regulation. Respondent argues:

> [T]he application of 32 C.F.R. §154.13 cannot be, as Leavitt suggests, restricted to persons who are on the Department of Defense payroll. The security classifications created through 32 C.F.R. § 154.13 must, of necessity, be based on what employes with access and responsibilities as to secret materials and information are doing -- not just who pays their wages. The purpose of the rule is plainly to create a structure for the protection of secret materials and information. The Security Officer position at issue is unquestionably one that not only has access to those materials and information but is given major responsibility for protection of that secrecy. To suggest that it is "vital to the national security that great care be exercised in the selection of individuals to fill such positions" only if the positions are on the Department of Defense payroll is simply illogical. When the rule refers to "positions **within** the Department of Defense," therefore, it must be assumed that the word "within" was intended to encompass all persons working in capacities in coordination with the Department of Defense and its subdivisions who fall within the classification **functions** outlined in 32 C.F.R. § 154.13.
> Respondent's reply brief, pp. 6-7.

The Commission is unable to accept this rationale for ignoring the plain language of 32 C.F.R. § 154.13 restricting its application to "civilian positions within the Department of Defense." Respondent implies that failure to expand the scope of the regulation to include positions outside the Department of Defense would require the illogical result that positions having access to classified information would not be subject to DOD control, resulting in a threat to national security. This is based on at least two faulty premises.

To begin with, there is nothing before the Commission from which to conclude that the position in question "has access to those [secret] materials and information." Second, there is no reason to assume that if the DOD saw fit to give a civilian position outside of DOD access to classified information, that DOD would have no means to ensure that the incumbent of that position was not a security risk if this regulation were not construed, as respondent argues, to interpret "civilian positions within the Department of Defense" to mean

"all persons working in capacities in coordination with the Department of Defense and its subdivisions who fall within the classification functions outlined in 32 C.F.R. §154.13." It seems far more logical to look at 32 C.F.R. §154.13 as a regulation concerning certain aspects of the employment of civilians within DOD rather than to assume in effect that it is the federal government's only means of dealing with access to classified material by employes in nonfederal security positions.

There simply is nothing in the federal law cited by respondent that is in conflict with either the law enforced by the Commission, §111.322(1), stats., which makes it illegal for a state agency to refuse to hire someone simply because of that person's handicap, or the Commission's processing of the instant complaint which alleges respondent Department of Military Affairs violated that law when it refused to hire complainant as a Security Officer 2. This conclusion is buttressed by the fact that federal law prohibits employment discrimination against the handicapped by federal agencies. Executive Order 11478 provides, inter alia:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of . . . handicap . . . . This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement and treatment of civilian employs of the Federal Government.

Thus, even if the position in question actually were within DOD, that agency would be prohibited from discriminating on the basis of handicap in its decision on hiring.

Even in the absence of a conflict between a specific federal law or regulation and state law or administrative proceeding, the doctrine of federal preemption can be applicable to matters that are inherently within the zone of federal authority. See Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153, 73 L.Ed.2d 664, 675, 102 S.Ct. 3014(1982); cf. Colorado Anti-Discrim. Commn. v. Continental Air Lines, Inc., 372 U.S. 714,718-19,83 S.Ct. 1022, 1024 (1963) ("states have no power to act in those areas of interstate commerce which by their nature require uniformity of regulation, even though Congress has not legislated on the subject.") While the federal government clearly has plenary authority with respect to the national defense, the military establishment in this country encompasses an intricate legal

framework involving the federal and state governments and the national guard. See Perpich v. Department of Defense, 496 U.S. _____, 110 L.Ed.2d 312, 110 S.Ct. 2418 (1990). In Perpich, the court discussed the various statuses of Guard members as follows:

> Notwithstanding the brief periods of federal service, the members of the state Guard unit continue to satisfy this description of a militia. In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the "drilling and other exercises" referred to by the Illinois Supreme Court are performed pursuant to "the Authority of training the Militia according to the discipline prescribed by Congress," but when that hat is replaced by the federal hat, the Militia Clause is no longer applicable. 110 L.Ed.2d at 327.

Merely because a position of state employment has certain functions in connection with the security of an air base that in certain respects may be said to be part of the federal military structure does not ipso facto make a state hiring decision with respect to that position beyond the reach of state administrative inquiry as involving an area of overriding federal concern.

In addition to the issue of preemption per se, respondent argues that this case involves an internal military decision and as such should not be processed by this Commission because it fails to meet the test set forth in Mindes v. Seaman, 453 F.2d 197(5th Cir. 1971). Respondent cites Costner v. Oklahoma Army National Guard, 833 F.2d 905, 907 (10th Cir. 1987), as follows:

> In Mindes [v. Seaman, 453 F.2d 197 (5th Cir. 1971)], the court developed a two-part test for deciding whether to review an internal military determination:
>
> > "[A] court [should] first . . . determine whether the case involves an alleged violation of a constitutional right, applicable statute, or regulation, and whether intra-service remedies have been exhausted. If so, the court is then to weigh the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision."

Assuming, arguendo, that this is the kind of proceeding to which the Mendes principle could theoretically be applied if its prerequisite were met, the

hiring decision for this civilian job in the state civil service is on its face not an "internal military decision," and there is no need to apply the two substantive prongs of the Mindes test.

ORDER

The respondent's motion to dismiss filed October 22, 1990, is denied.

Dated: December 13, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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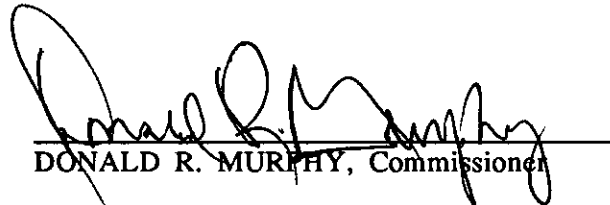
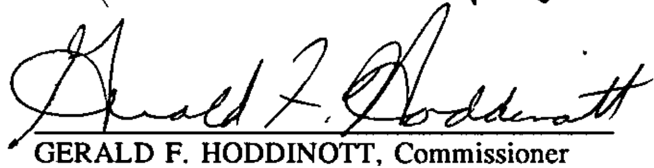


DONALD R. MURPHY, Commissioner



GERALD F. HODDINOTT, Commissioner