STATE OF WISCONSIN PERSONNEL COMMISSION

WILLIAM K. HAZELTON,

Complainant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

Case No. 88-0179-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination under the WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, stats.), on the basis of handicap and sexual orientation, with respect to complainant's involuntary separation from the Wisconsin National Guard (WIARNG), effective April 1, 1988, after having been diagnosed HIV positive as a result of a blood test. On March 14, 1989, the Commission entered a "Ruling on Jurisdictional Objection" overruling respondent's objection to jurisdiction on the grounds that complainant as a military member of the WIARNG was not a state employe within the context of the WFEA, and that the decision to separate complainant was made by the Secretary of Defense rather than by respondent. On April 29, 1991, the parties filed a revised stipulation of facts and submitted the case for decision based on the stipulation and subsequently filed briefs. The Commission adopts as its findings of fact those stipulated findings.[1]

FINDINGS OF FACT

1. Complainant has been a part-time member of the Wisconsin National Guard ("WIARNG") since 1961.
2. In January, 1988, complainant had attained the rank of Major and was three years away from the earliest date he could resign from the WIARNG and obtain retirement pay.

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[1] The stipulation includes a number of exhibits which are attached to the original of this decision, but not to the copies.

3. On January 21, 1988, complainant was notified that his HIV test results were positive (i.e., had in his blood stream antibodies to the virus associated with AIDS), that further testing was required, and that if the second HIV test was positive that he would [be] separated from WIARNG. Exhibit 1.

4. Complainant's second test was positive and on February 2, 1988, he was formally notified that he would be separated from WIARNG effective April 1, 1988. Exhibit 2.

5. Complainant was offered separation options of (1) retirement, for which he was ineligible; (2) complete separation from all military units; or (3) transfer to Standby Reserve where he could earn retirement points by enrolling in certain training opportunities at his own expense. Army Regulation 140-1, ¶ 2-16a(6) limits service in the Standby Reserve to two years. Therefore complainant could not qualify for retirement by transferring to Standby Reserve even if he paid for and took the available training opportunities. Exhibits 2-2, 2-3.

6. Complainant was honorably separated from the Army National Guard effective April 1, 1988 and became a member of the United States Army Reserve. He was assigned to the Reserve Control Group (Standby). Exhibit 3.

7. As of April 1, 1988, respondent had never given complainant notice that he could be discharged for any insufficiency in his performance of his duties or for any physical inability to perform his duties, nor had respondent indicated to him that evaluation of his performance in the next evaluation period would fail to match his preceding evaluations in any significant detail. See Exhibits 4, 5.

8. Complainant was informed by a WIARNG staff member, who had made an inquiry [sic] National Guard headquarters, that there was no appeal for separation based on a HIV positive test result and that no Board of Officers could be convened to examine fitness for retention. Exhibit 6. Reference was made to NGB-ARP-E Message 101626Z Nov. 87 (dated 12/2/87), which is attached hereto as Exhibit 7. See also Exhibit 8.

9. On March 2, 1988, complainant wrote Colonel John A. Liethen in the DMA Adjutant General's office, informing him of his decision to decline both options presented to him and alleging that the recent change in

Army policy was discriminatory and that it violated the Army's 7/17/86 Policy for Identification, Surveillance and Disposition of Personnel Infected with Human T-Lymphotrophic Virus Type III (HTLV-III). He stated that continued service would not be harmful to his health and that he would not pose a threat to the health of other members of WIARNG. Exhibit 9 [¶¶ 1, 2 refer to Exhibit 2; ¶ 3 refers to Exhibit 7; the "letter" referred to in ¶ 4 is not provided here].

10. On March 30, 1988, complainant wrote the Secretary of the Army requesting reconsideration of the separation decision, alleging that this decision violated regulation AR 600-110, which had been updated 11 March 88 (effective 11 April 88). Exhibit 10 [¶¶ 1a, 1b and 1d refer to Exhibit 12 here; ¶¶ 1c, 1e refer to regulations not provided here; Enclosure 1 (misidentified by date as 25 Feb 88) is Exhibit 2 here; Enclosure 2 is Exhibit 6 here; Enclosure 3 is Exhibit 5 here; Enclosure 4 is Exhibit 4 here]. Relevant pages from regulation AR 600-110, update 11 March 88, are attached hereto as Exhibit 12.

11. By memo dated December 27, 1988, complainant was notified by Colonel C. E. Rhodes, Chief, Army Personnel Division, that his request for reconsideration of the separation action was disapproved. Exhibit 11 [Enclosure 1 is Exhibit 2 here; Enclosure 2 is Exhibit 6 here; Enclosure 3 is Exhibit 3 here; Enclosure 4 is Exhibit 10 here].

12. Effective October 7, 1988, the blanket policy of separating Guard members who test HIV positive was rescinded and replaced by a modified case-by-case approach to the assignment and utilization of HIV-infencted [sic] reservists. Exhibit 13. AR 600-110 Interim Change No. I 01, dated 22 May 1989 (changing AR 600-110, 11 March 1988) [Exhibits 12]) describes the procedures for retention of HIV-infected reservists. Exhibit 14.

CONCLUSIONS OF LAW

1. The subject matter of this complaint of discrimination is cognizable pursuant to §§230.45(1)(b), 111.375(2), 111.34, and 111.36, stats.

2. The Commission's authority over this matter is superseded by operation of federal preemption.

DISCUSSION

The parties through their briefs raise a number of issues. Because the Commission agrees with respondent's primary contention, that the Commission's authority over this matter is preempted by federal law, it will not address these other issues, except to the extent they are related to the issue of preemption.

In Aries v. DMA, No. 90-0149-PC-ER (11/06/91) (a copy of which is attached hereto),[2] a case arising under the WFEA wherein the complainant was denied enlistment in the WIARNG on the basis of sexual orientation due to federal personnel requirements, the Commission concluded that federal law preempted the WFEA with respect to this transaction, after determining that there was persuasive precedent that it had the authority to address this issue. The essential basis for that decision was that there was a conflict between federal law and state law and compliance with both was impossible — under federal law it would have been improper to have enlisted the complainant because of his sexual orientation; under state law, it was improper to have denied him enlistment on the basis of his sexual orientation. The Commission rejected complainant's argument that the federal law in question was unconstitutional as violative of state authority conferred by the Militia Clauses (Article I, §8, Clauses 15 & 16), and also rejected the theory that preemption was not intended in this type of situation because of the voluntary nature of state participation in the federal guard system, and because of the related possibility that, if a state were determined to be out of compliance with federal regulations, it would have the opportunity pursuant to §2 U.S.C. §108[3] to bring its program into compliance before facing a cutoff of federal aid. In this case, some of the facts are different, but the same basic principles apply to compel the conclusion that federal preemption requires the Commission to dismiss this complaint.

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[2] The Commission will not reiterate all the points covered in that decision, but rather will summarize its main points and address the circumstances and arguments peculiar to the instant case.

[3] "If, within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title, its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege prescribed by law."

There does not appear to be any serious question that there is a conflict between the state and federal law applicable to this case. Pursuant to AR 600-110 (effective April 11, 1988), §5-10, all ARNG members who test HIV positive and who, like complainant, are neither AGR (active guard reserve) nor EAD (extended active duty) must be "transferred to the Standby Reserve or Retired Reserve (if eligible) or be honorably discharged . . . (if requested by the individual)." Complainant argues that this requirement is internally inconsistent with §§1-14 d. and h:

> d. Except for those identified during the accession testing program, soldiers who are HIV positive and demonstrate no evidence of progressive clinical illness or immunological deficiency will not be involuntarily separated solely on the basis of having been confirmed HIV positive.
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> * * *
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> h. To facilitate development of scientifically based information on the natural history and transmission pattern of HIV, it is essential that infected soldiers assist the military health care system by providing accurate information. Accordingly, the mere presence of the HIV antibody will not be used as the basis for adverse action against a soldier.

While it is by no means clear that these provisions are inconsistent with §5-10,[4] any such inconsistencies at best run to the merits and do not obviate the imperative of §5-10 that requires that covered ARNG personnel either be transferred to the Standby or Ready Reserve, or, if they so elect, be honorably discharged. This blanket command of §5-10 appears on its face to be in conflict with the WFEA.

Section 111.34, stats., governing handicap discrimination, is applicable to complainant because of his HIV positive status. See Racine Education Association v. Racine Unified School District, Wis. Equal Rights Division No. 86-50279 (Wis. 1986). Sections 111.34(2)(b) and (c), stats., require a case-by-case evaluation of an employe's fitness and do not permit a general rule which prohibits the employment of a "particular class of handicapped individuals." With respect to complainant's sexual orientation claim, the parties disagree as

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[4] For example, it may be that transfer to the Standby or Ready Reserve would not be considered either an "involuntary separation" or an "adverse action" in the context of this regulation.

to whether the stipulated facts and matters which may be within the permissible scope of official notice give rise to a conclusion of adverse impact against homosexuals as a result of the application of AR 600-110, §5-10. However, this is really a dispute on the merits. In any event, if there is adequate support in the record to conclude that the blanket prohibition of §5-10 has an adverse impact on homosexual employes in violation of §111.36, stats., and that this establishes that respondent discriminated against complainant in violation of the WFEA, this returns us to the conflict between state and federal law and the question of federal preemption. If the record is inadequate to support such a conclusion, and assuming for the sake of argument there were no conflict between state and federal law, and no other basis for federal preemption, then complainant's sexual orientation claim, which is based on a disparate impact theory, necessarily loses on the merits.[5]

Complainant argues, similarly to the complainant in Aries, that under the Militia Clauses, the federal government has no constitutional authority to prescribe criteria for national guard membership: "[c]omplainant has found no state or federal caselaw concerning suggesting that the federal power to prescribe discipline includes a power to dictate who may be enrolled in a state's militia." (footnote omitted) Complainant's reply brief, p.7. However, the Commission addressed this argument in Aries at p.1.3 as follows:

> This argument ignores the complete scope of Art. I, §8, clause 16, which provides:
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> The Congress shall have power . . .
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> * * *
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> To provide for organizing, arming, and disciplining the militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress. (emphasis added)

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[5] The same observation can be made about a sex discrimination claim. Therefore, the Commission will not address complainant's apparent attempt to amend his complaint to allege sex discrimination as well as sexual orientation and handicap. Complainant's brief, p.8, n.6.

> While the state has the authority to govern the WIARNG when it has not been called to federal duty, and is responsible for the selection process for WIARNG membership, it must do so subject to the federal requirements that have been imposed. . . In discussing the ways in which the Second Militia Clause enhanced federal power, the Court [in Perpich v. Department of Defense, 496 U.S. _____, 110 S.Ct. 2418, 110 L.Ed. 2d 312 (1990)] specifically stated that: "although the appointment of officers 'and the authority of training the Militia' is reserved to the States, respectively, that limitation is, in turn, limited by the words 'according to the discipline prescribed by Congress.'" 110 L.Ed. 2d at 328.

This proposition is supported more directly by a case cited by respondent, Johnson v. Orr, 617 F. Supp. 170, 177 (D.C. Cal. 1985), affirmed without opinion, 787 F. 2d 597 (9th Cir. 1986), which involved the plaintiff's involuntary discharge from the California Guard:

> In addition to her First Amendment arguments, plaintiff contends that Article I, Section 8, Clause 16 of the United States Constitution precludes the federal defendants from mandating the involuntary discharge of an officer in the California Guard.
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> * * *
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> Clause 16 specifically vests in the federal government the power "to provide for organizing, arming, and disciplining, the militia . . ." and reserves to the state only "the appointment of the officers, and the authority of training the militia *according to the discipline proscribed by Congress.*" (emphasis added). Therefore, Article I, Section 8, Clause 16 of the Constitution does not prevent the application of federal regulations to the plaintiff's status as an officer of the California Air National Guard.

Complainant attempts to distinguish that case because it did not involve a question of federal preemption of a state law. However, the court's holding runs directly contrary to an argument complainant makes against the application of federal preemption — that under Art. I, §8, Clause 16, the states have the sole authority to prescribe criteria for guard membership.

Complainant goes on to argue:

> Title 32 U.S.C. provisions do not set out either the requirements for initial appointment to a state national guard nor direct rules for discharge from a state national guard. These provisions are concerned with appointment to and discharge or transfer from ARNGUS, e.g., with federal recognition of persons who are national guard members and withdrawal of recognition. See 32

> U.S.C. §§ 307, 310, 323. The first requirement for recognition is appointment of an individual to a state national guard, and the first rule for withdrawal of an individual's federal recognition is that the person has ceased to be a member of the national guard.
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> Even though a state national guard may choose to utilize federal rules in the exercise of its state authority to appoint officers and organize the guard, this choice does not transform the state law character of such actions. The unconditioned authority of a governor to organize the militia and to appoint and discharge its members has been upheld in many jurisdictions. (citations omitted). Complainant's reply brief, pp.8-9.

Complainant's initial argument, that Title 32 U.S.C. does not address membership requirements for the national guard, ignores a number of provisions. For example, 32 U.S.C. §313 provides, inter alia:

> (a) To be eligible for original enlistment in the National Guard, a person must be at least 17 years of age and under 45. . . To be eligible for reenlistment, a person must be under 64 years of age.
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> (b) To be eligible for appointment as an officer of the National Guard, a person must —
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> (1) be a citizen of the United States, and
> (2) be at least 18 years of age and under 64. (emphasis supplied)

Since the "National Guard" is a distinct entity with a different definition than ARNGUS, see 32 U.S.C. §§101(4) and (5), this age requirement clearly applies to any "National Guard," including the WIARNG. Another provision in Title 32, 32 U.S.C. §110, gives the President broad authority to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." (emphasis added)

Contrary to complainant's next contention, the governor does not have "unconditioned authority . . . to organize the militia and to appoint and discharge its members." While state governors have the authority to appoint and discharge guard members, this power is subject constitutionally to such federal criteria that may be imposed: "although the appointment of officers 'and the authority of training the militia' is reserved to the States, respectively, that limitation is, in turn, limited by the words 'according to the discipline

prescribed by congress.'" Perpich, 110 L.Ed. 2d at 328. Current federal statutory law and statutorily-authorized regulations provide specific personnel criteria for the National Guard. Such federal requirements do not extend to state defense forces authorized by 32 U.S.C. §109(c) which are separate from the National Guard.[6] As was discussed in Aries, existing federal law does not require a state to have any militia, or to have a "National Guard" as defined in 32 U.S.C. §101(4) as opposed to a state "defense force" as set forth in 32 U.S.C. §109(c). However, once a state has elected to have a 32 U.S.C. §101(4) "National Guard," its governor no longer has "unconditioned authority" regarding the appointment and discharge of guard members, as specific federal statutes and regulations provide criteria for membership in the "National Guard."

Complainant cites Taylor v. Jones, 28 FEP Cases 1024, 653 F. 2d 1193 (8th Cir. 1981), for the proposition that "the National Guard bureau, a federal agency, has no authority to tell the Adjutant General who should be hired from the pool of qualified candidates; the only party who could alter the discriminatory racial makeup of the Arkansas National Guard is the state's Adjutant General." Complainant's reply brief, p.9. In Taylor, the Court's discussion of the federal-state interplay in this area came in the context of the United States' attempt to intervene, based on its assertion of federal interests with respect to that portion of the remedy which governed the employment of certain federal technicians. The Court rejected the United States' argument "that sovereign immunity bars the relief ordered against the defendant because the relief will affect a federal official in the exercise of his official functions." 28 FEP Cases at 1034. The Court held, inter alia:

> It is undisputed that the Adjutant General, a state employee appointed by the Governor and paid with state funds, is the appointing authority for all personnel of the Arkansas National Guard. He has full power to hire, fire, promote and assign federal as well as state employees. It is true that the Adjutant General can only hire persons as federal technicians who meet the requirements established by the federal National Guard Bureau for each position. However, the National Guard Bureau has no authority to tell the Adjutant General who should be hired from the pool of qualified candidates . . . the government's only means of nullifying

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[6] Section 21.025 Wis. Stats., provides authority for a "state defense force" which can be called up in case all or part of the WIARNG is called into active federal service.

> erroneous hiring decisions is to withdraw all monetary support for the state's technician program.
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> * * *
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> Furthermore, the record makes it clear that the specific relief granted does not run against the United States.
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> The Adjutant General has not been ordered to disregard any of the regulations established by the federal government: appointments will be made only to those who are qualified to receive them. (emphasis added) 28 FEP Cases at 1034-1035.

This holding runs specifically to the appointment of federal technicians, who are required to be guard members, 32 U.S.C. §709(b). To the extent that the principles set forth by the Court apply equally to appointments to the National Guard per se, the holding is completely consistent with the principles, discussed in Aries and above, that the states have the power of appointment with respect to the National Guard, but subject to federal personnel criteria. The Court explicitly recognizes the applicability of federally promulgated regulations to the appointment decisions that are made by the states,[7] and the Court relied to some extent on the factor that the remedy did not require the Adjutant General to make an appointment in violation of federal regulations. The fact that the federal statutes in this area do not provide federal authority to directly order the states how to discharge their power of appointment does not make federal preemption any less applicable to the instant controversy. The federal government has regulated where it has constitutional and statutory authority to regulate — i.e., with respect to the personnel criteria for National Guard membership — and these federal regulations are in conflict with state law governing nondiscrimination in employment.

Complainant makes a number of other arguments which will be discussed briefly. Complainant argues, in response to respondent's contrary contention, that the WIARNG is not a component of the U.S. Armed Forces:

> The fact that a state's National Guard is "federally recognized" (see 32 U.S.C. §101(4)(D), above) and the fact that guard enlistees in the "dual enlistment" system simultaneously enlist in the Army National Guard of the United

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[7] "[T]he Adjutant General can only hire persons as federal technicians who meet the requirements established by the federal National Guard Bureau for each position." 28 FEP Cases at 1034.

States (ARNGUS) do not make the Wisconsin Army National Guard (WIARNG) a "component of the total army." Complainant's reply brief, p.3.

It is unnecessary to address this dispute about whether the WIARNG is part of the "armed forces," because the federal regulation in question, AR 600-110, clearly applies to the WIARNG in any event.

Complainant also cites a member of provisions in Chapter 21, Stats., which he contends are inconsistent with federal supremacy in the area of WIARNG personnel standards. As discussed in Aries, a number of these provisions conform the WIARNG to federal standards while one appears to maintain state control in the face of army federal regulations to the contrary. For example, §21.01(1), Stats., provides that the "organized militia of this state shall be known as the Wisconsin national guard and shall consist of members appointed or enlisted therein in accordance with federal law or regulations governing or pertaining to the national guard." (emphasis added). Section 21.05 provides:

> Every person who enlists or receives a commission in the national guard shall serve for the term prescribed and satisfy the physical, educational and training requirements prescribed by the national guard bureau. (emphasis added)

However, §21.35, which begins: "[t]he organization, armament, equipment and discipline of the Wisconsin national guard shall be that prescribed by federal laws or regulations," (emphasis added), goes on to provide:

> Notwithstanding any rule or regulation prescribed by the federal government or any officer or department thereof, no person otherwise qualified may be denied membership in the Wisconsin national guard because of sex, color, race, creed or sexual orientation and no member of the Wisconsin national guard may be segregated within the Wisconsin national guard on the basis of sex, color, race, creed, or sexual orientation. (emphasis supplied)

While the Commission would agree that the latter provision evidences the legislative intent that certain kinds of discrimination in WIARNG membership be prohibited, notwithstanding inconsistent or conflicting federal rules or regulations, this kind of state legislative enactment cannot resolve the question of federal preemption, which is required when state and federal law conflict as they do in this case.

ORDER

This case is dismissed on the ground of federal preemption.

Dated: November 6, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

AJT/gdt/2

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STATE OF WISCONSIN PERSONNEL COMMISSION

RICHARD ARIES,

Complainant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

Case No. 90-0149-PC-ER

RULING ON RESPONDENT'S OBJECTIONS

NATURE OF THE CASE

This case involves a charge of discrimination on the basis of sexual orientation pursuant to §§111.322(1), 111.36(1)(d)1, and 230.45(1)(b), stats., with respect to respondent's refusal to enlist complainant in the Wisconsin national guard (WIARNG). Respondent has objected to the commission proceeding with this matter on the grounds that the WIARNG is not an employer with respect to complainant pursuant to §111.32(6)(a), stats., and on the ground of federal preemption. The parties have filed briefs, and the United States Department of Justice has filed a "statement of interest."

This matter was initiated by a charge of discrimination filed September 11, 1990. Complainant alleges that on July 11, 1990, he appeared at a national guard recruiting office to discuss enlistment in the WIARNG. He further alleges that in the course of a discussion with the guard recruiter, the recruiter asked him if he was a homosexual after learning that he had been denied reenlistment in the regular army. Complainant further alleges that after he answered in the affirmative, the recruiter told him he would not be allowed to join the WIARNG because of his sexual orientation.[1]

[1] It appears to be undisputed, although this is not set forth in the charge of discrimination, that complainant sought to join the WIARNG in an enlisted capacity, rather than as an officer.

In ruling on respondent's objections, the commission will assume the truth of the matters asserted, but in any event there does not appear to be any significant dispute about the underlying facts.

STATE EMPLOYE STATUS

Respondent contends the commission lacks subject matter jurisdiction over this matter because guard members are not state employes. The commission addressed this exact question in Schaeffer v. DMA, 82-PC-ER-30 (11/7/84), and concluded that guard members are state employes, relying largely on this holding in Maryland v. U.S., 381 U.S. 41, 48, 85 S. Ct. 1293, 1298, 14 L.Ed. 2d 205 (1965):

> It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employes of the States, and so the courts of appeals have uniformly held. See n. 5, supra. (emphasis supplied)

Respondent argues in its reply brief that the significance of the Maryland case, which had to do with a question of liability under the Federal Tort Claims Act (28 USC 2671), has been undermined by a 1981 amendment to bring within the law's coverage national guard personnel engaged in federal training. While this statutory change undoubtedly changes the answer to the question of whether a guard member is considered a federal employe for purposes of tort liability under the Federal Tort Claims Act, it does not change the answer to the question of whether a guard member is considered a state employe under the Wisconsin Fair Employment Act (FEA) (Subchapter II, Chapter 111, stats.). Again, the commission addressed this argument in Schaeffer as follows:

> In the opinion of the Commission, the extension of the FTCA in this manner does not alter the fundamental character of guard members as state employes, which rests on the framework provided by the Constitution. This was discussed by the Court in Gnagy v. United States, as follows:

> The holding in Maryland v. United States regarding the employment relationship arising from membership in a National Guard unit not active in federal service rests, in part, on article I, section 8, clause 16 of the United States Constitution. Clause 16 reads:
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> > [The Congress shall have Power * *]
> > To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.] [Emphasis supplied.] 634 F.2d at 578.

This is a basic reservation of the power of appointment to the states which is not impinged by the extension of FTCA coverage to guard members. See 53 Am Jur 2d Military, and Civil Defense §31:

> The Constitution of the United States gives to Congress power to provide for calling out the militia to execute the laws of the Union, suppress insurrection, and repel invasions, and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the united States, reserving to the states respectively the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress.

The commission sees no reason to deviate from its holding in Schaeffer, which is supported by additional authority that was not cited therein. In State v. Industrial Commission, 186 Wis. 1, 5-7, 202 N.W. 191 (1925), the Wisconsin Supreme Court addressed the question of whether a guard member who was injured while training was a federal or a state employe in the context of a claim for worker's compensation. The Court held that members of the guard were state employes notwithstanding increased federalization of what had always been considered a state organization:

> It must be conceded that the National Defense Act wrought a material change with respect to the National Guard. This change, however, while it effected a greater unification of the National Guard with the federal army, and created conditions which to a very large extent strengthened the Guards, from the standpoint of efficiency, when they might be called upon by the federal government, did not in any respect weaken the Guard as a state organization, nor did it wipe out or eliminate its character as a

> distinctive state organization. While it is known under the name of National Guard, it still retains its essential features as a part of the militia. Nowhere in the act can be found a provision which in times of peace alters the control which the state has over the Guard.
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> * * *
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> Sec. 116 of the act [2] provides:
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> > "Whenever any state shall, within a limit of time to be fixed by the President, have failed or refused to comply with or enforce any requirement of this act, or any regulation promulgated thereunder and in aid thereof by the President or the secretary of war, the National Guard of such state shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this act or any other law."
>
> The foregoing quoted section is the only penalty prescribed by the act for the failure of the Guard to comply with any of the rules, regulations, and orders of the President or the secretary of war. This, of course, has reference to times of peace. In order, therefore, that the Guard may receive the financial aid which the act provides for, Congress has seen fit, in order to accomplish the objects and purposes of the act, to extend such aid as an inducement. This clearly shows that the act was not intended to be compulsory, but optional, and in enacting such legislation it clearly had in mind its constitutional limitations upon the subject. If, therefore, the Guard was not properly officered, if it did not submit to training so as to reach the standard prescribed by Congress and the secretary of war, such failure or refusal would in no way eliminate or wipe out the Guard or work a discharge of its officers. The only result that would follow is a withdrawal of federal aid. The Defense Act is subject to no other construction.

See also 40 Opinions of the Attorney General 178, 181 (1951) ("The position that the national guard is a state agency is sustained by our own supreme court in State v. Industrial Commission et al, (1925) 186 Wis. 1, and by the federal district court for the western district of Wisconsin in Nietupski, et al v. U.S., Case No. 2095.") While the applicable federal statutes have been further amended since 1925 to impose even more federal control over the organization and functioning of the guard, the basic principles the court enunciated in State v. Industrial Commission with respect to the indicia of state status remain largely intact.

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[2] This provision is now 32 USC §108 and remains essentially the same.

Courts have recognized the status of guard members as state employes in other contexts as well. Zitser v. Walsh, 352 F. Supp. 438, 440 (D. Conn., 1972), involved a claim under 42USC §1983 that plaintiff was dismissed from a state Officer's Candidate School (OCS) program in violation of certain of his constitutional rights. The opinion includes the following discussion of whether the defendant guard officers were acting under color of state law:

> The National Guard is a lineal descendant of the militia; as such, the Constitution reserves to the states the appointment of its officers. U.S.Const., art. I, §8, cl. 16; see generally, Wiener, the Militia Clause of the Constitution, 54 Harv.L.Rev. 181 (1940). The dual status of a guard officer is set forth clearly in one of the governing federal regulations, 32 C.F.R. §564.2(a)(1):
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> > "The appointment of officers in the Army National Guard is a function of the State concerned, as distinguished from the Federal recognition of such appointment. Upon appointment in the Army National Guard of a State . . . an individual has a State status under which he can function. Such individual acquires a federal status when he is federally recognized and appointed as a Reserve of the Army."
>
> One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse. Thus, when defendants rejected Zitser as unsuitable officer material, they were exercising a state function and preventing him from receiving appointment as an officer in a state organization.

See also Sorrentino v. Ohio Natl. Guard, 53 Ohio St. 3d 214, 560 N.E. 2d 186, 190-191 (1990) (state court has jurisdiction over attempt to rescind National Guard enlistment agreement); Schultz v. Wellman, 717 F. 2d 301, 304-305 (6th Cir. 1983) (discharge of National Guard member is state action in 42 USC 1983 context notwithstanding state followed federal substantive and procedural rules).

Respondent also argues that if guard members indeed were state employes, two pieces of legislation would have been unnecessary. The first provision respondent cites is that part of §230.35(3)(a), stats., that provides:

> A state official or employee serving on state active duty as a member of the National Guard or State Defense Force, may elect to receive pay from the State under s.20.465(1) in an amount equal to base state salary for such period of state active duty. Leave granted by this section is in addition to all other leaves granted or authorized by any other law. For the purpose of determining seniority, pay or pay advancement and performance awards the

> status of the employee shall be considered uninterrupted by such attendance.

The commission is unable to discern how this provision sheds any light on this issue. Regardless of whether a guard member is considered a state employe for certain purposes — e.g., worker's compensation, tort liability, FEA coverage — it does not follow that a guard member who is also a state employe or official with regard to his or her primary employment would have the benefits provided by the foregoing provision (an election to receive the salary from their principal employment with the state while on active duty, and continued seniority) in the absence of such a specific statutorily provided entitlement.

Respondent also relies on §§893.82 and 21.13, stats. The former provides a method for processing claims against state employes, while the latter provides for the legal defense of guard members subject to a civil or criminal action with respect to an act performed while on military duty, for the payment of judgments, and for the processing of claims, and also provides that civil actions or proceedings are subject to §§893.82 and 895.46. Again, respondent contends that if guard members were state employes, "the legislature would not have seen fit to create Section 21.13." However, §21.13 does far more than simply bring guard members within the ambit of §893.82. Rather, it also contains provisions for the defense and indemnification of guard members. That the legislature also elected in 1980 to amend this section to specify that civil actions or proceedings against guard members are subject to the procedure set forth in §893.82, stats., see Laws 1979, ch. 221, §220, is hardly an indication that guard members are not state employes. It is not unusual for the legislature to codify specifically a point that arguably could be abstracted from more general existing statutory language. For example, as discussed above, the Supreme Court held in State v. Industrial Commission, 186 Wis. 1, 202 N.W. 191 (1925), that a guard member in training status was a state employe for purposes of worker's compensation coverage. Yet in 1945 the legislature saw fit to add §102.07(9), stats., which specifically provides that active duty guard members are employes for purposes of worker's compensation coverage, see Laws 1945, ch. 537, §5.

FEDERAL PREEMPTION

Before addressing the merits of this issue, the commission is constrained to consider on its own motion whether as an administrative agency it has the authority to decide whether its legislatively-granted authority under the FEA is preempted by federal power. As a general proposition, an administrative agency lacks the authority to determine the constitutional validity of the statutes under which it acts, 1 AM JUR 2d Administrative Law §185; Master Disposal v. Village of Menomonee Falls, 60 Wis. 2d 653, 659, 211 N.W. 2d 477 (1973). Some preemption issues might raise the question of the validity of an entire statutory enactment of administrative regulation, but the question here presented is arguably narrower, running solely to the commission's authority to deal with a discrete personnel transaction in light of assertedly overriding federal considerations affecting that particular transaction. In any event, there is authority for the proposition that it is appropriate for administrative agencies to rule on preemption issues of the kind present here. In Fore Way Express v. Wisconsin DILHR , 48 FEP Cases 18, 19, 660 F. Supp. 310, 312 (E.D. Wis. 1987), the employer sought federal judicial intervention to restrain DILHR from proceeding with an FEA handicap complaint on the ground of federal preemption. The Court granted DILHR's motion to abstain, based in part on the following reasoning:

> [T]he federal court should normally abstain in deference to ongoing "state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." There is no reason to doubt that Fore Way will continue to have a full and fair opportunity to raise its objections to the application of the WFEA to Mr. Waldogel's discrimination complaint in the course of the pending state administrative proceedings. (citation omitted)

See also Frito-Lay, Inc. v. Labor and Industry Review Commission, 95 Wis. 2d 395, 290 N.W. 2d 551 (Ct. App. 1980), affirmed, 101 W. 2d 169, 303 N.W. 2d 668 (1981); Thompson v. Northwest Airlines, Inc., Equal Rights Division #9052160 (7/12/91) (ERD has authority to consider federal preemption of Wisconsin Family and Medical Leave Act (§103.10, stats.) by ERISA (Employee Retirement Income Security Act of 1974, 29 USC §1144(8)).

In order to address the merits of the preemption issue, it is first necessary to outline the legal framework under which the national guard functions. The U.S. Supreme Court discussed this subject in a comprehensive manner in Perpich v. Department of Defense, 496 U.S., ___, 110 S. Ct., 2418, 110 L. Ed. 2d 312 (1990). The key constitutional provisions are Art. I, §8, clauses 15 and 16:

> The Congress shall have Power . . .
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> * * *
>
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by Congress.

The federal statutory scheme with respect to the militia has evolved over the years (as discussed in detail in Perpich) to the current structure whereby members of the state guard are simultaneously members of the National Guard of the United States (NGUS), which in turn is a reserve component of the national armed forces. 32 U.S.C. §311 provides that there are two classes of the militia:

> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
> (2) the unorganized militia, which consists of the militia who are not members of the National Guard or the Naval Militia.

The "National Guard" is defined as the "Army National Guard and the Air National Guard," 10 USC §101(9).[3] The Army National Guard is defined as "that part of the organized militia . . . that . . . is organized, armed and equipped wholly or partly at Federal expense; and . . . is federally recognized." 10 USC §101(10),(C),(D). The "Army National Guard of the United States" is defined as

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[3] Further references herein will only be to statutes governing the Army National Guard, which parallel those governing the Air National Guard.

the "reserve component of the Army all of whose members are members of the Army National Guard." 10 USC §101(11). 10 USC §3261 provides:

> (a) Except as provided in subsection (c), to become an enlisted member of the Army National Guard of the United States, a person must —
>
> (1) be enlisted in the Army National Guard;
>
> * * *
>
> (3) be a member of a federally recognized unit or organization of the Army National Guard in the grade in which he is to be enlisted as a Reserve.
>
> (b) Under regulations to be prescribed by the Secretary of the Army, a person who enlists . . . in the Army National Guard . . . shall be concurrently enlisted . . . as a Reserve of the Army for service in the Army National Guard of the United States.

32 USC §301 also provides: "[t]o be eligible for federal recognition as an enlisted member of the National Guard, a person must have the qualifications prescribed by the Secretary . . . . He becomes federally recognized upon enlisting in a federally recognized unit or organization of the National Guard "

The key Wisconsin statutory provision governing the WIARNG is §21.01(1), which provides that the "organized militia of this state shall be known as the 'Wisconsin national guard' and shall consist of members appointed or enlisted therein in accordance with federal law or regulations governing or pertaining to the national guard." (emphasis added) Wisconsin law also provides authority at §21.025 for a separate "state defense force" which can be called up in case all or part of the WIARNG is called into active federal service. The state defense force is authorized by 32 USC §109(c), which provides:

> In addition to its National Guard, if any, a State . . may as provided by its laws, organize and maintain defense forces. A defense force . . . may be used within the jurisdiction concerned as its chief executive . . . considers necessary, but it may not be called, ordered or drafted into the armed forces.

Based on the foregoing provisions, it can be seen that when complainant was denied enlistment in the WIARNG, he in effect also was denied enlistment in the NGUS. The enlistment criterion with respect to sexual

orientation which blocked his enlistment is of federal origin. 32 USC §110 provides: "The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." Pursuant to this authority, a number of regulations make complainant's enlistment improper under federal law. Army Regulation 40-501, §2-34 "Psychosexual conditions," provides that homosexual behavior (with certain exceptions) is cause for rejection of enlistment. Army Regulation 135-178 §10-4 provides that certain kinds of homosexual activity or the admission of homosexuality is a basis for separation from service. This is paralleled in National Guard Regulation 600-200.[4]

State law as set forth in Chapter 21, stats., recognizes federal control over WIARNG enlistment criteria, with one significant exception. As previously noted, §21.01(1) provides:

> The organized militia of this state shall be known as the "Wisconsin national guard" and shall consist of members appointed or enlisted therein in accordance with federal law or regulations governing or pertaining to the national guard. (emphasis supplied)

Section 21.36 provides:

> (1) The rules of discipline and the regulations of the armed forces of the U.S. shall, so far as the same are applicable, constitute the rules of discipline and the regulations of the national guard; the rules and uniform code of military justice established by congress and the department of defense for the armed forces shall be adopted so far as they are applicable and consistent with the Wisconsin code of military justice for the government of the national guard, and the system of instruction and the drill regulations prescribed for the different arms and corps of the armed forces of the U.S. shall be followed in the military instruction and practice of the national guard and the use of any other system is forbidden.
>
> (2) The governor may make and publish rules, regulations and orders for the government of the national guard not inconsistent with the law, and cause the same, together with any laws relating thereto, to be printed and distributed in book form or otherwise in such numbers as he deems necessary, and he may provide for

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[4] The parties agree that complainant was ineligible for enlistment in the WIARNG under federal law.

> all books, blank books and blanks that may be necessary for the proper discharge of the duty of all officers. (emphasis supplied)

Section 21.05, Stats., provides:

> Every person who enlists or receives a commission in the national guard shall serve for the term prescribed and satisfy the physical, educational and training requirements prescribed by the national guard bureau. (emphasis added)

Section 21.32, Stats., provides:

> The chief surgeons for army and air shall provide for such physical examinations and inoculations of officers, enlistees and applicants for enlistment, Wisconsin national guard, as may be prescribed by department of defense and national guard regulations. (emphasis added)

Finally, §21.35 begins by providing, consistent with the foregoing:

> The organization, armament, equipment and discipline of the Wisconsin national guard shall be that prescribed by federal laws or regulations; and the governor may by order perfect such organization, armament, equipment and discipline, at any time, so as to comply with such laws and regulations insofar as they are consistent with the Wisconsin code of military justice. (emphasis added)

However, the statute then goes on to provide:

> Notwithstanding any rule or regulation prescribed by the federal government or any officer or department thereof, no person otherwise qualified may be denied membership in the Wisconsin national guard because of sex, color, race, creed or sexual orientation and no member of the Wisconsin national guard may be segregated within the Wisconsin national guard on the basis of sex, color, race, creed or sexual orientation. (emphasis supplied)

Therefore, while state law governing the WIARNG expressly conforms to federal regulation in most respects, it purports to maintain state control with respect to nondiscrimination in enlistment, and notwithstanding any federal regulation to the contrary.[5]

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[5] This provision (in §21.35) is basically consistent with the state law enforced by this commission. Pursuant to §111.36(1)(d)1., stats., sex discrimination prohibited by the FEA includes the refusal to hire a person because of that person's sexual orientation.

An issue of federal preemption arises in this case because of the extensive federal involvement in WIARNG matters and the apparent conflict between federal power and state law that prohibits employment discrimination on the basis of sexual preference. The general concept of federal preemption has been described as follows:

> When Congress exercises a granted power, concurrent conflicting state legislation may be challenged via the Preemption Doctrine; the supremacy clause mandates that federal law overrides, i.e., preempts, any state regulation where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires. Moreover, where Congress acts pursuant to a plenary power, it may specifically prohibit parallel state legislation, i.e., occupy or preempt, the field. (citations omitted)

1 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law, 623 (1986). In Louisiana Public Service Com. v. FCC, 476 U.S. 355, 368-369, 90 L. Ed. 2d 369, 381-382, 106 S. Ct. 1890 (1986), the Supreme Court outlined these general principles on the subject:

> The Supremacy Clause of Art VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal law and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself, a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. . . . The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law. (authorities omitted).

In the instant case, the parties agree that there is a facial conflict between the substantive provisions of federal law governing eligibility for membership in the national guard, and Wisconsin law which prohibits discrimination on the basis of sexual orientation with respect to WIARNG membership. Appellant argues that: "federal military regulations regarding

homosexuality, which mandate state discrimination based upon sexual preference, are unconstitutional" violations of the Militia Clause, because Congress is only authorized "to provide for governing such part of the Militia as may be employed in the service of the United States," citing Perpich, 110 S. Ct. at 2428, and that until the WIARNG is called into active service, the state is responsible for its membership and training. This argument ignores the complete scope of Art. I, §8, clause 16, which provides:

> The Congress shall have power . . .
>
> * * *
>
> To provide for organizing, arming, and disciplining the militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress. (emphasis added)

While the state has the authority to govern the WIARNG when it has not been called to federal duty, and is responsible for the selection process for WIARNG membership, it must do so subject to the federal requirements that have been imposed. This point is illustrated by the Supreme Court's holding in Perpich that "far from being a limitation on those powers the Militia Clauses are — as the constitutional text plainly indicates — additional grants of power to Congress." 110 L. Ed. 2d at 327. The Court also stated:

> This Court in Tarble's Case, 13 Wall 397, 20 L Ed 597 (1871), had occasion to observe that the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the armed forces was exclusive. Were it not for the Militia Clauses, it might be possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia. The Militia Clauses, however, subordinate any such structural inferences to an express permission while also subjecting State militia to express federal limitations. (footnotes omitted) (emphasis added)

110 L. Ed. 2d at 330. In discussing the ways in which the Second Militia Clause enhanced federal power, the Court specifically stated that: "although the appointment of officers 'and the authority of training the Militia' is reserved to the States, respectively, that limitation is, in turn, limited by the words

'according to the discipline prescribed by Congress.'" 110 L.Ed. 2d at 328. Therefore, it can be seen the federal government has extensive constitutional authority with respect to regulating the national guard, and under this authority it has issued regulations regarding guard membership which facially conflict with §§21.35 and 111.36(1)(d)1., Wis. stats.

In support of its objection to this proceeding, respondent points out that if it were to enlist complainant in violation of federal regulations, the WIARNG would face the loss of some or all of its federal funding,[6] and its very existence would be jeopardized. In response, complainant argues that the legislature must have been aware of this risk when it made the explicit choice enunciated in §21.35, stats. (and paralleled in the WFEA, §111.36(1)(d)1.), to prohibit discrimination in WIARNG membership on the basis of sexual preference, and that the legislature has the prerogative to make this decision notwithstanding the potential negative consequences to the WIARNG:

> It is not up to the Guard to make a decision between what are, in effect, two competing evils; the loss of the State Guard v. continued discrimination against certain members of the population. The state legislature has spoken as to what it believes is the greater evil. Simply because the Guard does not like the legislature's choice does not mean the statute is not valid.

In the Commission's opinion, the debate on this point is basically inapposite to the question of whether federal preemption applies in this case. The parties already agree that state and federal law conflict on the matter of complainant's enlistment in the WIARNG. Any loss of federal funding would be a result of this conceded conflict. Therefore, it adds little, if anything, to respondent's case to point out this consequence. However, complainant's position, which rests to some extent on the principle that each state has the prerogative to decide whether or not to participate in the federal guard system, and thus to receive federal aid, suggests a potential alternative approach to the preemption issue.

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[6] 32 USC §108 provides: "If within a time to be fixed by the President, a State does not comply with or enforce a requirement of, or regulation prescribed under, this title, its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law."

As noted above, Congress has provided the President the authority to withhold federal aid to a state's national guard if it "does not comply with or enforce a requirement of, or regulation prescribed under, this title." 32 USC §108. This provision and others make it clear that the states have an option whether to participate in the federally recognized guard system.

There is nothing in federal law that requires the states to have militias or national guard units. A state has the option of having no militia, an organized militia/federally recognized national guard pursuant to 32 USC §311(b)(1), or an independent "defense force" pursuant to 32 USC §109(c): "In addition to its National Guard, if any, a State may . . . as provided by its laws organize and maintain defense forces." (emphasis added) The voluntary nature of state participation in the federally-recognized guard system was recognized in Lederhouse v. United States, 126 F. Supp. 217, 218-219 (W.D.N.Y. 1954), reversed on other grounds, 230 F. 2d 112, which contains the following discussion of the interrelationship of state and federal authority with respect to the guard:

> The United States Constitution, Art. I, Sec. 8, made provision for the calling of the State militias into Federal service, and reserved to the States the appointment of officers and the training of the militia. The whole government of the militia remained with the States, except when employed in the service of the United States. United States ex rel. Gillett v. Dem, 64 App.D.C. 81, 74 F.2d 485. By the National Defense Act of 1916, 39 Stat. 197, 32 U.S.C.A. §1 et. seq., the President was invested with power to *call* the "Guard" into active Federal service pursuant to constitutional provision and in addition to *order* the federally recognized National Guard, as a reserve component of the National forces, into active federal service. 32 U.S.C.A. §81. The only effective control exercised by the Government and the regular armed forces relative to organizing, equipping, training and policies of the national Guard of any of the States comes from the control of funds which may be granted to or withheld from the National Guard units pursuant to granting or withdrawing federal recognition. To obtain federal recognition, certain conditions and requirements must be met before application by the National Guard unit will be granted. The application is the voluntary act of the unit and cannot be required or enforced. The penalty is the loss of federal aid which includes funds and equipment.

State v. Industrial Comm., 186 Wis. 1, 6-7, 202 N.W. 91 (1925), cited above in the context of the question of whether a WIARNG member is a state employe, has similar language. After quoting the predecessor of 32 USC §108, the Court held:

> The foregoing quoted section is the only penalty prescribed by the act for the failure of the Guard to comply with any of the rules, regulations, and orders of the President or the secretary of war. This, of course, has reference to times of peace. In order, therefore, that the Guard may receive the financial aid which the act provides for, Congress has seen fit, in order to accomplish the objects and purposes of the act, to extend such aid as an inducement. This clearly shows that the act was not intended to be compulsory, but optional, and in enacting such legislation it clearly had in mind its constitutional limitations upon the subject. If, therefore, the Guard was not properly officered, if it did not submit to training so as to reach the standard prescribed by Congress and the secretary of war, such failure or refusal would in no way eliminate or wipe out the Guard or work a discharge of its officers. The only result that would follow is a withdrawal of federal aid. The Defense Act is subject to no other construction.

The voluntary nature of the states' participation in this system, in the context of the relatively unusual intertwining of state and federal authority with respect to the militia, see, e.g., Perpich, 110 L.Ed. 2d at 325 ("Those [1933] amendments [to the National Defense Act of June 3, 1916, 39 Stat 166] created . . . 'two overlapping but distinct organizations' . . . the National Guard of the various States and the National Guard of the United States."), raises the question of whether Congress did not intend to preempt state law in this area, but rather left it up to the states to decide whether to comply with federal requirements while providing the President with the authority to withhold federal aid from guard units that did not comply with federal law in the operation of their federally recognized guard units.

To reiterate, under federal law Wisconsin has the option of either participating in the federally recognized and supported guard, maintaining its own "defense force" outside of the federally-regulated scheme, or not having any state military arm. If Wisconsin elected the second option of maintaining its own defense force and enlisted complainant into it, presumably there would be no issue of federal preemption because Congress has not imposed personnel standards for such forces. The path Wisconsin has chosen to follow, however, is simultaneously to participate in the federally-recognized guard, to accept federal aid and benefits, and to comply with federal law governing guard

membership except where federal law conflicts with Wisconsin law regarding nondiscrimination. This election is evidenced statutorily most significantly by §21.01(1), stats., which provides that the 'organized militia of this state shall be known as the 'Wisconsin national guard' and shall consist of members appointed or enlisted therein in accordance with federal law or regulations governing or pertaining to the national guard," and §21.35, stats., which states that "[n]otwithstanding any rule or regulation prescribed by the federal government . . . no person . . . may be denied membership in the Wisconsin national guard because of . . . sexual orientation." Since there is an obvious and undisputed conflict between state and federal law relating to complainant's eligibility for WIARNG membership, the question is whether a conclusion of federal preemption can be avoided under the theory that Congress intended that, in the kind of situation involved here, rather than have federal law preempt state law, the operation of 32 USC §108 should be given initial priority, so that state government would first have the option of either complying with federal law with respect to complainant's status or not complying and running the risk of paying the consequences of withheld federal aid.

The withholding of federal aid pursuant to 32 USC §108 is a means, and apparently the only means, of enforcing compliance with federal regulations by a state that is participating in the federal guard system. Lederhouse v. U.S., 126 F.Supp. at 218-219. While a state is not required by law to participate in that federal system, once a state's legislature has committed it to that system, any subsequent conflict between the state's laws and the federal regulations with respect to the guard is no less a conflict encompassed by the concept of federal preemption because the Congress has provided a framework whereby, rather than attempting more directly to force state compliance with federal regulations, it in effect has given the participating states the option of complying or forcing a cutoff of federal funds. The cutoff of federal aid is merely another means of enforcement of federal regulations with respect to states already participating in the federal guard program. Cf. South Dakota v. Dole, 483 U.S. 203, 211, 97 L.Ed. 2d 171, 181, 107 S. Ct. 2793 (1987). It seems clear that if Wisconsin had not opted to participate in the federal guard system, there would be no state-federal conflict, because the federal regulations would not pertain to the Wisconsin military establishment. However, once it has

elected to participate in that system, it has brought its military establishment under the coverage of applicable federal regulations, with compliance enforced by the possibility of loss of federal aid pursuant to 32 USC §108. It would be anomalous to conclude that federal preemption was not intended in this situation, most significantly through 32 USC §110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.") because Wisconsin conceivably could eliminate the conflict by deciding either to reverse its earlier decision to participate in the federal guard system or to change its position on discrimination in guard membership. Under such an approach, instead of federal law being supreme over conflicting state law, federal law would not be supreme while there was a possibility that federal sanctions for noncompliance with federal law might cause the state to change its law or to take some other approach that would obviate the statutory conflict. The unique interlocking federal-state authority with respect to the militia, referred to above, comes into play in this context in that a state is not obligated to participate in the federal guard system, and if it does not, it is free from federal regulations pertaining to guard membership. However, once it has decided to participate in that federal system, federal preemption with respect to state law in conflict with federal regulations cannot be avoided because there are options available which would have the effect of eliminating the statutory conflict.

Looking at this issue from a slightly different perspective, the application to this case of the process set forth in 32 USC §108 would do nothing either to resolve the conflict between state and federal law or the impossibility of complying with both, due at least in part to the fact that the Wisconsin legislature in Chapter 21 of the statutes effectively has committed the state military establishment to participation in the federal guard system. If the State barred complainant from the WIARNG under threat of loss of federal aid, this would be in violation of state law prohibiting discrimination on the basis of sexual orientation. If the State enlisted complainant as a member of the WIARNG, this would be in violation of federal law. If one were to look down the road even further, the United States' reaction to the latter course of action could be to withdraw federal recognition and aid.[7] However, at that point, Wisconsin

[7] As complainant points out, this might not happen. However, this eventuality would do nothing to eliminate the conflict between state and federal law.

could not simply exercise either the option of forming an independent military force or of entirely eliminating the militia, thus eliminating the federal-state conflict, because the existing WIARNG statutory framework envisions a state guard as part of the federal system, most significantly through §21.01(1), stats., which provides:

> The organized militia of this state shall be known as the "Wisconsin national guard" and shall consist of members appointed or enlisted therein in accordance with federal law or regulations governing or pertaining to the national guard. (emphasis added)

Furthermore, §21.025, stats. ("State defense force authorized"), only provides authority to the adjutant general to organize the state defense force "if all or part of the Wisconsin national guard is called into the service of the United States." Therefore, if Wisconsin elected not to discharge complainant notwithstanding withdrawal of federal aid and recognition, it might well have to amend its statutes either to provide authority for the organization of the state defense force under circumstances other than when the WIARNG has been called into federal service or alternatively to provide for the elimination of any state military force. This all underscores the inappropriateness of a conclusion that federal preemption should not be applied in this case.

In conclusion, while there is no inherent reason under the U.S. Constitution and statutes why Wisconsin would have had to conform to federal membership requirements for its state military forces, if it had elected to have a state "defense force" under total state control, once the legislature in effect has made the election that the WIARNG is to be organized and administered in accordance with federal law and as part of the federal guard system, the federal law governing the federally recognized guard has the effect of preempting inconsistent state law on the subject, and this Commission is compelled to sustain respondent's objection on this ground.

ORDER

Respondent's objection to the commission proceeding with this matter on the ground that the WIARNG is not a state employer is overruled, its objection on the ground of federal preemption is granted, and this matter is dismissed.

Dated: November 6, 1991 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:gdt/2

DONALD R. MURPHY, Commissioner

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