STATE OF WISCONSIN PERSONNEL COMMISSION

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WILLIAM K. HAZELTON,

Complainant,

v.

Adjutant General, DEPARTMENT OF MILITARY AFFAIRS,

Respondent.

Case No. 88-0179-PC-ER

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RULING ON JURISDICTIONAL OBJECTION

This is a complaint of discrimination on the basis of handicap and sexual orientation with respect to separation from the Wisconsin National Guard. Respondent filed a jurisdictional objection on the grounds that complainant as a military member of the guard is not an "employe" of the state and hence is not covered by the FEA (Fair Employment Act) (Subchapter II, Chapter 111, Stats.), and that the decision to separate complainant from membership was made and effectuated by the United States Secretary of Defense rather than by respondent.

DISCUSSION

In Schaeffer v. DMA, No. 82-PC-ER-30 (11/7/84), the Commission held that it had jurisdiction over a complaint of discrimination under the FEA by a national guard member notwithstanding the respondent's argument that guard membership did not constitute an employer-employe relationship. The Commission cited Maryland v. United States, 391 U.S. 41, 48, 85 S.Ct. 1293, 1298 (1965), as follows:

> It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and most 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)

The Commission is aware there are a number of federal cases under Title VII holding that military members of the guard are not to be considered employes of the state for Title VII purposes, notwithstanding the existence of certain incidents of the employer-employe relationship, because of the theory that the status of the member as a soldier predominates over the member's status as employe, and makes it inappropriate to apply a law concerning discrimination in employment. E.g., see Gonzalez v. Dept. of Army, 34 FEP Cases 1850 (9th Cir. 1983); EEOC Decision No. 84-4, 34 FEP Cases 1982 (1984); Taylor v. Jones, 653 F.2d 1193, 1220, 28 FEP Cases 1024 (8th Cir. 1981); Stinson v. Hornsby, 44 FEP Cases 594, 595-596 (11th Cir. 1987).

While federal decisions interpreting Title VII can be helpful tools in the interpretation of the FEA, they cannot be applied automatically without consideration of the particular provisions of state law.

In 67 OAG 169, 173 (1978), the Attorney General considered the question of whether a register in probate was covered by the FEA. The opinion included the following:

> The Legislature's extension of the Act's coverage to virtually all employers and employes evinced comprehensive and equal treatment. The declared public policy is "to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry." Sec. 111.31(3), Stats. Our supreme court has declared that it will liberally construe the Act in order to foster full employment without discrimination. See Chicago, M., St.P. & P. R.R. v. ILHR Dept., 62 Wis.2d 392, 397, 215 N.W. 2d 443 (1974).

> The Act's legislative history supports the comprehensive coverage intended. In State ex rel. Dept. of Pub. Instruction v. ILHR, 68 Wis.2d 677, 684, 229 N.W. 2d 591 (1975), before sec. 111.32(3) of the Act was amended to include the state as an employer, the court urgently suggested that the Legislature make the Act applicable to all employers.
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> > "...The legislative purpose or public policy as set forth in the Fair Employment Act should apply to all employees whether hired by the state or others. If the legislature does not include them, questions of constitutional equal protection could be raised. A simple amendment to the act could include the state and its agencies as an employer or person so that all employees (with stated exceptions) may enjoy the protection of our antidiscrimination statutes." (Emphasis added.)
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> The Act was amended by ch. 31, Laws of 1975, to include the state as an employer and all state employes without exception. In view of the manifest broad coverage it is my opinion that "employe" includes such appointed officials as registers in probate. To construe employe narrowly to exclude such persons would frustrate legislative intent.

In addition to the language in the FEA and the related legislative history, the Commission must consider the specific language of §21.35, Stats.:

> ...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 nation guard because of sex, color, race, creed or sexual orientation and no member of the Wisconsin national guard may be segregated on the basis of sex, color, race, creed or sexual orientation....

This provision (with the exception of the sex and sexual orientation bases) was enacted in 1949 by Laws of 1949, Ch. 76.[1]

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[1] The provision on sex was added in 1975 by Laws of 1975, ch. 94, and sexual orientation in 1981 by Laws of 1981, ch. 112.

This statute has the effect of paralleling some aspects of the coverage of the FEA specifically for guard membership. However, this is not indicative of legislative intent that guard membership is not to be considered a form of employment covered by the FEA. This is because this provision of §21.35 long antedated FEA coverage of the state as employer, and because the scope of these provisions of §21.35 is far less extensive than the FEA. Cf. State ex rel. Dept. of Public Instruction v. DILHR, 68 Wis. 2d 677, 682, 229 N.W. 2d 591 (1975), where the Court addressed the question of whether the FEA covered the state as employer, prior to the amendment effected by ch. 31, Laws of 1975, to explicitly include the state in its coverage. DPI argued that the provision in what is now §230.18, Stats., prohibiting certain kinds of discrimination in the state civil service in the recruitment, application, examination or hiring process indicated "that the legislature did not intend the state to be covered by the Fair Employment Act." While the Court ultimately concluded that the state was not covered, it was not impressed by this particular argument: "However, while the terms of the Civil Service Act as it applies to state employes are compatible, they are not as extensive as the Fair Employment Act and do not cover all the acts of discrimination complained of."

However, the partially parallel coverage of §21.35 reinforces to some extent the notion that this complaint is cognizable under the FEA. The main rationale for rejecting Title VII coverage of guard or other military membership is the peculiar nature of the relationship between the soldier and the guard or other military organization. For example, the Court's opinion in Johnson v. Alexander, 572 F. 2d 1219, 16 FEP Cases 894, 898 (8th Cir. 1978), included the following:

> While military service possesses some of the characteristics of ordinary civilian employment, it differs

> materially from such employment in a number of respects that immediately spring to mind,[4] and the peculiar status of uniformed personnel of our armed forces has frequently been recognized by the courts....
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> [4] An enlisted man in the Army, for example, is not free to quit his 'job', nor is the Army free to fire him from his employment. Additionally, the soldier is subject not only to military discipline but also to military law."

It is significant in this context that notwithstanding the circumstances surrounding military service, Wisconsin saw fit from an early point (1949) to impose strict prohibitions against discrimination in guard membership and segregation with respect to race, color or creed, and subsequently added sex and sexual orientation. This militates against the argument that guard membership has inherent characteristics that should preclude the reach of the FEA.[2]

Respondent also contends that it was the U.S. Department of Defense, and not the DMA, which issued the regulation on HIV testing, made the decision that those who tested positive were to be discharged from the guard, and took the adverse employment action against complainant.

Based on documents submitted with complainant's brief on jurisdiction, it appears that respondent effectuated complainant's separation from guard membership pursuant to its interpretation of Department of the Army policy concerning HIV. The United States Constitution provides at Article I, Section 8, Clause 16:

> 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

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[2] While the provisions of §21.35, Stats., are not tied to an administrative enforcement scheme, they presumably could be enforced judicially.

> 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 described by congress.

Respondent may have been acting pursuant to federal policy in separating complainant from guard service, but within the scope of its authority for personnel administration, and to the extent there was an employment relationship it was acting as the employer.

To the extent respondent's position could be considered an assertion of federal supremacy in this area, the Commission feels it would be premature to attempt to make any ruling on such an issue at this stage of this proceeding, since it has not been directly raised and briefed. Also, it is noted from the documentation submitted with complainant's brief that he has expressed disagreement with respondent's interpretation and application of the federal policy in question. The resolution of this apparent dispute conceivably could remove any supremacy issue from this case.

ORDER

Respondent's jurisdictional objections as set forth in its letter of December 6, 1988, are overruled.

Dated: March 14 ,1989 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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