

STATE OF WISCONSIN

PERSONNEL COMMISSION

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THOMAS CHRISTENSEN,

Complainant,

v.

Secretary, DEPARTMENT OF
CORRECTIONS, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,

Respondents.

Case No. 90-0144-PC-ER

* * * * *

DECISION
AND
ORDER

On August 30, 1990, Mr. Christensen filed a charge of discrimination with the Personnel Commission alleging that respondent discriminated against him in compensation because of his race and sex, as well as in retaliation for activities protected by the Fair Employment Act (FEA). On October 5, 1990, Mr. Christensen withdrew his retaliation charge.

On April 1, 1993, an Initial Determination was issued which found No Probable Cause to believe that discrimination occurred as alleged. Mr. Christensen appealed the Initial Determination.

A prehearing conference was held on August 3, 1993, at which time the parties agreed to the following hearing issue: Did respondents discriminate against complainant on the basis of race or sex in regard to compensation? The parties further agreed that very few, if any, factual disputes existed and that the parties would like the case disposed of based on written information submitted in lieu of hearing. A schedule was established to address the parties' wishes, with the last brief due and filed on December 15, 1993.

Procedurally, the briefs were submitted as part of respondents' motion for summary judgement. Mr. Christensen, however, indicated he was "in essential agreement with the facts" submitted by respondents. He did not point to one alleged fact with which he disagreed. The Commission interpreted these actions of the parties as an effective withdrawal of the motion for summary

judgment and as a request to issue a decision on the merits based upon undisputed facts.¹

FINDINGS OF FACT

1. Mr. Christensen is a white male.

2. On January 28, 1990, Mr. Christensen accepted a promotion at DOC's Green Bay Correctional Institution (GBCI) from Officer 3 (\$10.240/hour) to Officer 5 (\$11.549/hour), and such promotion was accepted at a time when negotiations were pending on the union contract. The promotion resulted in his change in status from a position covered by a union contract (represented position), to a management position which was not covered by a union contract (nonrepresented position). Details regarding the hourly wage adjustment from \$10.240-\$11.549 were given in Mr. Nuss's affidavit, as follows:

par. 4. When calculating his rate of pay upon promotion, the document controlling this procedure was Department of Employment Relations (DER) Bulletin CC 213 (11/30/89). This document reads in part ". . . classified represented employees who become classified nonrepresented employees as a result of an approved transaction after November 5, 1989, but prior to the effective date of any general adjustments provided under the applicable collective bargaining agreement, are eligible for a discretionary award on the date of the transaction. These awards shall be effective as of the date of movement and shall be processed prior to the application of any pay adjustment resulting from the transaction." Based on this provision, Mr. Christensen received a raise of \$.358 per hour which represented the standard raise ($\$10.240 + 3.5\% = \10.598 per hour).

par. 5. After this calculation, he then received the standard promotional increase of 3 steps ($3 \times \$0.317 = \0.951) per Wis. Administrative Code ER 29.03(4)(b) bringing him to \$11.549 per hour.

3. Mr. Christensen received several favorable wage adjustments related to his promotion and work performed in the Officer 5 position which raised his starting hourly salary of \$11.549 to \$12.529, by the end of his first six-month's probation (by July 29, 1990). The detailed wage-adjustment information was described in Mr. Nuss's affidavit as follows:

¹ The wording was changed to clarify that a ruling was not issued on the Motion for Summary Judgment and that no need existed for such a ruling.

par. 6. Effective 4/8/90 the Officer 5 classification (pay range 01-11) was reallocated to Supervisory Officer 1 (pay range 01-12). DER bulletin CC 234 established that ". . . Associated nonrepresented positions identified within this bulletin will also receive one within-range pay step of the new pay range for reallocations as included in the provisions of the 1989-91 Compensation Plan as approved by the Joint Committee on Employment Relations." The 1989-91 Compensation Plan established the step for pay range 01-12 as \$.342. The addition of this amount brought his hourly rate to \$11.891.

par. 7. The next increase in pay Mr. Christensen received was a Parity Adjustment which was effective May 20, 1990. DER Bulletin CC 231 stated "On May 20, 1990, agencies with employees allocated to the classifications specified above will generate 2.4% of the active hourly payroll for these employees for distribution as Parity Adjustments to eligible employees. . ." The Department of Corrections made the decision that all employees in the Supervising Officer classification would receive a 2.4% increase. Mr. Christensen's hourly rate was then increased to \$12.177 per hour ($\$11.891 \times 1.024 = \12.177).

par. 8. As previously stated Mr. Christensen's promotion was effective January 28, 1990. He was eligible for a six month probationary increase of one step as per Wisconsin Administrative Code ER 29.03(2) effective 7/29/90. The 1989-91 compensation Plan under Section F, page 97, established the Within Range Step as \$.352. With this increase his hourly salary was raised from \$12.177 to \$12.529.

4. When the union contract settled on April 8, 1990, employees occupying represented positions were eligible for a certain retroactive pay adjustment. Mr. Christensen was eligible and received this retroactive pay adjustments up until the date of his promotion to a nonrepresented position. The details were provided in Mr. Nuss's affidavit as noted below.

par. 9. For all hours worked between 7/2/89 and 1/27/90 when Mr. Christensen was in a position represented by WSEU, he did receive a retroactive payment of \$.384 per hour as required by Article XII, Section 1, Paragraph 4 of the contract. This amount of increase (\$.384) was not added to his base salary because the contract was not settled at the time of his promotion. He did receive the nonrepresented increase as already explained above. Mr. Christensen indicates he should have received the stratification and back pay for this stratification, but the contract clearly states in Article "12/1/5 Employees Not Eligible for (1989-90) Wage Adjustments

The following employees shall not be eligible for the (1989-90) general and/or Stratification wage adjustments or retroactive payments as set forth in Section 1 of this Article.

A. Those employees who have previously been considered for

or received a 1989-90 fiscal year wage adjustment."
Mr. Christensen had received a 1989-90 fiscal year wage adjustment when he accepted promotion to Officer 5 effective January 28, 1990.

5. Some employees occupying nonrepresented positions in July 1990, were eligible for a 4.25% discretionary monetary award. Specifically excluded, however, were nonrepresented employees serving the first 6 months of probation if such probationary period began before July 3, 1989, or after November 5, 1989. Mr. Christensen was not eligible for this award because his probationary period for the Officer 5 position started on January 28, 1990 (which was after 11/5/89).

6. Mr. Christensen received all monetary adjustments to which he was entitled. Either the union contract or the nonrepresented pay plan controlled those adjustments, as appropriate for the positions he occupied. Both the union contract and nonrepresented pay plan provide for monetary adjustments only if certain factors are met. None of the factors were based on race and/or sex. Nor did those factors impact less favorably on individuals who are of the same race and/or sex as Mr. Christensen.

7. Mr. Christensen provided no examples of employees of a different race (non-white) whom he believed were treated more favorably in terms of wages.

8. Mr. Christensen provided one example of a female employee, Catherine Cate, whom he believed was treated more favorably in terms of wages. However, she was not similarly-situated to Mr. Christensen as noted in Mr. Nuss's affidavit.

par. 13. . . Ms. Cate was paid in accordance with the same provisions that applied to Mr. Christensen. The major area of difference between the two of them occurred when Ms. Cate was eligible for the July, 1990, 4.25% Discretionary Award as a result of being in the second six months of her promotional probation rather than the first six months as was the case with Mr. Christensen. . .

Ms. Cate received the discretionary award because she was promoted on July 30, 1989 (not before 7/3/89 and not after 11/5/89).

DISCUSSION

The analytical framework for discrimination cases was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). This

framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondents to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondents' reason is a pretext for discrimination.

A prima facie case of wage discrimination could be established if the evidence shows: 1) complainant is a member of a group protected under the FEA, and 2a) different wage-eligibility factors were used for complainant than for other employees who were of a different race and/or sex, or 2b) the same wage-eligibility factors were used for complainant as for all other employees but such factors had an adverse impact on the group of employees of the same sex and/or race as complainant.

Mr. Christensen failed to establish a prima facie case. He did not show that different wage-eligibility factors were used for him than were used for all other employees regardless of their race and/or sex. Nor did he show that the uniform wage-eligibility factors impacted less favorably on the group of employees with the same sex and/or race as complainant.

Even if complainant had established a prima facie case, respondents articulated a non-discriminatory reason for the wage-eligibility factors used. Specifically, the law requires respondents to apply the union contract provisions for all represented positions and to follow the nonrepresented pay plan for all nonrepresented positions. Mr. Christensen did not show these reasons to be pretextual.

Mr. Christensen feels it is unfair that he missed out on certain pay adjustments, and especially on the stratification mentioned in paragraph 4 above. The Commission notes, however, that it is not unusual in civil service for probationary employees to be excluded from certain wage adjustments. Nor is it surprising (based on common sense) that each time a factor is used to draw a line, some employees fall on the favorable side of the line, while others do not. However, as noted by respondents, such perceived unfairness may underpin a discrimination claim only if respondents' actions were taken in relation to Mr. Christensen's sex and/or race; or if respondents' actions impacted less favorably on individuals of Mr. Christensen's sex and/or race. Neither circumstance exists in this case.

Mr. Christensen's current wage may be lower than it would have been if he had either accepted a promotion sooner or later than January 1990. The Commission, however, lacks jurisdiction to review perceived inequities which arise under the circumstances presented in this case.

In his reply brief, it is evident that Mr. Christensen would like to be informed of the origin of the wage-eligibility factors established in the union contract and in the nonrepresented pay plan. He also would like to know what advantage the State gained through the wage-eligibility factors. The Commission was not a party to those discussions and, therefore, is not in a position to provide the requested information.

CONCLUSIONS OF LAW


1. This case is properly before the Commission pursuant to s. 230.45(1)(b), Stats.
2. It is complainant's burden to show that the alleged discrimination occurred.
3. Complainant failed to meet his burden of proof.

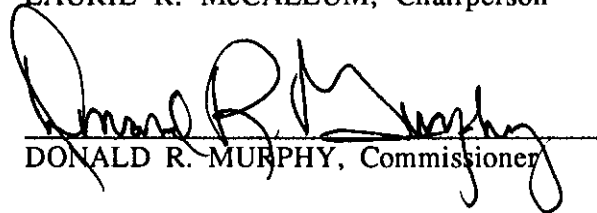
ORDER

Complainant's case is dismissed.

Dated February 3, 1994

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must

serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)