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DANIEL HANKE, \*

Complainant, \*

v. \*

Secretary, DEPARTMENT OF HEALTH \*  
AND SOCIAL SERVICES, \*

Respondent. \*

Case No. 91-0041-PC-ER \*

\* \* \* \* \*

DECISION  
AND  
ORDER

This matter arises from a complaint of discrimination based on handi-  
cap. The parties agreed to the following issue for hearing:

Whether complainant was discriminated against on the basis of  
handicap when respondent established his base pay rate upon  
reinstatement in June, 1990.

The parties offered arguments orally upon the conclusion of the evidentiary  
portion of the hearing.

FINDINGS OF FACT

1. Complainant is handicapped.
2. Complainant worked as a Youth Counsel 3 (YC 3) at respondent's Ethan Allen School commencing in March of 1980. He transferred to a YC 3 position at Lincoln Hills School in October of 1987 and was medically terminated effective March 26, 1989, as a consequence of back injuries. At the time his employment was terminated, complainant's rate of pay was \$10.757.
3. The YC 3 classification is in the Security and Public Safety bargaining unit and is assigned to pay range 5-10. During the relevant time period, the pay schedule for this pay range reflected a minimum pay rate of \$9.777, a Permanent Status in Class Minimum (PSICM) rate of \$10.071 and a pay rate maximum of \$13.661.
4. After a period of unemployment, complainant contacted Jeff Davis, Section Chief of the Milwaukee After Care Section in respondent's

Division of Youth Services in an effort to be reinstated to state service, specifically in the Social Worker 1 classification.

5. The Social Worker 1 classification is in the Professional Social Services bargaining unit and is assigned to pay range 12-02. During the relevant time period, the pay schedule for this pay range reflected a minimum pay rate of \$9.777, a PSICM of \$10.071 and a pay rate maximum of \$13.661.

6. Mr. Davis had had positive contacts with the complainant when the complainant was employed at Ethan Allen School and was very excited that complainant was interested in reinstatement.

7. In a May 31, 1990 memo to his supervisor, Patricia Millichap, Director of the Bureau of Community Resources, Mr. Davis recommended hiring complainant as a Social Worker 1 on a reinstate basis.

8. The following day, Mr. Davis wrote another memo to Ms. Millichap recommending that complainant's hire be "at the beginning rate of a Social Worker I which is \$9.77 per hour. Mr. Davis justified this recommendation by noting that complainant had not previously worked as a social worker for the State, that YC 3 duties are different than a Social Worker 1, and that the complainant had only been promoted to the YC 3 level shortly before his injury and, therefore, had not established a work record as a YC 3.

9. By letter dated June 13, 1990, respondent issued a letter confirming complainant's reinstatement to the Social Worker 1 position, effective June 18, 1990, at the rate of \$10.071 per hour. Complainant was required to serve a six month probationary period.

10. Complainant's starting rate of pay was set at the PSICM level. It reflected the policy of Ms. Millichap of bringing all new workers into the unit at the minimum permitted pay level.

11. Scott Paschal, who does not suffer from a handicap, was employed as a YC 2 at Ethan Allen School until he terminated his employment on January 17, 1986. At the time his employment ended, Mr. Paschal was paid at the rate of \$9.101 per hour. Mr. Paschal was reinstated to the position of YC 2 at Ethan Allen School effective February 4, 1986 at the same pay rate of \$9.101. He was not required to serve a probationary period.

12. Joel Adams, who does not suffer from a handicap, was employed as a YC 5 at Ethan Allen School until September of 1985. He then took a demotion to a Social Worker I position, from which he resigned in February of 1986 in

order to move out of state. At the time his employment ended, Mr. Adams was paid at the rate of \$10.898 per hour. Mr. Adams was reinstated to the position of YC 5 at Ethan Allen School effective March 2, 1987 at the same pay rate of \$10.898. He was not required to serve a probationary period. Youth Counselor 5 positions have supervisory responsibilities and, at all relevant times were outside of a bargaining unit.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden of proof.
3. The respondent did not discriminate against the complainant based on his handicap when it established his beginning rate of pay upon his reinstatement to the Social Worker 1 position in June of 1990.

#### OPINION

Complainant alleges that respondent discriminated against him based upon his handicap when it established his base rate of pay at the \$10.071 level upon his reinstatement to the Social Worker 1 position in June of 1990, rather than paying him at the rate of \$10.757. Respondent conceded that complainant is handicapped and that he suffered an adverse term or condition of employment. The complainant also established that two non-handicapped individuals who were reinstated by respondent did not have their pay level reduced upon their reinstatement.

Respondent's position is that it properly exercised its discretion when it set complainant's pay, and that Patricia Millichap, who made the decision, acted in conformance with her standard policy of paying new employes in the Social Worker 1 classification at the minimum permissible level. The complainant has failed to present evidence that the respondent's rationale is pretextual. In reaching this conclusion, the Commission notes the following:

1. Given that the Ethan Allen School and the Division of Youth Services are separate work units in the same agency, the fact that Mr. Paschal and Mr. Adams maintained their previous salary levels at Ethan Allen can hardly be considered weighty evidence that the exercise of discretion by Ms.

Millichap in the Division of Youth Services with respect to complainant's reinstatement pay rate at a lower level was discriminatory.

2. The Paschal and Adams reinstatement actions were to the same classifications from which they had previously obtained permanent status in class. Their reinstatements were within the same work unit, Ethan Allen School, and, as to the Paschal reinstatement action, in the same collective bargaining unit.<sup>1</sup> In contrast, the complainant was reinstated to a position in a different classification assigned to a different bargaining unit and in a different work unit, with his reinstatement eligibility based upon the fact that the classifications were in comparable pay ranges.

3. Mr. Davis, who made the recommendation to hire the complainant, was fully aware of complainant's handicap at the time he made that recommendation. It is highly improbable that Mr. Davis would recommend the selection of the complainant on May 31st and then discriminate against him the next day when recommending his rate of pay.

4. Ms. Millichap, who made the decision to hire the complainant, was fully aware of complainant's handicap at the time she made that decision. It is highly improbable that Ms. Millichap would agree to hire the complainant and then discriminate against him immediately thereafter when setting his rate of pay.

5. Ms. Millichap knew that she had discretion when setting complainant's starting rate of pay but understood the provisions of the Wisconsin Administrative Code to require that, for persons who are reinstated after already serving an original term of probation, the starting pay upon reinstatement can be no less than the PSICM level for the new classification. This view was premised on the language of §ER 29.03(6)(c)1.b.:

(c)1. ...[W]hen an employe is reinstated, the base pay may be at any rate which is not greater than the last rate received plus intervening... contractual adjustments....

a. Employes placed on probation when reinstated shall be paid not less than the minimum of the pay range to which the class is assigned.

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<sup>1</sup>The corresponding sentence in the proposed decision has been modified to better reflect the record.

b. Employees not placed on probation when reinstated shall be paid not less than the PSICM of the pay range to which the class is assigned.

c. Employees shall not be paid more than the maximum of the pay range to which the class is assigned.

The letter of appointment indicates that the complainant was required to serve a probationary period when he began working as a Social Worker 1. Nevertheless, Ms. Millichap understood that complainant could be paid no less than PSICM, which for the Social Worker 1 pay range was \$10.071 per hour. Ms. Millichap then set complainant's starting rate at \$10.071 per hour, approximately \$0.30 higher than the level recommended by Mr. Davis which had been based on the pay range minimum.

6. While Ms. Millichap had the discretion under §ER 29.03(6)(c)1. to set complainant's pay equal to his "last rate received [\$10.757] plus intervening... contractual adjustments," to do so would have been contrary to her policy of starting entry level workers at the minimum rate.

7. In light of the fact that the complainant had not previously performed the duties of the Social Worker 1 position, Ms. Millichap properly treated him as she would any other entry level worker, i.e. she decided to pay him the minimum permissible rate.

8. Mr. Davis' June 1st memo (Finding of Fact 8) was incorrect in that it indicated the complainant had only been promoted to the YC 3 level shortly before his injury, but the relative time period which complainant had been a YC 3 did not play a role in Ms. Millichap's decision setting complainant's rate of pay.

9. Complainant did not transfer into the Social Worker 1 position, he reinstated. The pay rate requirements are different for transfer actions than they are for reinstatements. The fact that the complainant would have been entitled to maintain his previous salary level if he had transferred rather than reinstated into the Social Worker 1 position is irrelevant to the issue of discrimination.

10. Both Mr. Davis and Ms. Millichap expressly denied that complainant's handicapping condition played a role in the starting pay decision.

ORDER

The complaint of discrimination is dismissed.

Dated: June 25, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms  
K:D:Merits-ER hcp (Hanke)

  
JUDY M. ROGERS, Commissioner

Parties:

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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.