STATE OF WISCONSIN PERSONNEL COMMISSION

STEVEN BUTZLAFF,

Complainant,

v.

Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondent.

Case No. 91-0043-PC-ER

DECISION AND ORDER

This matter is before the Commission on the respondent's motion to dismiss for lack of subject matter jurisdiction. The file indicates the following facts, which appear to be undisputed.

1. Prior to January of 1990, the complainant had worked for nearly five years for the State of Wisconsin as a Security Officer 2 and 3 for the University of Wisconsin-Madison.

2. In January of 1990, the complainant was hired by the Department of Health and Social Services, Mendota Mental Health Institute as a Security Officer 3. He was terminated from that position in May of 1990.

3. Complainant was reinstated in September of 1990, to a RCT 1 position at DHSS's Central Wisconsin Center (CWC).

4. Eileen Slaney-Bartels, a personnel assistant at CWC, initially calculated the complainant's reinstatement pay rate. However, CWC's Personnel Manager, Brian Fancher, approved a lower rate of pay. This rate of pay was less than the final rate complainant had been earning as a Security Officer for the University of Wisconsin-Madison.

5. CWC had previously granted a higher reinstatement pay rate to Stuart Coogan, whose prior state position was as a Security Officer 2

6. By letter dated February 27, 1991, the complainant brought the matter of his rate of pay to the attention of the respondent Department of Employment Relations (DER). In a letter dated March 7, 1991, a compensation analyst for the respondent quoted the language of §ER 29.03(6), Wis. Adm. Code, and wrote:

> This [rule] is interpreted to mean that CWC had discretion in setting your rate of pay upon reinstatement. The rate could not

> have been set at less than the minimum ($7.937) or PSICM ($8.176) of the pay range (depending upon whether or not you are serving a probationary period) nor could it be more than the rate you were receiving when you terminated state service in May, 1990 plus the July, 1990 percentage increase. Upon review of payroll records, it appears that the rate of pay you are currently receiving is within this range and, therefore, based on the rules, is appropriate.

7. On April 8, 1991, the complainant filed the instant charge of discrimination against DER. The complaint stated that "the current rules for State Employment Reinstatement easily allow for management to discriminate against individuals eligible for reinstatement, just as I have been." Complainant alleged discrimination on the basis of age, arrest/conviction record, color, creed, family/medical leave, handicap, honesty testing device, marital status, military reserve membership, national origin or ancestry, race, sex and sexual orientation as well as retaliation based on elderly abuse reporting, fair employment activities, public employe safety and health reporting and whistleblowing.

8. On the same date, the complainant filed a charge of discrimination against DHSS alleging that its decision to set his rate of pay upon reinstatement constituted discrimination based on family/medical leave, handicap and marital status and retaliation based on fair employment activities and whistleblowing. That complaint, which has been assigned Case No. 91-0044-PC-ER, is pending before the Commission.

Complainant's basic allegation is that the respondent's rules regarding pay on reinstatement allow employing agencies to set different pay levels for reinstated employes who have identical work records:

> They allow discretion to be used that is based on personal feelings toward the individual employee and not necessarily based on merit, like that which occurred with the discrepancy in pay rates of (Former Security Officer II) Stuart Coogan and myself (Former Security Officer III). This is abuse of discretion, see Wis. subchapter 230.44(1)(d). I have much, much more work/life related experience and education for the RCT position. In addition my last State position (Security Officer III-Lead) was of a higher rank, pay, and responsibility than Stuart Coogan's last State position (Security Officer II) yet now Coogan is paid far more than I. To reinstate Stuart Coogan at his last rate of pay sets a precedent which must be consistent and apply to me also as stated in Wis. subchapter 227.10(3)(c). DER's rules of reinstatement regarding

> pay do not require employers to be consistent in setting pay rates as Wis. subchapter 111.815(1) and (2) require.
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> * * *
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> At the April 18, 1991 prehearing I stated clearly that DER's rules not only could discriminate, but did in fact discriminate against me. Even after I complained to DER about the discriminations and asked for assistance, DER did nothing to correct the discriminations (abuse of discretion) or pay discrepancy between Stuart Coogan and my pay. I'm charging DER with discrimination because DER and their reinstatement rules regarding pay have in fact allowed the specific aforementioned discriminations to be committed against me. If an employee is allowed three (3) years to be reinstated that individuals last rate of pay should also be reinstated within that time, this would make it fair, equal, and consistent for everyone. In addition I checked all other forms of discrimination to demonstrate how easy it is for any one or more of those discriminations to occur under DER's reinstatement rules regarding pay.

The respondent has identified three bases for its jurisdictional objection:

> a) There is no subject matter jurisdiction pursuant to sec. 230.45(1)(b), Wis. Stats.;
>
> b) Complainant has not alleged a claim upon which relief can be granted by this Commission;
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> c) The complaint only challenges the constitutionality of DER's rules on their face, a remedy over which the Commission has no jurisdiction.

Complainant is not represented by counsel in this matter.

The respondent's contention that the Commission lacks subject matter jurisdiction is based on the argument that the complainant has made no allegation of "actual, specific discrimination by DER as against Complainant."

Claims of discrimination typically fall within either the theory of disparate treatment, i.e. cases involving overt or intentional discrimination when an employer treats one person differently from another based upon the person's protected status, or the theory of disparate impact, i.e. cases involving the application of a facially neutral employment policy which has a disproportionate effect on one or more protected groups. The prototypical disparate impact case is Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed. 2d 158, 91 S.Ct. 849

(1971). In Griggs, the Supreme Court overturned the employer's requirements for entry into four, traditionally all-white, departments in a power station. Blacks had traditionally been restricted to a fifth department. All employes entering the four traditionally white departments were required to have high school diplomas and to pass two standardized tests. The Court found that the test and the high school diploma requirements had a substantially different impact on blacks than on whites. The percentage of blacks in North Carolina who had graduated from high school was only one-third the rate of graduation for whites and the disparity in passing the two standardized tests was even greater between the two groups.

Here, DER's role with respect to establishing the complainant's rate of pay upon reinstatement was limited to adopting an administrative rule which established minimum and maximum rates and required the appointing authority to exercise discretion in setting a particular rate within the available spectrum. The rule in question is found in §ER 29.03(6), Wis. Adm. Code, which provides in relevant part:

> [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 compensation plan adjustments ... or 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.

In Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 101 L.Ed. 2d 827, 108 S.Ct. 2777 (1988) the Supreme Court held that a disparate impact analysis could be applied to subjective or discretionary employment practices and was not restricted to standardized tests or criteria as in Griggs. Pursuant to §230.06(1)(b), Stats., it is the responsibility of the appointing authority, rather than the Secretary of the respondent DER to "[a]ppoint persons to ... the classified service ... and fix their compensation, all subject to this subchapter and the rules prescribed thereunder." Even though the individual decisions setting pay on reinstatement are made by the various employing agencies of the State of Wisconsin, rather than by DER itself, the agencies are bound by the rule adopted by DER which sets parameters but does not set criteria for making the pay decision. The complainant is entitled to argue, and the Commission has the

jurisdiction to hear, that the utilization of DER's rule has a disparate impact on reinstated employes based upon their protected status.

Even though the Commission has the authority to hear such a claim, there is still a question as to whether the complaint must be dismissed for failure to state a claim on which relief may be granted. The factual basis on which all of the complainant's charges rest is limited to the allegation that Stuart Coogan, who was being reinstated from a Security Officer 2 position, received a higher pay rate than the complainant, who was reinstated from a Security Officer 3 position. There is no information in the file indicating whether complainant and Mr. Coogans are distinguishable in terms of their race, sex, age, marital status or any of the various other categories of discrimination and retaliation claimed by the complainant in this matter. There is no allegation as to how any other persons were affected by the respondent's rule.

The complainant alleges that the mere fact that discretion is available under DER's rule constitutes discrimination. The policy of making discretion available cannot be discriminatory under a disparate impact analysis unless and until there is evidence establishing that the discretion has been exercised in a discriminatory manner. Obviously it is possible for someone to exercise discretion in a non-discriminatory manner, just as it is possible to exercise it as a means of discriminating. Here, the complainant is not even alleging that the various protected groups are, in fact, impacted differently by the respondent's rule. Complainant is merely alleging that he was not treated the same way under DER's rule as someone else, and because he, the complainant, is in a protected group and he could have received a higher pay rate, the rule is discriminatory. In order to withstand a motion to dismiss for failure to state a claim, the complainant must at least advance some theory as to how the rule will result in a disproportionate effect on one or more protected groups with respect to which he has standing. The complainant has not done that, and based upon the materials in the file in this matter, the Commission is unable to formulate a theory of that type. Therefore, the Commission will grant the respondent's motion to dismiss with respect to the complainant's disparate impact claim.

The complainant also appears to raise a claim of disparate treatment by DER with respect to the decision represented by the March 7, 1991, letter from Kathy Kopp, a compensation analyst for DER, concluding that complainant's

rate of pay was "appropriate." To the extent the complainant is arguing that DER discriminated against him by not reversing DHSS's decision setting his rate of pay upon reinstatement, the authority to establish rates of pay rests with the appointing authority. DER, therefore, lacked the authority to revise DHSS's decision where it could not be shown that the rate established by DHSS was outside of the parameters set by DER's rules. Respondent's motion to dismiss must also be granted as to this disparate treatment claim in that the authority to set the rate of pay within the range established in the rule rested with the appointing authority. Given this lack of authority on behalf of DER, the complainant has failed to identify any basis on which he can obtain relief from the Commission on a disparate treatment claim against DER.

In his brief, the complainant also references statutory provisions, §§111.815 and 227.10, Stats., which are outside of the Commission's jurisdiction The Commission lacks the authority to enforce these statutes as a part of a charge of discrimination/retaliation.

Complainant also indicates in his brief that he wishes to have this matter processed under §230.44(1)(d), Stats. That provision allows the Commission to review "[a] personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion." The time limit for filing such an appeal is "within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later." §230.44(3), Stats. Here, it is apparent that the complainant's rate of pay on reinstatement was established in September of 1990 and his complaint did not reach the Commission until April 8, 1991. The 30 day time limit is mandatory rather than discretionary and is jurisdictional in nature. Richter v. DP, 78-261-PC, 1/30/79.
Therefore, an appeal under §230.44(1)(d), Stats., is untimely.

In his brief, the complainant also references certain constitutional claims: "[My complaint] must be processed to observe my 14th Amendment Rights of due process and equal protection of the Laws." In McSweeney v. DOJ & DMRS, 84-0243-PC, 3/13/85, the Commission addressed the question of whether it had the authority to consider certain constitutional issues raised by the appellant. After analyzing the applicable case law, the Commission concluded:

> It seems clear, based on these general principles, and because the Commission's specific enabling statutes do not confer such power, that the Commission lacks the authority to rule on the question of the constitutionality of the statutes relating to the requirement of Wisconsin residency for civil service employment. Presumably the Commission could consider questions concerning alleged constitutional violations emanating from the statutes as applied, the determination of which would not involve reaching any conclusions as to the facial constitutional validity of such statutes, if this case presents such issues.

Here, the distinction between the "facial constitutional validity" and "alleged constitutional violations emanating from the [rule] as applied" parallels the existence of complainant's charge against DER and his charge against DHSS (Case No. 91-0044-PC-ER). Based on the analysis made in McSweeney, the Commission lacks the authority to determine the validity of the rule adopted by DER, although the complainant may conceivably advance contentions of constitutional violations in Case No. 91-0044-PC-ER, in terms of how DHSS applied the rule to the complainant.

The complainant makes various additional claims in his brief on respondent's motion. These claims specifically relate to the conduct of Brian Fancher of CWC, rather than DER. If the complainant wishes to have the Commission consider these as additional allegations, he must raise them in the context of his pending case against DHSS rather than in the instant proceeding against DER.

ORDER

This matter is dismissed.

Dated: August 8, 1991 STATE PERSONNEL COMMISSION

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

Parties:

Steven G. Butzlaff
1910 Vondron Road
Madison, WI 53716

Jon E. Litscher
Secretary, DER
P. O. Box 7855
Madison, WI 53707