STATE OF WISCONSIN CIRCUIT COURT Branch 4 DANE COUNTY

WILLIAM K. HAZLETON,

Petitioner,

vs.

WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER

Case No. 91-CV-4770

This is an administrative review under secs. 227.52 - .57, Stats. Petitioner William K. Hazleton was a part-time officer in the Wisconsin Army Reserve National Guard. Pursuant to federal regulations then in effect, as adopted and enforced by the State Department of Military Affairs (DMA), petitioner was assigned to Standby Reserve because he tested positive for HIV human immuno-deficiency virus, the AIDS virus. He filed a complaint with respondent Wisconsin Personnel Commission (WPC) alleging, among other things, that the transfer discriminated against him on the basis of handicap within the meaning of the Wisconsin Fair Employment Act (WFEA), secs. 111.31, et seq., Stats. WPC found that it had jurisdiction in the matter but concluded that enforcement of the WFEA was preempted by the federal regulations. Petitioner now seeks reversal of that decision. Because the federal regulation did not preempt enforcement of the Fair Employment Act, the Court remands for reconsideration of remaining issues.

REVIEW OF RECORD

Petitioner had been a part-time member of the Wisconsin Army Reserve National Guard since 1961 and had attained the rank of major. In early 1988, he twice tested positive for HIV.

On February 2, 1988, petitioner was formally notified by the National Guard that he would be separated from the Reserve National Guard for the positive test results. At the time he was offered three options -- retirement, complete separation or transfer to United States Army Standby Reserve. The retirement option was moot because petitioner was still three years from retirement eligibility. Transfer to Standby Reserve would not allow petitioner to reach retirement status because regulations limited such service to two years. Moreover, petitioner would be required to pay his own expenses to participate in exercises to attain such retirement eligibility as was available.

Petitioner declined to choose an option and on April 1, 1988, one was chosen for him as he was honorably detached from the National Guard and assigned to United States Army Reserve, Reserve Control Group (Standby Reserve). Petitioner's separation was not in any way related to the performance of his duties, nor was it based on a determination that the discharge of duties would jeopardize the health and safety of himself or others because of the presence of the AIDS virus.

The action taken by the National Guard and DMA followed federal regulation AR 600-110 sec. 5-10a, then in effect.

Effective October 7, 1988 AR 600-110 sec. 5-10a was superseded. The new regulation provided that Army Reserve National Guard soldiers who tested HIV positive would not be automatically separated but would be allowed to continue service in certain capacities if they established fitness in accordance with stated procedures.

On November 15, 1988, petitioner filed a complaint with the WPC alleging that his reassignment was discriminatory under WFEA. Over the objection of the respondent to the complaint, DMA, the WPC took jurisdiction in the matter on the grounds that petitioner was a state employe covered by the act.

In the interim, the federal National Guard Bureau denied petitioner's request for reconsideration on December 27, 1988.

On November 6, 1991, petitioner's claim was dismissed on the grounds that the federal army regulations in effect at the time of his discharge preempted enforcement of the WFEA.

The instant petition for review was filed on December 9, 1991. In addition to respondent WPC, the DMA has made an appearance under sec. 227.53(2), Stats.

CONCLUSIONS OF LAW

Petitioner seeks reversal of WPC's conclusion of law that enforcement of the provisions of the Wisconsin Fair Employment Act barring discrimination against the handicapped by state agencies is preempted by the federal regulation which authorized petitioner's placement on Standby Reserve.

Petitioner also alleges that respondent failed to consider a number of issues presented to it but, contrary to DMA's view, does not seek review of WPC's conclusion that his sexual orientation discrimination claim was preempted. There are no disputes with respect to respondent's findings of fact. Under sec. 227.57(5), Stats., the Court shall set aside an agency's action which is based on an erroneous interpretation of the law. Under sec. 227.57(4), Stats., the Court shall remand the case if the agency's decision is marred by a material error in procedure, such as failure to consider an issue presented to it.

1. FEDERAL AND STATE CONTROL OF NATIONAL GUARD

An explanation of the relationship between federal and state control of national guard units is necessary for an understanding of the issues presented in this case. The starting point is Article I, sec. 8, cls. 15-16, the Militia Clauses, of the United States Constitution. Under them:

> The Congress shall have the power
>
> . . .
>
> 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 organized militia of Wisconsin is called the Wisconsin National Guard. Sec. 21.01(1), Stats. The governor may make regulations administering the Guard and has the authority to commission officers. Secs. 21.36(2), 21.43,

Stats. He also has the authority to discharge officers under the Wisconsin code of military justice or due to disability. Sec. 21.51, Stats. The Guard is administered on the governor's behalf by the Department of Military Affairs. Sec. 21.015, Stats.

> Since 1933 all persons who have enlisted in a state National Guard have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state Guard unit.

Perpich v. Department of Defense, 110 L.Ed.2d 312, 325 (1990).

This case does not involve a dispute over a call to active duty. However, the federal government maintains substantial controls over National Guard units even under state rule through their dual assignment to the National Guard of the United States. "The Federal Government provides virtually all of the funding, the materiel, and the leadership for the state Guard units." Perpich, 110 L.Ed.2d at 328-329.

Recognizing the need for uniformity in the training and discipline of national guard units in many states, Wisconsin has enacted several statutes adopting the standards of the federal government to the state Guard. Thus, Guard members must be enlisted or appointed in accordance with regulations governing the National Guard of the United States, sec. 21.01(1), Stats., and, with certain exceptions, federal laws and regulations prescribing organization and discipline have been adopted by the state. Secs. 21.35, .36, Stats.

The entanglement of state and federal control over members of the National Guard has been characterized thus:

> In a sense, all of them [members of the Guard] now must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat -- only one of which is worn at any particular time.

110 L.Ed.2d at 327.

2. PERSONNEL COMMISSION'S JURISDICTION

Applying the Guard's civilian and state hats, the Personnel Commission, over the objection of the DMA, found that petitioner was covered by WFEA and that it could review his discharge under the Act. It reasoned as follows: The Wisconsin Fair Employment Act prohibits discrimination due to handicap. Sec. 111.321, Stats. Discrimination includes a reduction in status such as the action against petitioner which has effectively deprived him of retirement benefits. Sec. 111.322(1), Stats. Adverse action against an employe may be taken if, as the result of a case-by-case evaluation, the employe is found to be unable to undertake job-related activities but the employe cannot be adversely treated if the handicap does not affect his or her work. Sec. 111.34, Stats. Encumbrance by the HIV virus is a handicap under the act. Racine Unified School Dist. v. LIRC, 164 Wis.2d 567, 598-603 (Ct. App. 1991).

The "state and each agency of the state" are employers covered by the act. Sec. 111.32(6)(a), Stats. Noting that the Wisconsin Supreme Court has long held that members of the National Guard were state employes for worker's compensation

purposes, State v. Industrial Commission, 186 Wis. 1, 2, 9 (1925), the Personnel Commission extended this logic to conclude that petitioner was an employe covered by the Act. The Personnel Commission has jurisdiction of complaints filed against state agencies under the Act. Sec. 111.375(2), Stats.

On this review, the Department of Military Affairs attempts to restate its objection to the Personnel Commission's conclusion that petitioner was covered by the Act and the Commission could review the adverse action taken against him by the Department. The issue is raised on review for the first time in the Department's brief, at 14, "as an alternate ground on which to affirm the Commission's order dismissing the complaint." However, adopting the Department's position would constitute reversing the Commission's decision in that respect and that issue has not been properly presented before the Court.

This action was began by petitioner's petition to review only such part of the Commission's decision as was adverse to him. As a party to the proceedings before the Commission, the Department has a right to participate in this review. Sec. 227.53(1)(d), Stats. However, that right is subject to sec. 227.53(2), Stats., which states in pertinent part:

> Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation, or modification of the order or decision under review.

(Emphasis added).

Here, the Department's Notice of Appearance flatly states "that the final decision and order of the Wisconsin Personnel Commission dated November 6, 1991, which are sought to be reviewed should not be reversed or modified, but should be affirmed in all respects." (Emphasis added). It is settled law that full compliance with statutory requirements for obtaining judicial review of an agency's decisions is necessary for the Court to invoke subject matter jurisdiction. Schiller v. DILHR, 103 Wis.2d 353, 355 (Ct. App. 1981). Here, not only did the Department fail to raise the issue in its notice of appearance, it acquiesced in the Commission's decision. The issue was raised more than three months after the notice of appearance. Petitioner was unable to respond to it until the reply brief. The Court concludes that it does not have jurisdiction over the issue, and in the alternative, that the Department has waived its right to challenge the Personnel Commission's decision in that regard.

3. PREEMPTION

The Personnel Commission concluded that enforcement of the provisions of WFEA was preempted by Army Regulation AR 600-110 sec. 5-10(a). That provision states:

> Soldiers confirmed to be HIV positive, but who manifest no evidence of progressive clinical illness or immunological deficiency, will not be separated solely on the basis of having been confirmed positive for the HIV antibody. The following policies apply:
>
> a. HIV positive soldiers, not AGR or on EAD, will be transferred to the Standby Reserve or Retired Reserve (if eligible), or be honorably discharged under the

> plenary authority of the Secretary of the Army . . . (if requested by the individual). The mere presence of the HIV antibody, in and of itself, will not be used as the basis for -- (1) Disciplinary action . . . [or] (2) Adverse characterization of service.

The parties do not explain why the action taken against petitioner was characterized as a discharge although the regulation expressly excludes involuntary separation. Petitioner's main contention is that WPC's conclusion was in error and that WFEA controls.

> 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 state and federal 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 and execution 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.

Louisiana Public Service Commission v. FCC, 476 US 355, 368-369 (1986) (Citations omitted).

The question of whether the federal government can regulate qualifications for petitioner's post under the Militia Clause and whether it has, to the exclusion of WFEA, are two different issues.

A. FEDERAL AUTHORITY UNDER MILITIA CLAUSES

As a state court, this Court does not have the authority to address petitioner's initial premise that Congress

exceeded its constitutional authority by allowing AR 600-110 sec. 5-10a and binding state guards to it, if that is what it intends. In any event, the Court believes that Congress had such power.

> [A]lthough 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.

In The Federalist No. 29, Alexander Hamilton described the function of Art. I, sec. 8, cl. 16.

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects. . . . This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.

J. Cooke, ed., The Federalist, at 181 (1961). Thus, it is clear that Congress' authority to prescribe "discipline" under cl. 16, means discipline in the broader sense of imposing a standard of order, rather than in the narrower sense of establishing a means of averting or punishing misconduct as advocated by petitioner. See Webster's Third New International Dictionary, at 644-645 (1986). Petitioner does not contend that the regulation violated the Constitution in any other respect. Thus, Congress, through the Army, had the authority to require that state guard units adopt and enforce sec. 5-10a.

B. CONGRESS' INTENT TO PREEMPT

The more perplexing question is whether it chose to do

so. Preemption is an issue which state courts have addressed many times. E.g., State ex rel. Cornellier v. Black, 144 Wis.2d 745, 751-756 (Ct. App. 1988).

Essentially, WPC held that there was a substantive conflict between the regulation and the Fair Employment Act, a point not in dispute. Although a state is not required to participate in the federal guard or accept federal funding, once it has done so, WPC concluded, it is compelled by the doctrine of preemption to follow federal regulations. Thus, these regulations controlled.

Significantly absent from WPC's decision is acknowledgment that "an act of congress is presumed not to preempt state law" and "the burden of showing preemption is upon the person claiming it." State ex rel. Cornellier, 144 Wis.2d at 756. In the preemption context, conflicting laws do not merely mean a disagreement in policy but an intent by Congress to prevent states from having contradictory policies which frustrate Congress' efforts to discipline the militia. See Louisiana PSC, 476 US at 368-369.

Several statues regulate the state national guard. The President has the general authority to prescribe regulations. 32 USC sec. 110. Personnel qualifications such as age and citizenship are set. 32 USC sec. 313. State guard units are subject to inspection. 32 USC sec. 105. Officers and enlisted personnel are required to meet standards for what is characterized as "federal recognition." 32 USC secs. 301, 307-309. Interestingly, respondent failed to cite 32 USC sec. 324 which requires discharge of a national guard officer

if "his federal recognition is withdrawn."

However, these standards must be placed in the context of the complete law. State v. Industrial Comm., 186 Wis.2d at 2. As respondent noted in its incorporated decision of Ariès v. DMA, at 17, "[t]he withholding of federal aid pursuant to 32 USC sec. 108 is a means, and apparently the only means, of enforcing compliance with federal regulations by a state participating in the federal guard system." In its entirety that statute states:

> If, within a time frame 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.

Significantly absent from this statute is any Congressional directive mandating that recognition of a State's National Guard, as opposed to its individual members, be withdrawn. The absence of such a condition suggests that lockstep compliance with federal regulations is not required. In 1925, the Wisconsin Supreme Court relied on a similarly worded predecessor to 32 USC sec. 108, to rule that Guard members were state employes entitled to worker's compensation. It noted that the statute:

> 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 to be compulsory, but optional, and in enacting such legislation it clearly had in mind its constitutional limits 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 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.

State v. Industrial Comm., 186 Wis. 1, 6-7 (1925) (Emphasis added).

Contrary to WPC's ruling, the state's choice to comply with federal regulations is not an all or nothing proposition notwithstanding its statutory option to form an unorganized militia not part of the national guard system. No federal statute expressly or implicitly informs the state that once it opts into inclusion into the federal national guard it loses its option to decline to adopt regulations contrary to its own policies. To the contrary, 32 USC sec. 108, specifically states that funds may be cut off in whole or in part. "[T]he President's power to terminate funding under sec. 108 is discretionary." McFarlane v. Grasso, 696 F.2d 217, 226 n. 3 (2d Cir. 1982). Thus, should a state choose not to follow federal policies in limited circumstances, the only adverse action it can expect is a partial reduction of funding rather than injunctive relief compelling compliance.

In determining that the Secretary of the Army had not participated in a violation of a national guard officer's first amendment rights by the State authority's failure to hire him, the Court in McFarlane, 696 F.2d at 226 n.4 noted

> Although Article I, Section 8, Clause 16 of the United States Constitution authorizes the Congress "(t)o provide for organizing, arming, and disciplining" the

> National Guard, the same clause reserves to the states the power to appoint the officers of the Guard. The United States has not attempted directly to control the appointing power. The fact that most, if not all states voluntarily have chosen to appoint Army National Guard officers according to the standards of National Guard Regulations 600-100 (1980) and 32 CFR sec. 564.2-564.5 (1981) in order to qualify their units for federal recognition does not mean that federal action is present in the appointment of individual officers. Instead, as the federal regulations recognize, the actual selection and appointment of Army National Guard officers is solely a state responsibility. See paragraph 2-2a of National Guard Regulation 600-100 (1980) ("The appointment of officers in the ARNG is a function of the State concerned, as distinguished from the Federal recognition of such appointment."); 32 C.F.R . sec. 564.2(a)(2) (1981) ("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." See also Zitser v. Walsh, 352 F.Supp. 438, 440 (D.Conn. 1972) ("One may be a member of the National Guard of a state without receiving federal recognition, but never the reverse."), and paragraph 4-1 of Regulation 600-100 ("The assignment and transfer of officers is a function of the State concerned.")

(Emphasis added) (While the regulations cited have often been subject to change, for example 32 CFR sec. 564.2 was rescinded as not properly belonging in the CFR, 43 Fed.Reg. 26443 (1978), there is no indication that the National Guard Bureau no longer adheres to those principles.) See also Hurley v. United States, 47 F.2d 431, 433 (D.C. Ct. App. 1931) ("The withdrawal of federal recognition to an officer of the National Guard of a state does not terminate his status as a state officer.")

The cases on which respondent relies are distinguishable. Perpich involved an act of Congress which eliminated the authority of a state governor to veto an exercise of its right to federalize the national guard. In

Johnson v. Orr, 617 F.Supp. 170-177 (E.D. Cal. 1985), aff'd without op., 787 F.2d 597 (9th Cir. 1986), although the Court upheld under clause 16 a regulation prohibiting homosexuals from serving in the national guard, there was no preemption issue discussed in that case. Taylor v. Jones, 653 F.2d 1193, 1206 (8th Cir. 1981), involved Congress' ability to prescribe regulations for a state's hiring of federal technicians who were also required to be national guard members. Moreover, the court there noted testimony that federal funding had never been cutoff for failure to comply with federal regulations.

The checkered history of sec. 5-10a makes it unlikely that the federal government will begin to enforce 32 USC sec. 108 here. The original notification to petitioner characterized the policy as a "recent change." (Ex. 2-1) The final form of the regulation was not effective until April 11, 1988, after petitioner's transfer. (Ex. 12) By October 7, 1988, apparently due to an official request ("The ASD (RA) requested the army reexamine its blanket policy ... of involuntary transfer"), the policy was rescinded in favor of a policy which, like WFEA, determines eligibility for continued service on a case-by-case basis. Thus, it cannot be said that failure to comply with sec. 5-10a for the few months it substantively conflicted with WFEA frustrates any fixed federal policy. Additionally, enforcement of WFEA here does not interfere with Congress'control over the membership of the National Guard of the United States, a separate organization, or over whom it may extend federal recognition.

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 US 725, 746 (1981). To be sure the Court's ruling here that WFEA was not preempted is not consistent with the policy of uniformity expressed by Hamilton in the Federalist. However, the choice of whether to exercise the full power of the militia clause is Congress' and it could have enacted a statute clearly prohibiting state National Guard units from adopting different policies. It did not do so. As the boundary between state and federal control of the unfederalized militia is traditionally ambiguous, that Congress declined to stake out its authority more clearly is evidence of an intent not to preempt. The Court concludes that respondent erred as a matter of law in its ruling that AR600-110 sec. 5-10a as promulgated at the time of petitioner's discharge was a preemption of the Fair Employment Act. Respondent's decision is reversed in that respect.

4. REMAINING ISSUES

Remand is required because even though sec. 5-10a did not preempt enforcement of the Fair Employment Act as a matter of federal law, the State has nevertheless adopted it as its own under sec. 21.35, Stats. Contrary to petitioner's contention, the State of Wisconsin has adopted, the regulations in question here. Under sec. 21.35, Stats., "[t]he organization, armament, equipment and discipline of the Wisconsin national guard shall be that prescribed by

federal law or regulations." While that adoption is specifically conditioned upon the prohibition of discrimination in certain circumstances, discrimination against the handicapped is not among them. Sec. 21.36(2), stats., is not an additional condition on the adoption of federal regulations as petitioner suggests but, instead, is a grant of additional regulatory powers to the governor.

The result is that two provisions of Wisconsin law, the Fair Employment Act and sec. 5-10a as adopted by sec. 21.35, Stats., appear to conflict with each other. Stopping with the preemption issue, respondent failed to consider this issue. As petitioner, WPC and DMA all have failed to discuss any of the implications of sec. 5-10a as a state regulation, and in light of the deficiencies in the record described below, the Court remands WPC's decision for a determination of those issues along with a determination of what, if any, relief is appropriate.

In particular, the Court is concerned with resolution of the following issues: As a state law, sec. 5-10a must be read together with the Fair Employment Act's prohibition against "general rules" which prevent employment of "a particular class of handicapped individuals." Sec. 111.34(2)(b), Stats. Sec. 5-10a was a specific prohibition adopted as a state law regulation and thus it is not clear whether or not it comes under the provisions of sec. 111.34(2)(b). However, as noted, sec. 5-10a was changed, apparently after an official request, to a standard which is arguably similar to WFEA. The record fails to indicate the

grounds for this change. This deficiency in the record is material because the short-lived nature of the regulation does not preclude the possibility that it was a mistake or not in conformance with congressional or Department of Defense policy. Such a finding would compel the conclusion that WFEA controls because a fair reading of sec. 21.35, Stats., is that only valid federal regulations are incorporated into state law. However, a finding that sec. 5-10a as enforced against petitioner was not an erroneous implementation of federal policy would not compel the conclusion that it controls over WFEA as a matter of state law if sec. 111.34(2)(b) applies to it.

The Department of Military Affairs relies on a note by Colonel C. E. Rhodes of the National Guard Bureau for the proposition that the new regulation would not be applied retroactively. Written after the new regulations were promulgated, but without any reference to them, it states that petitioner's "separation was processed in accordance with the Department of the Army policy and procedures at the time of his discharge." Exhibit 11. This cryptic comment made without any citation of authority provides scant support for the propositions that the original sec. 5-10a was a valid delegation of Congressional or Defense Department authority or that sec. 5-10a as revised was only intended for prospective enforcement. DMA should put into the record as much of the history of sec. 5-10a, before and after revision, as it is able to obtain.

Parenthetically, the deficiency of the record in this

respect, would have compelled the Court to order remand even if it had concluded that Congress intended to preempt. "A federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." Louisiana Public Service Commission, 476 US at 374. As the record lacks the history of sec. 5-10a, the Court cannot establish the Army's intent in promulgating and then revising it.

Accordingly,

O R D E R

IT IS HEREBY ORDERED that respondent's decision is REVERSED and REMANDED for proceedings consistent with this decision.

Dated at Madison, Wisconsin, this 13 day of July, 1992.

BY THE COURT

Jack Autik, Judge
Circuit Court, Branch 4

cc: Attorney Jacqueline Macaulay
Assistant Attorney General Bruce A. Olsen