STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN C. THORPE,

Complainant,

v.

DEPARTMENT OF JUSTICE and DEPARTMENT OF EMPLOYMENT RELATIONS,

Respondents.

Case No. 93-0093-PC-ER

FINAL DECISION AND ORDER

Complainant filed a charge of discrimination with the Commission on June 10, 1993, alleging discrimination on the basis of age and handicap in relation to use of "hiring above the minimum" wage rate (HAM) in connection with the "critical recruitment hiring policy" used by the Department of Justice (DOJ) and approved by the Department of Employment Relations (DER). On December 16, 1993, an Initial Determination (ID) was issued which found no probable cause (NPC) to believe that discrimination occurred. Complainant filed an appeal of the NPC ID.

The parties agreed to a hearing date of June 16, 1994, at a prehearing conference held on March 1, 1994. The parties also agreed to the hearing issue, as shown below.

> Did respondents discriminate against complainant on the basis of handicap as set forth in his charge of discrimination?

The parties confirmed at hearing that the defined hearing issue was intended to omit complainant's prior claim of age discrimination which he intended to withdraw. Respondents clarified that they were not disputing complainant's claim that he is a handicapped individual, as defined in the Fair Employment Act (FEA) (s. 111.32(8), Stats.). It was further clarified that the parties wished to proceed at hearing on the merits of the case, rather than a repeat of the lower probable cause level.

The hearing was held as scheduled on June 16, 1994. The following Findings of Fact are based on the record established at hearing.

FINDINGS OF FACT

1. Mr. Thorpe, the complainant, was hired by DOJ as a Crime Laboratory Analyst 3 (CLA-3), on April 8, 1991.
2. Prior to Mr. Thorpe's hire, DOJ had difficulty attracting qualified candidates for CLA-3, and related forensic analyst positions. A specific exam was given for the DOJ positions which candidates passed thereby qualifying for inclusion on a certification list as eligible for interviews. However, DOJ was experiencing unsatisfactory hires and other retention problems. DOJ determined that part of the situation was caused by the pay limits which DOJ could offer candidates. DOJ felt the starting pay was not competitive with wages offered in the labor market. (See R's Exhs. 3 and 10.) DOJ and DER discussed the problem.
3. In August of 1990 (prior to Mr. Thorpe's hire), DER agreed as a long-range plan to conduct a class-and-compensation survey sometime in the future to determine (in part) what wages DOJ would need to offer to be competitive in the labor market. As a temporary measure, DER agreed to raise the minimum hiring rates for CLA-3 positions, effective April 27, 1990. Since the actual labor market data was not yet gathered through the survey process, the temporarily-raised minimum hiring rate (hereafter referred to as the First Raised Minimum Rate) was based on estimates of what wages were competitive in the labor market. (See R's Exh. 12 for a general explanation of raised minimum rates.)
4. Effective on September 9, 1990, DER authorized raising the minimum hiring rate a second time (hereafter referred to as the Second Raised Minimum Rate). Mr. Thorpe was hired (on April 8, 1991) under the Second Raised Minimum Rate. He received a starting wage of $14.922 per hour, which was the highest wage offer DOJ could make under the Second Raised Minimum Rate.
5. DER learned through the survey process that competitive wages in the labor market were greater than estimated for either the First or Second Raised Minimum Rate.

6. By October 1991, the survey was well underway but had not yet been completed. DER learned by this time that most states pay crime laboratory analysts on a progression scale which recognizes the individual's past training and experience, even if gained in other employment. The payment system for DOJ hires did not provide monetary recognition of past training and experience. Instead, all DOJ candidates were held to the hiring minimum as the starting wage regardless of the candidate's experience or training history. For example, DOJ was required to offer the same starting wage to someone with one year of experience, as to someone with 20 years of experience.

7. Prior to completion of the survey, DER attempted to address DOJ's inability to offer a higher starting wage to more experienced candidates. Effective with new hires on October 29, 1991, DER authorized DOJ to hire individuals above the minimum starting wage based on the candidate's past training and experience. The authority to hire above the minimum is referred to as "HAM". (See R's. Exh. 11 for more details about HAM.)

8. Mr. Gary Martinelli is the Personnel Director for DOJ. He was involved with the decision to institute HAM as part of DOJ's critical recruitment policy for hiring crime laboratory analysts. Many employes at DOJ and DER were involved with those decisions. Mr. Martinelli, however, was the only individual involved in making the decision to use HAM who was aware of Mr. Thorpe's handicap prior to October 29, 1991. Mr. Martinelli learned of Mr. Thorpe's handicap from Mr. Thorpe.[A] At the time Mr. Thorpe was hired on April 8, 1991, Mr. Martinelli did not know that the HAM hiring process would begin later the same year.

9. The authorization for HAM hirings became part of a larger package called "critical recruitment program" (CRP) initiated in June 1991. The CRP allowed DOJ increased flexibility in recruiting, screening, evaluating and hiring of candidates for crime laboratory analyst positions. The CRP program included the ability to consider candidates

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[A] This change from the Proposed Decision and Order was made at the request of respondents to more accurately describe the record testimony. Mr. Thorpe had no objection to this change.

who resided in states other than Wisconsin and resulted in quicker hires than were possible under the prior hiring system. The CRP (with HAM component) was adopted to address a critical staffing shortage of analysts at DOJ. Specifically, 8 vacant analyst positions existed when HAM authority was requested, with an additional 10 vacancies expected in the near future. (See R's Exhs. 3 and 10).

10. DOJ hired some individuals under the CRP program who had less training and experience than Mr. Thorpe brought to the job, yet they were paid a higher starting wage under DOJ's HAM authority. None of the individuals hired under the CRP program identified themselves as handicapped on their job application form (R's Exh. 1).

11. The changes made due to DER's completed survey became effective on April 19, 1992. The changes included the creation of new classifications for crime laboratory analysts, as well as the establishment of new pay ranges. (See R's. Exh. 6.) The new pay ranges made the prior raised-minimum-rate hiring process obsolete.[B] Hires after April 19, 1992, were made under the post-survey pay plan, which has been further modified by later negotiated pay plans in the union contract which covers Mr. Thorpe's position.

12. Mr. Thorpe and another employe (Ms. Doreen Huntington) were hired prior to the effective date for HAM hiring (prior to October 29, 1991). Accordingly, they were offered and accepted the minimum hiring rate in effect at the time they were hired, which did not provide monetary recognition for the training and experience they brought with them to the job. A perceived inequity resulted to Mr. Thorpe and Ms. Huntington from later HAM hires. Specifically, Mr. Thorpe and Ms. Huntington were hired at a lower wage than other individuals with comparable training and experience.

13. Ms. Huntington does not claim to be a handicapped individual yet complainant acknowledged that, like him, she received no monetary recognition of her training and experience as did later hires under HAM.

B Same as footnote "A".

14. Mr. Martinelli knew (or should have known) that if individuals with training and experience similar to current DOJ employes were hired under HAM that the newly-hired individuals would be paid more than the current employes. Mr. Martinelli, however, decided to go forward with hiring under HAM to correct the retention and recruitment problems noted previously. No one at DOJ wanted to use a system that would create pay inequities for any current employe. Unfortunately, the HAM system did not allow equity salary adjustments for current staff. Therefore, DOJ was faced with either adopting HAM to improve the hiring system at a of critical staff shortages, or to preserve current pay equities without a mechanism to improve the hiring system.

15. DOJ has pursued a number of options to try to resolve Mr. Thorpe's pay status. In fact, DOJ management instructed Mr. Martinelli to attempt to cure the problem. So far, such attempts have been unsuccessful. Specifically, neither DER nor DOJ could change Mr. Thorpe's salary without approval under the union contract which had not been obtained even as of the hearing date.

16. Mr. Thorpe does <u>not</u> believe that HAM hiring was adopted for the purpose of disadvantaging him personally. Nor does he believe such action was taken because of his handicap.

17. Since February 10, 1992, DOJ (as Mr. Thorpe's employer) conducted two informal investigations concerning Mr. Thorpe.[1] The first investigation related to an allegation that Mr. Thorpe made certain (negative) racial comments; [C] and the second investigation involved another allegation of sexual harassment, as well as an alleged violation of safety procedures. The first investigation arose out of a county attorney's office. DOJ 's investigation exonerated complainant of the

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[1] The investigations were of the in-house informal type conducted by any employer faced with similar allegations regarding one of its employes. DOJ, by the nature of its department function, also investigates criminal charges. The investigations regarding Mr. Thorpe were of the former and not the later nature.

[C] This change from the Proposed Decision and Order was made at Mr. Thorpe's request to more accurately describe the record testimony. Respondents had no objection to this change.

first sexual harassment allegations. DOJ's second investigation was resolved as follows: the second allegation of sexual harassment was dropped and DOJ found that Mr. Thorpe did not violate a safety procedure. It is reasonable for employers to investigate such allegations when made. DOJ's decision to investigate was not based in any part on Mr. Thorpe's handicap.

CONCLUSIONS

1. This case is properly before the Commission pursuant to s. 230.45(1)(b), Stats.
2. Complainant is a handicapped individual, within the meaning of s. 111.32(8), Stats., and is therefore eligible for the protections against handicapped discrimination as found in the Fair Employment Act, s. 111.321 and 111.34, Stats.
3. Respondents did not discriminate against complainant on the basis of his handicap in regard to DOJ's use of hiring new candidates under HAM and in regard to DER's approval of the same.

DISCUSSION

The initial burden of proceeding in this case was on Mr. Thorpe, as a complainant under the Fair Employment Act. If Mr. Thorpe established a prima facie case of discrimination, the burden would shift to respondents to articulate a legitimate, non-discriminatory reason for their actions. If respondents articulated a legitimate reason, the burden would shift back to Mr. Thorpe to provide him with an opportunity to show that respondents' proffered reasons were pretextual. Mr. Thorpe had the ultimate burden of persuasion. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases (1981).

It is arguable whether Mr. Thorpe established a prima facie case of discrimination. He did establish that he was handicapped and was paid less for his training and experience than non-handicapped individuals later hired under HAM. However, it is debatable whether a prima facie case is shown

where, as here, the complainant testifies that he did not believe his handicap was a reason why he was paid less than later hires under HAM. Assuming, arguendo, that a prima facie case was established, the following additional analysis is provided.

Respondents cited critical staff shortages as their legitimate reason for using and approving use of HAM hires. Their articulated reason was supported by the record. Mr. Thorpe failed to persuade the examiner that these legitimate reasons for using HAM were pretextual.

Mr. Thorpe questioned whether DOJ really needed to attract more qualified candidates. He also attempted to show pretext by eliciting testimony regarding the two DOJ investigations described in the final paragraph of the FINDINGS OF FACT. Any inference of discrimination or pretext raised by this testimony, however, was dispelled entirely by Mr. Thorpe's admission that he really did not believe respondents' decision to institute HAM was based in any part on his handicap. Rather, his handicap was coincidental to his being one of two individuals who were employed at DOJ before the HAM hires and who, therefore, received no monetary recognition for their training and experience which was given to individuals who were later hired under HAM.

Mr. Thorpe observed that the chart on page 2 of Respondent's Exhibit 10, indicates the availability of several candidates who could be interviewed for analyst positions. His observation is insufficient to show pretext. Other information in the same chart supports respondents' contentions regarding a shortage of qualified or interested candidates. For example, 11 candidates were certified for CLA-3 interviews in 1988, and none were hired. Also, page 3 of the same exhibit contains documentation of historical retention problems of analysts at DOJ.

The two investigations of Mr. Thorpe (as noted in the last paragraph of the FINDINGS OF FACT) also were insufficient to persuade the examiner that respondents' stated reasons for using HAM were pretextual. DOJ exonerated Mr. Thorpe of all allegations. Further, it appears the first allegation was raised by a county employe, not by an employe of DOJ or DER. The second allegation appears to have been raised by a DOJ, non-managerial employe. Under either circumstance, it was reasonable for DOJ management to investigate the

allegations. The investigations were not shown to have been undertaken because of Mr. Thorpe's handicap.

ORDER

That this case is dismissed.

Dated July 25, 1994.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JMR:jmr

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.