

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JOHN F. LORSCHETER,**  
*Appellant,*

v.

**Secretary, DEPARTMENT OF  
INDUSTRY, LABOR AND HUMAN  
RELATIONS (DEPARTMENT OF  
WORKFORCE DEVELOPMENT),<sup>1</sup>**

*Respondent.*

Case No. 94-0110-PC-ER

FINAL DECISION AND  
ORDER

#### NATURE OF THE CASE

This is a case of age discrimination under the Fair Employment Act (FEA). In a December 4, 1996, ruling on respondent's motion to dismiss the complaint as untimely filed and for failure to state a claim, the Commission ordered that the hearing be conducted on the following issue: "Whether respondent discriminated against the complainant on the basis of age with respect to its refusal to extend complainant's retirement date from September 1994 to December 1994."

#### FINDINGS OF FACT

1. Complainant's exact age was not identified during the hearing of this matter before the Commission. However, based on other evidence of record, it can be inferred that at the time of the matters complained of, complainant was in the protected age category - i. e., 40 or more, and of approximate normal retirement age - i. e., approximately 65.

2. Complainant was hired in 1989 in the LaCrosse District Job Service

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<sup>1</sup> 1995 Wisconsin Act 27 resulted in the change of the agency's name to the Department of Workforce Development effective July 1, 1996.

Office as a Job Service Counselor 3 (JSC 3).

3. On March 24, 1994, complainant informed his immediate supervisor, Daniel Hoch, and Mr. Hoch's supervisor, Thomas Abing, that: "I will be retiring on September 7, 1994." (respondent's exhibit 1). Mr. Hoch accepted complainant's notice of intent to retire in a letter also dated March 24, 1994 (respondent's exhibit 2).

4. As of March 24, 1994, complainant was employed on an 80% time basis in the "JOBS" program, which was supervised by Mr. Hoch. The JOBS program was funded by an annual contract with the Department of Health and Social Services (DHSS) (now part of DWD). The budget resulting from that contract allowed the program to have one full-time and one part-time counselor, as well as other staff with other duties. Complainant was in the part-time counselor position which was budgeted at 80% through the end of the year.

5. After complainant announced his retirement and it was accepted, he discussed with Mr. Hoch the possibility of increasing his hours until his retirement. Mr. Hoch discussed this with Mr. Abing, and the two agreed that this could be worked out within the constraints of their budget. Mr. Hoch advised complainant of this decision by a memo dated March 25, 1994 (respondent's exhibit 3).

6. By a June 16, 1994, memo (respondent's exhibit 4) to Mr. Hoch, complainant requested, because of his financial situation, that his retirement date be changed from September 7, 1994, to December 30, 1994.

7. Because of budgetary reasons, respondent was unable to grant this request. Mr. Hoch advised complainant of this in an August 26, 1994, letter (respondent's exhibit 5), as follows:

This confirms what you were verbally told by me on July 22, 1994, regarding the division's decision not to extend your retirement date. The division is not in a position to extend your retirement date for budgetary reasons. Your position was budgeted at .80; you were approved to go full-time based on your September 7, 1994, retirement date. We are not in a position to extend your retirement date to December 30, 1994, because it puts us in an overspending situation due to allowing you to go full-time until September. I'm sorry that we cannot approve your request.

8. Complainant never requested or applied for employment in another position.

9. During the approximate time frame discussed above, respondent hired certain other employees at the LaCrosse District Job Service Office.<sup>2</sup> No one was hired in complainant's position or to "replace" complainant. None of the funds which were available to pay these other employees could have been used to pay for the extension of complainant's employment, due to contractual budgetary restrictions of the nature mentioned above.

#### CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof and must prove by a preponderance of the evidence the facts necessary to establish that respondent discriminated against him on the basis of age when it refused to extend his retirement date as he requested.

3. Complainant failed to sustain his burden.

4. Respondent did not discriminate against complainant on the basis of age in connection with its refusal to extend his retirement date from September 7, 1994, to December 30, 1994.

#### OPINION

In discrimination cases of this nature, the initial burden of the complainant is to show a prima facie case—i. e., facts which, if unrebutted, have a tendency to show that discrimination has occurred. Respondent then must articulate a nondiscriminatory rationale for its action which complainant then must try to prove constitutes a pretext for unlawful discrimination. Since the case has been fully heard on the merits, the Commission will not dwell on whether complainant established a prima facie case, but proceed directly to the question of whether respondent's explanation for its decision not

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<sup>2</sup> The actual dates and other details of these transactions do not appear in this record.

to extend complainant's retirement date was actually a pretext for age discrimination.<sup>3</sup> See *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U. S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983).

The record evidence in this case shows that respondent was unable to have extended complainant's retirement date because of budgetary constraints. Complainant argues that Mr. Hoch could have shifted money "from one pocket to the other." However, there is no evidence to support this argument, which on this record amounts to speculation. Complainant also argues essentially that respondent's hiring of other employees during this time frame demonstrates pretext. However, there is no evidence in this record to contradict Mr. Hoch's testimony that because of the way respondent's budget was structured, the money used to hire these employees was not available to have funded further employment in complainant's position.

Finally, complainant contends in effect that respondent should have hired him into one of the other positions in the district that were filled during this time frame. However, complainant never applied for employment with respondent. Also, there is nothing in the record to show when these positions were announced, or what the time frame was for applications. Thus, even if could be contended that a failure on the part of respondent to have approached complainant about possible vacancies after he requested an extension of his retirement date would have been probative of pretext/age discrimination, there is not enough evidence in this record upon which to base a finding that respondent had that opportunity.

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<sup>3</sup> Complainant made some remarks at the hearing about his handicap, and about a reduction in his hours which apparently occurred in 1991. These matters are not before the Commission because the stipulated issue for hearing only includes age discrimination, and in an interim decision dated December 4, 1996, the Commission held that the complaint was untimely filed with respect to the reduction in hours.

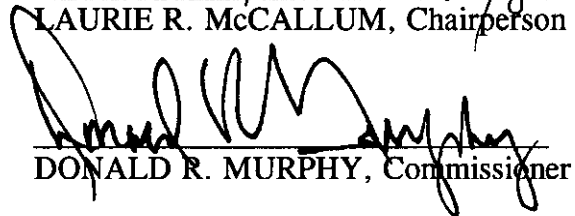
ORDER

The Commission having concluded that respondent did not discriminate against complainant on the basis of age in connection with the denial of his request to extend his retirement date, this complaint is dismissed.

Dated: April 24, 1997 STATE PERSONNEL COMMISSION

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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

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