STATE OF WISCONSIN PERSONNEL COMMISSION

RICHARD S. SCHRUBEY,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 96-0048-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission as an appeal from an initial determination of no probable cause to believe that sex discrimination occurred. The parties agreed to the following statement of issue for hearing:

> Whether there is probable cause to believe that complainant was discriminated against on the basis of sex when he was denied overtime at the Robert E. Ellsworth Correctional center in 1995.

After a hearing, the parties filed post-hearing briefs.

FINDINGS OF FACT

1. In 1995, complainant, who is male, was employed by respondent's Robert E. Ellsworth Correctional Center (hereafter Ellsworth) as a correctional officer.

2. Ellsworth is a minimum security facility for women. The facility includes a pre-release (PR) section that readies the inmates for their release into the community, a non-pre-release (NPR) section, which is a step before PR, and a segregation (Seg) unit for segregating individual inmates from the rest of the offenders at Ellsworth.

3. Rehabilitation of offenders is a key role of Ellsworth. Ninety to 95% of the inmates at Ellsworth have been victimized by males, including 45% who have been sexually victimized by males. A high ratio of female staff is necessary to cushion the offender so they know that not all males are dominant.

4. Respondent adopted a gender-based bona fide occupation qualification (BFOQ) plan on October 4, 1993. That plan (Resp. Exh. 101) remained substantially in effect at all times relevant to this complaint.

5. The BFOQ plan has been implemented because respondent requires, absent an emergency, that females perform strip searches, body cavity searches, urine sampling and shower observations for all female inmates. In terms of all other responsibilities, male officers perform the same responsibilities as female officers.

6. Of the approximately 47 correctional staff employed at Ellsworth, 85% to 90% are females.

7. Certain posts in the facility are denominated as BFOQ posts. In other words, only females are permitted to sign up for these 6 month assignments. Although typically referred to as "posts," they are more accurately called "areas of responsibility" in that respondent has retained the flexibility and authority to move someone from their normal work assignment to another assignment on that shift if the need arises.

8. There are three work shifts at Ellsworth. Overtime arrangements for a shift are made shortly before the end of the previous shift. This procedure allows respondent to recruit employes for overtime before they leave the premises.

9. The respondent applies the BFOQ policy by insuring that there is at least one female in each of three areas of the facility: PR, NPR and Seg.

10. Respondent only permits temporary exceptions to this policy. For example, one of the female officers might be permitted to be away from her post in order to accompany an offender to the hospital for a very limited portion of the shift.

11. Less often than once every two weeks, Ellsworth encounters a scheduling problem where, due to leave requests and illness, a shift is about to begin without female correctional staff at each of the three units in the center. Respondent's initial response to such a scheduling problem is to rearrange/reassign the other females who are already scheduled to work that shift. In other words, if no female is scheduled to work in Seg, but there are two females scheduled for PR, one is reassigned to Seg for the shift. Very infrequently, there are fewer than three females scheduled for the shift

and it becomes necessary to hire, on an overtime basis, the most senior female from the preceding shift.

12. Under certain circumstances, where the supervising officer for the shift is female, that person can fill in for the post as needed during the course of the shift in order to meet the BFOQ requirement.

13. On October 19, 1995, Sgt. Zirke, a female, was asked to work overtime for 2nd shift in order to fill one of the 3 BFOQ posts. Complainant has more seniority than Sgt. Zirke, who accepted the offer and filled the post for the shift.

14. On December 28, 1995, complainant worked a post at Ellsworth during the 1st shift. Instead of employing complainant, on an overtime basis, to work the same post on 2nd shift, respondent offered the post to a female who had been working a different post on 1st shift. Respondent took this action in order to have 3 females working on the 2nd shift. If respondent had employed complainant instead, they would not have complied with the BFOQ plan.

15. During the 3rd shift on August 15, 1995, a male sergeant worked a BFOQ post (3rd shift Rover).

16. On October 28, 1995, there were only 2 female security officers on the 2nd shift at Ellsworth. A female captain backed up a third position on the shift.

CONCLUSIONS OF LAW

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

2. The complainant has the burden of establishing probable cause to believe that he was discriminated against on the basis of sex when he was denied overtime on October 19 and December 28, 1995.

3. Respondent's actions of employing Sgt. Zirke to fill a BFOQ post during 2nd shift on October 19, 1995, and not hiring complainant for the 2nd shift on December 28th, were consistent with the provisions of the Ellsworth BFOQ plan.

4. Complainant has failed to sustain his burden of proof.

5. There is not a reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe that discrimination based on sex probably occurred with respect to respondent's failure to offer overtime to complainant for the 2nd shifts on October 19 and December 28, 1995.

OPINION

In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. Section PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

During the course of the hearing in this matter, complainant made it clear that he is *not* claiming that respondent's BFOQ plan for staffing Ellsworth is discriminatory.[1] Complainant agreed with the appropriateness of the Ellsworth BFOQ plan.

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[1] If complainant alleged that the BFOQ plan violated the Fair Employment Act, the Commission would adopt the following analysis as set forth in the initial determination in this matter:

> Respondent must now present a non-discriminatory reason for its actions. Respondent contends complainant was not offered overtime as a result of the minimum staffing requirements under the BFOQ plan for Ellsworth. Under the Fair Employment Act, a legal BFOQ is a defense to what otherwise would be an illegal act of sex discrimination. Section 111.36(2), Stats. defines a BFOQ. It states:
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> > For the purposes of this subchapter, sex is a bona fide occupational qualification if all of the members of one sex are physically incapable of performing the essential duties required by a job, or the essence of the employer's business operation would be undermined if employes were not hired exclusively from one sex.
>
> The Wisconsin Fair Employment Act closely parallels the language of Title VII of the Civil Rights Act of 1964. §111.36 (1)(d)2 Stats., 42 U S.C. §2000e-2(e)(1). Federal decisions interpreting the bona fide occupational qualification exception to Title VII provide guidance in determining the validity of BFOQ plans implemented under state law. Section 703 of Title VII permits classifications based on sex only "where . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e)(1). Federal courts have

found this exception to be "an extremely narrow exception to the general prohibition of discrimination." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). "It is also well established that a BFOQ may not be based on 'stereotyped characterizations of the sexes.'" *Torres v. Wisc. Dept. of Health & Social Services*, 859 F.2d 1523, 1527 (7th Cir. 1988) (citing *Dothard v. Rawlinson*, 433 U.S. at 333). However, the necessity of a BFOQ may be established by a commonsense understanding of the circumstances involved· no general requirement exists that the necessity of a BFOQ be established by objective, empirical evidence. *Id.* at 1532.

In *Torres*, the Court overturned a district court decision striking down a BFOQ plan at Taycheedah Correctional Institution. *Id.* at 1532-33. The Court found that a BFOQ plan for female prison guards at a female prison could be considered reasonably necessary to the normal operation of the prison, specifically the legislatively mandated task of rehabilitation. *Id.* at 1531-32. The determination could be based on the reasoned decision of the penal administrators and the belief by professional penologists that the decision was reasonable. *Id.* at 1532. In *Torres*, Ms. Switala, the penal administrator, made "a professional judgment that giving women prisoners a living environment free from the presence of males in a position of authority was necessary to foster the goal of rehabilitation " *Id.* at 1530. Her decision was based upon her experience, professional expertise, and due to the "fact that a high percentage of female inmates has [sic] been physically and sexually abused by males." *Id.* at 1530.

The privacy interests of inmates are also implicated in the business of operating a correctional facility. These interests must be balanced against the employee's interests secured under the FEA The FEA protects employees from adverse actions in employment based solely on sex. However, Wisconsin state law clearly recognizes some inmate privacy interests. Section HSS 306 16(1)(b) of the Wisconsin Administrative Code states that "except in emergencies, a strip search must be conducted by a person of the same sex as the inmate being searched." In Opinion No. OAG 53-81, the Wisconsin Attorney General opined that §53.41 Stats. (requiring at least one person of the same sex be responsible for the care of a prisoner), did not conflict with the prohibition against sex discrimination under the Wisconsin FEA. 70 Op. Att'y Gen. 202 (1981). The Attorney General concluded that because all jailers are not required to be of the same sex, it may be possible to comply with the requirements of both statutes. *Id.* However, in the case that an apparent conflict arises, the more specific statute, requiring the same sex of jailers, would control. *Id.*(citing *Sigma Tau Gamma Fraternity House v. Menomonie*, 93 Wis.2d 392, 402 (1980)).

Respondent's basis for the BFOQ plan for Ellsworth falls under the Wisconsin Fair Employment Act exception that "the essence of the employer's business operation would be undermined if employees were not hired exclusively from one sex." More specifically, many of the new officer positions at Ellsworth require officers to engage in the process of rehabilitation and to conduct strip searches of inmates Under the *Torres* decision, the necessity of a BFOQ plan for female rehabilitation can be considered reasonable if it is based on the

Complainant's sex discrimination charge relates solely to two instances that he was denied overtime, October 19th and December 28th. Complainant contended that respondent did not follow the BFOQ plan on those two instances because of complainant's sex.

However, during the hearing, complainant acknowledged that the BFOQ plan was applied according to its terms on October 19th. In addition, testimony established that respondent had to hire a female for the 2nd shift on December 28th in order to satisfy the BFOQ plan. Therefore, the Commission rejects any contention by complainant that respondent did not follow the BFOQ plan on either October 19th or December 28th.

Complainant also appears to contend that respondent should have made an exception to the BFOQ plan and employed him on an overtime basis during the 2nd shifts on October 19th and December 28th because they had made an exception to the BFOQ plan on both August 15th and October 28th. For purposes of the discussion in this paragraph, the Commission will accept complainant's suggestion that on both August 15th and October 28th, respondent employed males in positions that should have been filled by females under the BFOQ plan. The conclusion that respondent employed males on two other occasions is not a basis for concluding that the decision not to employ complainant on the 2nd shift on October 19th and December 28th constituted discrimination based on complainant's sex, where respondent's actions were consistent with the BFOQ plan and where complainant is not attacking the validity of that plan.

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opinion of penal administrators at Ellsworth. Further, the BFOQ plan implemented at Ellsworth is necessary to comply with §HSS 306 16(1)(b) of the Wis. Admin. Code. Finally, the BFOQ plan utilizes sex as a criteria for employment only where it is reasonably necessary for the normal operations of a correctional facility. Specifically, only twenty-four out of a total of forty-one officer positions at Ellsworth are designated as BFOQ. Therefore, the BFOQ recommendation at Ellsworth does fall under the narrow exception to the general prohibition on discrimination in employment based on sex.

Where complainant has acknowledged that respondent's BFOQ plan was not discriminatory, and where he was not employed on an overtime basis on either October 19th or December 28th so that respondent could be in compliance with the BFOQ plan, complainant has failed to establish a *prima facie* case of sex discrimination.

ORDER

This complaint is dismissed.

Dated: Jan. 27, 1999. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:960048Cdec1

DONALD R. MURPHY, 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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