

affirmed Volovsek v. DATCP & DSR,  
93-0098-PC-22, 6-19-97

X

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 1

WASHINGTON COUNTY

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JUDITH VOLOVSEK,

Petitioner,

v.

Case No. 97-CV-0287

PERSONNEL COMMISSION,

Respondent.

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**RECEIVED**

NOTICE OF ENTRY OF ORDER

SEP 09 1998

PERSONNEL COMMISSION

To: Helen Marks Dicks  
Boushea, Segall & Joanis  
124 W. Broadway, Ste. 100  
Monona, WI 53716-3902

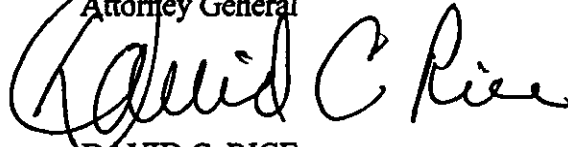
Jennifer Sloan Lattis  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707

PLEASE TAKE NOTICE that an Order affirming the decision of the Personnel Commission, of which a true and correct copy is hereto attached, was signed by the court on the 28th day of August, 1998, and duly entered in the Circuit Court for Washington County, Wisconsin, on the 28th day of August, 1998.

Notice of entry of this Order is being given pursuant to secs. 806.06(5) and 808.04(1), Stats.

Dated this 4th day of September, 1998.

JAMES E. DOYLE  
Attorney General

A handwritten signature in black ink that reads "David C. Rice". The signature is written in a cursive style with a large, looping initial "D".

DAVID C. RICE  
Assistant Attorney General  
State Bar No. 1014323

Attorneys for Personnel Commission

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 266-6823

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STATE OF WISCONSIN

CIRCUIT COURT

WASHINGTON COUNTY

BRIDGE 19 25 AM '98

JUDITH VOLOVSEK,

Petitioner,

v.

Case No. 97-CV-0287

PERSONNEL COMMISSION,

Respondent.

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ORDER

PERSONNEL COMMISSION

This proceeding having been commenced on June 30, 1997, under Wis. Stat. § 111.375(2) and ch. 227, to review a decision of the Wisconsin Personnel Commission under the Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-111.395; and

The petitioner having appeared by Helen Marks Dicks, Boushea, Segall, Joanis & Johnston, the Commission having appeared by Jennifer Sloan Lattis, Assistant Attorney General, and the Wisconsin Department of Agriculture, Trade, and Consumer Protection and the Wisconsin Department of Employment Relations having appeared by David C. Rice, Assistant Attorney General; and

The court having reviewed the record and having considered the written and oral arguments of the parties; and

The court having rendered a bench decision on August 19,  
1998,

Now Therefore, IT IS ORDERED that the Commission's decision  
is affirmed.

Dated at West Bend, Wisconsin, this 28th day of Aug.,  
1998.

BY THE COURT:

/s/ LAWRENCE F. WADDICK

HONORABLE LAWRENCE F. WADDICK  
Circuit Judge

STATE OF WISCONSIN : CIRCUIT COURT : WASHINGTON COUNTY  
BRANCH I

JUDITH VOLOVSEK,

Plaintiff,

vs.

Case No. 97-CV-287

PERSONNEL COMMISSION,

Defendant.

Stenographic Transcript of proceedings had upon  
MOTION FOR REVIEW HEARING in the above-entitled civil  
action, the Honorable LAWRENCE F. WADDICK, Circuit Judge,  
presiding, at West Bend, Wisconsin, on Wednesday, August  
19, 1998, commencing at 11:00 o'clock in the forenoon.

**RECEIVED**

SEP 09 1998

A P P E A R A N C E S

MS. HELEN MARKS DICKS, Attorney-at-Law,  
124 W. Broadway, Suite 100, Monona,  
WI, 53716-3902, of BOUSHEA, SEGALL &  
JOANIS, appeared on behalf of the plain-  
tiff, who was present in person.

PERSONNEL COMMISSION

MR. DAVID C. RICE, Assistant Attorney General,  
State of Wisconsin, Department of Justice,  
123 W. Washington Avenue, P. O. Box 7857,  
Madison, WI, 53707-7857, appeared on behalf of  
defendants Department of Agriculture, Trade  
and Consumer Protection and Department of  
Employment Relations.



LORETTA JUSTMAN  
OFFICIAL COURT REPORTER, BR. I  
WASHINGTON COUNTY CIRCUIT COURT  
WEST BEND, WISCONSIN

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P R O C E E D I N G S

(Whereupon, said proceedings in the above-entitled civil action were recommenced in open court at 11:56 o'clock a.m.)

THE COURT: Be seated, please.

This Court having heard the arguments of counsel, as well as having previously reviewed the Briefs submitted and the file in this matter, I do render the following Decision.

This case comes before the Court for judicial review under Chapter 227, specifically .53 of that Statutory Chapter. And I believe that the basic and rather extensive facts are ably set forth in both the Order of the Commission and the Briefs of counsel, all of which, as I said, I've read.

And I will say that the Order of the Commission, I believe, was quite and extensively detailed; much more so than the usual cases that I have to review.

The standard of review and what deference this Court must give to the Commission are set forth in that Statutory Section, which, of course, is entitled Scope of Review. And, of course, the

1 parameters and limitations of this Court review are  
2 set forth Statutorily, confined to the record. And  
3 unless I find grounds for setting aside, modifying,  
4 remanding or ordering the Agency to take further  
5 action, this Court must affirm the Agency's action.

6 However, I must remand it if I find either  
7 the fairness of the proceedings or the correctness  
8 of the action has been impaired by a material error  
9 in procedure or failure to follow prescribed  
10 procedure. I don't believe that that existed in  
11 this case.

12 Furthermore, I must set it aside or modify  
13 it if I find that there has been an erroneous  
14 interpretation of a provision of law; and a correct  
15 interpretation compels a particular action. And I  
16 will discuss that later.

17 As has been stated in many cases, I am not  
18 to substitute my decision for that of the Agency  
19 where it's supported by substantial evidence. But,  
20 again, I should reverse or remand if the Agency's  
21 exercise of its discretion is beyond the range of  
22 such discretion delegated to it by Statute or by  
23 Administrative Rules; or if their discretion is  
24 contrary and inconsistent with an Agency rule.

25 This Court, as were the Court of Appeals if

1 this case were to be appealed, must uphold the  
2 interpretation given by the Agency, as long as it is  
3 reasonable and consistent with the Statutory  
4 language, and regardless of whether other  
5 interpretations are reasonable. That's St. Croix  
6 Falls School District v. Wisconsin Employment  
7 Relations Commission, 1994 Appellate Court, 186 Wis.  
8 2d 671.

9 Due weight must be accorded the Agency's  
10 decision; and the Agency's legal conclusions must be  
11 upheld if they are reasonable, even if an  
12 alternative view is also reasonable. That being in  
13 Barnes v. Department of Natural Resources, 1993  
14 Court of Appeals, 178 Wis. 2d 290, which was  
15 affirmed on review in 184 Wis. 2d 645.

16 A further standard of review indicates that  
17 the reviewing court ought not reverse the Agency's  
18 interpretation of a Statute if there exists a  
19 rational basis for the Agency's conclusion, even if  
20 the reviewing court does not entirely agree with the  
21 rationale. Luetzow Industries v. Wisconsin  
22 Department of Revenue, Appellate Court 1995, in 197  
23 Wis. 2d 916.

24 As to what may constitute substantial  
25 evidence to sustain the Commission's interpretation



1 and conclusion necessary to support their Decision,  
2 it is such relevant evidence as reasonable minds  
3 might accept as adequate to support the conclusion.  
4 Cadott, C-a-d-o-t-t, Education Association v.  
5 Wisconsin Employment Relations Commission, Appellate  
6 Court 1995, in 197 Wis. 2d 46.

7 Plaintiff's counsel has, in her Brief,  
8 asserted that the standard that this Court should  
9 apply as to deference to the Agency would be one of  
10 very low standard of the three levels; and, in  
11 support thereof, gives a number of cases that had  
12 been brought before the Equal Rights Appeals for, at  
13 least, Petition for Hearing.

14 And I recognize that those are not totally  
15 accurate for consideration of this purpose; but at  
16 least gives some benchmark of what they have heard  
17 in whole. Although, it's not dissected as to how  
18 many are for age or sex discrimination.

19 The total appeals of 7,432 for 1978 to 1997  
20 and ER cases constituted a total of 8,576. And ER  
21 cases were 1,144; 13 percent of the total. I don't  
22 think that is particularly helpful to this Court.

23 All I do know is that the Equal Rights  
24 Division, in all likelihood, hears tremendously more  
25 cases than certainly this Court; and probably more

1 than any other Circuit Court in this state. I  
2 believe that they are in a unique position, with the  
3 technical and other expertise, to be accorded great  
4 weight deference.

5 They do have specialized knowledge, which  
6 would aid them in their interpretation of the  
7 Statutes. And I do not believe that the facts in  
8 this case are so unique that it would take them out  
9 of that technical expertise.

10 It is also important to note the technical  
11 areas that we're talking about in determining  
12 whether this particular employee would be suitable  
13 for advancement or placement in a different  
14 position. The Currie case, that's Currie v. DILHR,  
15 as well as St. Joseph's Hospital, in some of the  
16 standard cases, clearly indicate that an employer's  
17 motivation is a question of fact, which, if  
18 supported by substantial evidence, must be affirmed.

19 If there be conflicts as to the testimony,  
20 it is up to the Agency, not the Court, to make the  
21 differentiation, particularly where sustained upon  
22 the weight and the credibility of the evidence.  
23 That has been set forth in the Bucyrus-Erie case.

24 And a finding is conclusive if there is more  
25 than one inference. That's set forth in Vocational

1 Technical College v. Industry, Labor and Human  
2 Relations. And the Court is not making this  
3 independent determination; nor am I here to second  
4 guess the Commission's fact finding.

5 There are several issues that have been  
6 raised; and there were a number of days of testimony  
7 at the Hearing and evidence. There was, I firmly  
8 believe, substantial evidence to support the  
9 conclusions and Finding of the Commission.

10 This is not a case in which there are  
11 specific facts which are supporting age or sex  
12 discrimination in any blatant form; but that's not  
13 the standard. The real issue here is what  
14 inferences can be drawn by the various actions that  
15 had occurred as to the, particularly, the  
16 reclassification of the job position.

17 And this one had, for a number of years,  
18 been two positions. The bargaining unit was a fact  
19 to consider. The decision was made, which was  
20 within the right of these Agencies, between DILHR  
21 and Employee's Relations, to consolidate certain  
22 things and to have them within the same bargaining  
23 units.

24 The question is, also, whether there has  
25 been any reason shown by the employer for any

1 nondiscriminatory action, which would support the  
2 actions between the employer and the employee. And  
3 I do find that there is reasonable and substantial  
4 evidence, which is credible, to support  
5 nondiscriminatory reasons for such decision.

6 I am not here to substitute my decision for  
7 that of the tribunal. But I would, if this were  
8 before me ab initio, I would probably not find  
9 probable cause on any of these assertions.

10 There is reasonable-- It is reasonable to  
11 conclude that there has not been proved--probable  
12 cause shown for discrimination based on age or sex;  
13 as would be the standard set forth in Boldt v. LIRC,  
14 173 Wis. 2d 469. Insufficient evidence was  
15 presented to show such.

16 The same is true as to the change in  
17 selection of job classifications and this employee  
18 not being selected for the senior position, as a  
19 newly-created function, or the senior specialist.

20 I have read, again, the facts that are being  
21 asserted for support of age or sex discrimination on  
22 the incident involving the herbicide denominated  
23 command. And I find not a shred of credible  
24 evidence that was presented to the Commission that  
25 their actions would support any such kind of

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discrimination.

There had been ample evidence of some concerns about the fulfillment of the job requirements, including the understanding of rules, of industry practice and lack of understanding of herbicides. And this Court finds that that evidence supports the Findings of the Commission.

As to the reclassification, it's basically, I think, purported that this reclassification was a subtle and intentional action, which would eliminate the plaintiff from advancement in position. I find no evidence that that's true; nor such that was presented to the Commission, nor reasonable inferences that could be gleaned therefrom.

This is not a civil service appeal. And I note the statements of counsel as to the propriety of a civil service appeal or the opportunity of the plaintiff to assert that.

It did give me concern, however, that there was not strict compliance with the Civil Service Rules. And the Court feels that the Agency, certainly, could have given greater consideration in that regard. But that, in and of itself, nor when combined with other actions by the Agency, do not give rise to evidence of discrimination on the basis

1 of age or sex.

2 For these reasons, this Court does affirm  
3 the Decision and Order of the Personnel Commission.  
4 And I ask the Attorney General's office, Mr. Rice or  
5 your colleagues, to draft an appropriate Order  
6 commensurate with this Decision.

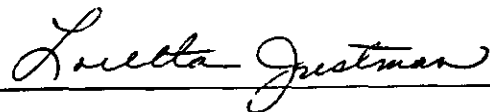
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9 (Whereupon, said proceedings in the above-  
10 entitled civil action were concluded at 12:15  
11 o'clock p.m.)

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CERTIFICATE

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3 I, Loretta Justman, Official Court Reporter  
4 in and for Branch I of the Circuit Court of Wash-  
5 ington County, Wisconsin, hereby certify that as  
6 such reporter I attended the proceedings held in  
7 the above-entitled civil action on Wednesday,  
8 August 19, 1998, the Honorable LAWRENCE F. WADDICK,  
9 Circuit Judge, presiding, commencing at 11:00  
10 o'clock a.m., and reported by machine shorthand the  
11 proceedings held at said time and place.

12 I further certify that the foregoing type-  
13 written transcript has been carefully compared by  
14 me with my original stenographic notes thereof,  
15 so taken at said time and place; and that the  
16 foregoing is a full, true and complete transcript  
17 of said portion of proceedings held at said time  
18 and place, and is the original transcript thereof.

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22 Loretta Justman, RPR  
23 Official Court Reporter  
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