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PETER MOY,

Appellant,

v.

Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION, and Admin-
istrator, DIVISION OF PERSONNEL,

Respondents.

Case Nos. 79-135-PC &
79-PC-ER-167

* * * * *

ORDER

This matter is before the Commission following a hearing on the merits for consideration of the hearing examiner's proposed decision. The Commission has considered the proposed decision and the objections and arguments of the respondent administrator, and hereby adopts as its final decision and order in this matter, the proposed decision and order, attached hereto, with the following addition to the findings, which is made to better reflect the record, and the following addition to the opinion.

FINDING

Appellant also wrote and edited materials on racial problems and desegregation needs for use by the school district teachers in preparing classroom instruction on desegregation.

OPINION

The administrator, in his arguments following the hearing, argues for the first time in this proceeding that there was not a "logical and gradual change" in appellant's duties and responsibilities, pursuant to ¶Pers 3.02(4) (a), Wisconsin Administrative Code. There is no need to make a finding on this point since the question of "logical and gradual change" is not properly before the Commission.

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The parties agreed to the issue for hearing of "Whether the appellant's position is more properly classified as Equal Opportunity Specialist 4 or Educational Consultant 1." They also stipulated that the effective date of reclassification of appellant's position to Educational Consultant 1 would be June 17, 1979, the date the two Sex Equity positions were reallocated.

Dated: Aug 21, 1981

STATE PERSONNEL COMMISSION


GORDON H. BREHM
Chairperson


CHARLOTTE M. HIGBEE
Commissioner


DONALD R. MURPHY
Commissioner

AJT:nwb

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STATE OF WISCONSIN

PERSONNEL COMMISSION

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 PETER MOY, *
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 Appellant, *
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 v. *
 *
 DEPARTMENT OF PUBLIC INSTRUCTION *
 & DEVISION OF PERSONNEL, *
 *
 Respondents. *
 *
 Case No. 79-135-PC & 79-PC-ER-167*
 *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASES

Mr. Moy's position was reallocated from Education Services Assistant 2-Education (PR 13-04) to Equal Opportunity Specialist 4 (PR 1-12), effective July 2, 1978, as the result of a personnel survey conducted by the Division of Personnel. Appellant subsequently appealed the reallocation. In the spring of 1979, Mr. Moy requested reclassification of his position to Education Consultant 1 (PR 13-08). This request was denied by the Division of Personnel. This decision was also appealed by Moy. On November 27, 1979, Moy filed a charge of discrimination with the Commission alleging that he had been discriminated against by the Department of Public Instruction because of his race (oriental) in regard to the wages he received. On September 17, 1980, an Initial Determination was issued by George Callan-Woywod, a Commission Equal Rights Officer, finding that there was probable cause to believe that Moy had been discriminated against on the basis of race in the wages paid him. A consolidated hearing on these two cases was held by Commissioner Gordon H. Brehm on November 11, 1980, and November 12, 1980. Briefs were subsequently filed by the parties. Case No. 79-PC-ER-167 is properly before the Commission pursuant to §111.31 to 111.37. Case No.

79-135-PC is properly before the Commission pursuant to §230.44(1)(b),
Wis. Stats.

FINDINGS OF FACT

1. Appellant at all times relevant to the matters appealed in these cases was employed by the Department of Public Instruction (DPI) Equal Education Opportunities Office with permanent status in the classified service.

2. As part of an Equal Opportunity Class Survey, appellant's position was reallocated from Educational Services Assistant 2-Education (PR 13-04) to Equal Opportunity Specialist 4 (PR 1-12), effective July 2, 1978. Appellant was notified of this action in a memo dated May 15, 1979. (Appellant's Exhibit 3)

3. Appellant appealed the reallocation in a letter to the Commission received May 25, 1979.

4. In the spring of 1979, appellant requested reclassification of his position to Education Consultant 1 (PR 13-08). The Division of Personnel denied this request after a review of the position. Appellant was informed of this denial in a memo dated July 26, 1979 (Respondent's Exhibit 2).

5. Appellant appealed the denial of his reclassification request in a letter to the Commission received August 1, 1979.

6. Appellant subsequently filed a charge of discrimination with the Commission on November 27, 1979, alleging that he had been discriminated against by DPI in regard to wages received because of his race (oriental).

7. Following an investigation, Commission Equal Rights Officer George Callan-Woywod issued an Initial Determination on September 17, 1980, finding

there was probable cause to believe that Moy had been discriminated against on the basis of race in the wages paid him.

8. The issues agreed to by the parties are:

Case No. 79-135-PC

1) Whether the appellant's position is more appropriately classified as Equal Opportunity Specialist 4 (PR 1-12) or Education Consultant 1 (PR 13-08)?

2) What is the appropriate effective date, if any?

Case No. 79-PC-ER-167

1) Did the complainant perform substantially the same job duties in terms of utilized skills and responsibilities as those persons who filled the Sex Equity Coordinator positions?

2) If his job duties were comparable to those of the Sex Equity Coordinators, did the respondent DPI discriminate against the complainant because of his race, in regard to salary received?

9. The parties stipulated at the hearing that the effective date for the reclassification of appellant's position to Education Consultant 1 would be June 17, 1979, if he prevailed on the merits of his reclassification denial appeal.

10. Appellant left State service November 30, 1979.

11. The position Standard for the Equal Opportunity Specialist series states, in part:

"These series encompass professional positions which perform a wide range and combination of activities in such areas as: staff and/or program support, program coordination and/or administration,

technical assistance, compliance, outreach and/or liaison, and special project work in connection with a State agency's internal Affirmative Action Program and/or its external program responsibilities in such areas as Affirmative Action, Equal Employment Opportunity, or other similar equal opportunity and non-discrimination programs and activities. Although positions in these series may be affiliated with an agency's internal Affirmative Action Program, they normally are not responsible for the administration of such a program but rather, are involved in activities which are more specialized in nature (i.e., relating to selected aspects of Affirmative Action and/or to specific equal opportunity programs or sub-programs) and/or are broader in their scope and application (i.e., affect non-state employes, organizations, individuals, and/or various state agencies). Professional staff support and program specialist positions in the State Affirmative Action Office are also allocated to these series."

The Equal Opportunity Specialist 4 level is specifically defined as follows:

"EQUAL OPPORTUNITY SPECIALIST 4 (PR 1-12)

Positions allocated to this class perform professional work as: 1) the program coordinator for an equal opportunity program or project of a highly specialized nature but relatively limited in scope and/or size; or 2) a program assistant with responsibility for several major sub-programs within the Affirmative Action Program of an agency, a diversified equal opportunity program, or the State Affirmative Action Office; or perform 3) entry/developmental level work in a program coordinator, program specialist or staff specialist position with a higher objective level; or 4) duties and responsibilities of a comparable nature and level.

The work at this level requires the application of a complete knowledge of the broad program area; a working knowledge of the organizations, groups, and individuals affected by the program(s); and an indepth knowledge and expertise in the specifically assigned program areas. The work typically involves such activities as: program administration and coordination; the development and implementation of comprehensive operating policies, procedures, and systems; compliance monitoring and/or enforcement; the development and dissemination of informational materials, handbooks, and/or model systems/plans; and the provision of a wide range of technical assistance and/or group training services. In addition, employes in this class normally also function in a responsible program assistant and/or team member capacity in regard to the other aspects of the overall program.

The work at this level is distinguished from that performed at lower levels within the Specialist series by: the complexity, scope, and impact of the assigned sub-program or project areas; the level of the program responsibilities; the independence of action; and the difficulty and frequency of decision-making and interpretations which are required.

The work is normally performed under general supervision and is reviewed and discussed on a regular basis." (Respondent's Exhibit 4)

The class description for Education Consultant 1 provides:

"This is responsible work as a professional education consultant and program supervisor primarily in the Department of Public Instruction. Positions allocated to this level, under limited supervision, must perform consultative services on a statewide basis and must directly advise and confer with institutions and/or district schools. Within the area of specialization, these positions provide educational leadership and information to teachers, administrators, public officials, advisory committees, teacher education institutions, and the public; review and prepare recommendations for ongoing and proposed programs of instruction with the aim of improving the state's educational system; and work within the framework of policies established by higher level departmental administrators." (Respondent's Exhibit 5)

12. Appellant's primary responsibility was to assist school districts throughout the state by providing technical assistance in desegregation. His duties included conducting desegregation needs assessments for the districts; planning and conducting program activities -- such as workshops -- for district staff, evaluating desegregation activities, and developing desegregation plans for the districts. He also coordinated the development of Equal Opportunity Title IV proposals, provided assistance to other DPI departments in developing EEO programs, and prepared written materials on desegregation for the districts.

13. Two positions, now located at the Board of Vocational, Technical and Adult Education (BVTAE), were reallocated to Vocational Education Consultant 1 effective June 17, 1979. Those positions were then held by Anna Biermeier and Barbara Bitters. The working titles of these two positions are Sex Equity Coordinators and the primary responsibility of the positions is to conduct statewide sex equity programs for the VTAE districts.

14. Ms. Biermeier performed the job held by Moy until shortly before he was appointed to the position. She wrote the Position Description for Moy's position (Appellant's Exhibit 5).

15. As a result of Moy's reclassification request, William Calcese, a personnel specialist for the Division of Personnel, audited the position in late June or early July, 1979. Calcese interviewed Moy and his immediate supervisor, John Strother, as a part of his audit. Calcese recommended that the reclassification request be denied.

16. Appellant/Complainant is an Asian American male and thus is a member of a protected group.

17. The respondent did not discriminate against Moy on the basis of race with respect to the wages paid to him.

18. Appellant failed to provide sufficient evidence in the record to establish that the reallocation decision was incorrect.

19. Appellant's duties and responsibilities were very similar to the duties and responsibilities performed by the two Sex Equity Coordinator positions which were reallocated to Vocational Education Consultant 1 on June 17, 1979, a classification parallel to Education Consultant 1.

20. The duties and responsibilities that are assigned to the position appellant occupied are better described by the class description for Education Consultant 1 than for Equal Opportunity Specialist 4.

CONCLUSIONS OF LAW

79-135-PC:

1. This case is properly before the Commission pursuant to §230.44(1)(a), Wis. Stats.

2. The appellant has the burden of proving that respondent's actions in reallocating his position and in denying him reclassification of his position were incorrect.

3. Appellant has failed to meet his burden in regard to the reallocation decision but has met his burden in regard to the decision to deny the reclassification request.

4. Respondent's decision to reallocate appellant's position is affirmed.

5. Respondent's decision to deny appellant's request for reclassification to Education Consultant 1 is rejected.

79-PC-ER-167:

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

2. The complainant has the burden of proving that respondents discriminated against him as charged in the complaint of discrimination filed November 27, 1979.

3. Complainant has not sustained his burden of proof.

4. The respondents have not discriminated against complainant on the basis of his race in the wages paid him and this complaint must be dismissed.

OPINION

79-135-PC:

The issues agreed to by the parties in this case are:

1) Whether the appellant's position is more properly classified as Equal Opportunity Specialist 4 (PR 1-12) or Educational Consultant 1 (PR 13-08)?

2) What is the appropriate effective date, if any?

The parties stipulated during the hearing that the effective date for the classification of appellant's position to Education Consultant 1 would be June 17, 1979, if he prevailed on the merits. By this stipulation, appellant has in effect dropped his challenge of the reallocation which became effective on July 2, 1978. The question remaining is whether appellant's position was properly classified from June 17, 1979, until he left State service on November 30, 1979.

Appellant requested reclassification in the spring, 1979. This request was sent to the Division of Personnel without a recommendation by the Department of Public Instruction (DPI) Personnel Department. The Division of Personnel, following an audit of the position by William Calcese, found the position appropriately classified and notified DPI in a memorandum dated July 17, 1979. About a month earlier, two positions now located at the Board

of Vocational and Adult Education (BVTAE) titled as Sex Equity Coordinator, had been reallocated to Vocational Educational Consultant 1. This is a parallel position to Educational Consultant 1.

Appellant's argument that his position should have been reclassified to Education Consultant 1 focussed on the similarities between his position and the two Sex Equity positions. Ms. Anna Biermeier, who formerly held appellant's position, testified that the knowledge and skills needed for both positions were essentially similar. Calcese did not interview Ms. Biermeier during his audit of appellant's position.

Respondent argued that Moy only worked with 15 school districts out of 427 in the state and that he did not have responsibility for developing or reviewing school curricula. The Commission does not believe that the class specifications for Education Consultant 1 require that the position develop or review school curricula.

The specifications state that "these positions provide educational leadership and information to teachers, administrators, public officials, advisory committees, teacher education institutions, and the public..." There is no dispute that appellant conducted workshops and developed educational materials on desegregation for the school districts.

The specifications also state that "positions allocated to this level, under limited supervision, must perform consultative services on a state-wide basis..."

It is not unusual here, given the nature of appellant's work assignment, that he normally worked with only about 15 school districts. It is

a known fact that most minority school children are concentrated in only a few areas of the state and it is natural that he would concentrate his efforts in those areas. On the other hand, the two Sex Equity Coordinators, whose responsibility it was to eliminate sex bias in the BVTAE program, naturally worked throughout the state attempting to eliminate gender-based discrimination as opposed to racial discrimination.

The record clearly establishes that appellant's position is very similar to the two Sex Equity positions and best fits the Education Consultant 1 classification as compared to Equal Opportunity Specialist 4.

Therefore, the Commission finds that appellant should have been more properly classified as Education Consultant 1 from June 17, 1979, until he left State service on November 30, 1979.

79-PC-ER-167:

The issues agreed to by the parties in the case are:

1) Did the complainant perform substantially the same job duties in terms of utilized skills and responsibilities as those persons who filled the Sex Equity Coordinator positions?

2) If his job duties were comparable to those of the Sex Equity Coordinator, did the respondent Department of Public Instruction discriminate against the complainant because of his race, in regard to salary received?

As stated earlier in this decision, the Commission finds that complainant did perform substantially the same job duties as those of the Sex Equity Coordinators. The question remains as to whether respondent discriminated

against complainant because of his race, in regard to salary received.

Complainant's prima facie case must show that he was a member of a protected class, that his position met the qualifications for reclassification to Education Consultant 1, and that reclassification was denied. Complainant has shown, without opposition, that he was a member of a protected class and that he was denied reclassification. The major contested issue is whether the reasons given for the reclassification denial were the real reasons for the denial or were pretextual.

The record is undisputed that respondent audited complainant's position and clearly stated its reasons for denying the reclassification request (Respondent's Exhibit 2). Although the Commission does not agree with the conclusion the respondent reached in denying the reclassification request, respondent did base its decision on its interpretation of the position standards for the two classifications in question, that is, Equal Opportunity Specialist 4 as opposed to Education Consultant 1 and the duties and responsibilities complainant performed.

Complainant testified that his supervisor, Mr. Strother, made what he considered discriminatory remarks to him and also stereotypic remarks. He also testified that Mr. Calcese seemed "uncomfortable" and "would not look me in the eye" while he was interviewing Moy during his audit of the position.

Complainant failed to offer any evidence that Strother, who is Black, ever discriminated against him. As a matter of fact, he testified that Strother gave him good performance evaluations and recommended him for merit wage increases. In any event, Strother was not involved in the decision to

deny Moy's reclassification request, since this was a non-delegated action made by the Division of Personnel.

With respect to Mr. Calcese, the argument that his perceived nervousness is evidence of discrimination carries very little weight. As stated earlier, the Commission believes that the decision to deny the reclassification was in error, but there was no proof that it was so unreasonable as to be probative of a pretext.

ORDER

With respect to Case No. 79-PC-ER-167, the complaint of discrimination is dismissed. With respect to Case No. 79-135-PC, respondent's action in denying appellant's reclassification request is rejected and this matter is remanded to respondent for action in accordance with this decision.

Dated _____, 1981

STATE PERSONNEL COMMISSION

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