

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 *
 JERRY D. SCHAEFFER, *
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 Complainant, *
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 v. *
 *
 Adjutant General, DEPARTMENT *
 OF MILITARY AFFAIRS, *
 *
 Respondent. *
 *
 Case No. 82-PC-ER-30 *
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DECISION
 AND ORDER ON
 PETITION FOR
 REHEARING

This matter is before the Commission pursuant to §227.12, Stats., on the complainant's petition for rehearing filed April 2, 1984. The respondent has been afforded an opportunity to reply.

In a decision and order dated March 14, 1984, and served March 16, 1984, the Commission dismissed this complaint of handicap discrimination for lack of subject matter jurisdiction.

In that decision, the Commission noted that Mr. Schaeffer had been employed as a "technician" in accordance with 32 U.S. Code §709. This law requires that a technician such as Mr. Schaeffer "... be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position," 32 U.S.C. §709(b), and, in the event of separation from the Guard, that he "... shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned." 32 U.S.C. §709(e)(1), which is what occurred in Mr. Schaeffer's case.

In examining its subject matter jurisdiction, the Commission considered only Mr. Schaeffer's employment status as a technician. The Commission

concluded that this employment did not make Mr. Schaeffer an employe of the State of Wisconsin, noting that 32 U.S.C. §709(d) provides: "A technician employed under subsection (a) is an employe of the Department of the Army ... and an employe of the United States." (emphasis supplied)

In his petition for rehearing, Mr. Schaeffer points out, as material, that he had a dual status until his termination as both a federal civil service technician and a National Guard member. The Commission in its decision did not consider whether his status as a member of the Guard would provide a basis for the Commission's subject matter jurisdiction.

The question of whether military members of the National Guard are federal or state employes was addressed specifically by the United State Supreme Court in Maryland v. United States, 318 U.S. 41, 48, 85 S. Ct. 1293, 1298 (1965):

"It is not argued here that military members of the Guard are federal employes, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employes of the States, and so the courts of appeals have uniformly held. See n. 5, supra." (emphasis supplied)

The provision in the federal statutes at 32 U.S.C. §709(d) cited above, which provides that a technician is an employe of the United States, was not enacted until subsequent to this decision, and it applies only to technicians.

In light of the definitive holding of the Supreme Court set forth above, the Commission must conclude that it committed a material error of law in its March 14, 1984, decision, by failing to consider Mr. Schaeffer's status as a military member of the Guard, and by failing to conclude that it had jurisdiction over so much of this matter as charges that the

complainant's status as a military member of the Guard was terminated because of his handicap.

It must be stressed that the Commission continues to lack jurisdiction over so much of this complaint as relates to the complainant's status as a technician. Thus there is a question whether any decision favorable to the complainant with respect to his status as a Guard member could possibly affect his status as a technician.

ORDER

The complainant's petition for rehearing is granted on the basis of a material error of law in the March 14, 1984, decision. The foregoing decision shall serve as a modification of the March 14th decision. The March 14th order is vacated and the following is substituted in its place: So much of this complaint as relates to Mr. Schaeffer's status as a technician is dismissed for lack of subject matter jurisdiction. The Commission will retain jurisdiction over, and will proceed to investigate, so much of this complaint as relates to Mr. Schaeffer's status as a military member of the National Guard.

Dated: April 25, 1984

STATE PERSONNEL COMMISSION

AJT:jat


LAURIE R. McCALLUM, Commissioner


DENNIS P. MCGILLIGAN, Commissioner

Parties:

Jerry D. Schaeffer
6400 Westgate Road
Monona, WI 53716

Raymond A. Matera
Major General/Adjutant General
Department of Military Affairs
P.O. Box 8111
Madison, WI 53708