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 VIRGINIA BARTELL, \*  
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 Complainant, \*  
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 v. \*  
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 Secretary, DEPARTMENT OF \*  
 HEALTH AND SOCIAL SERVICES, \*  
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 Respondent. \*  
 \*  
 Case No. 84-0038-PC-ER \*  
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DECISION  
 AND  
 ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of age and sex in regard to wages. Following the issuance of an initial determination of "no probable cause" to believe that discrimination had occurred, and an appeal thereof, the parties agreed to submit this case for a decision on briefs as to the following issues:

- a) Whether the settlement agreement signed October 19, 1983, by the complainant, acts as res judicata (or other bar) to the charge.
- b) Whether the charge was untimely filed, which raises the further question of whether the underlying allegation constitutes a legally cognizable continuing violation.

The attorneys for both parties having filed briefs, it appears the underlying facts as to the aforesaid issues are not in dispute.

FINDINGS OF FACT

1. The complainant began her employment at the Kettle Moraine Boys School (now the Kettle Moraine Correctional Institution, hereinafter "KMCI") on September 23, 1963, as a receptionist.
2. On or about January 1, 1967, the complainant's position was reallocated from the receptionist classification to the Clerk 2

classification and she was regraded. The complainant continued to work in the school's control center on the first shift.

3. During the period from 1972 to 1974 the Kettle Moraine Boys School was converted to KMCI, an adult medium security correctional institution.

4. On or about November 22, 1974 the complainant filed a charge of discrimination against the respondent with the Department of Industry, Labor and Human Relations alleging that the respondent had discriminated against her on the basis of sex in regards to wages. The gravamen of her charge was essentially that Officer 2's employed by the respondent in the control center on the night shift were paid a higher wage than the complainant, although the night shift Officer 2's and the complainant were performing essentially the same duties.

5. On December 2, 1976, a DILHR hearing examiner issued recommended findings of fact, conclusions of law, and order in favor of the respondent. The complainant filed timely exceptions to the proposed decision.

6. As a result of the conversion of the Boys School to KMCI, the complainant's control center responsibilities increased in scope and complexity and, effective January 1, 1978, the complainant's position was reallocated from Clerk 2 to Clerk 3 and the complainant was regraded. The complainant filed a timely appeal of the reallocation with the State Personnel Board. The appeal was given the case number 78-3-PC

7. By a decision and order dated October 6, 1978, the Labor and Industry Review Commission concluded that the respondent had discriminated against the complainant on the basis of sex in regards to wages. L.I.R.C.

ordered the respondent to pay the complainant back wages, which respondent did.

8. As a result of the clerical survey conducted by the Department of Employment Relations, on or about August 26, 1979, (the effective date of the clerical survey), the complainant's position was reallocated from Clerk 3 to Clerical Assistant 2 and the complainant was regraded. The Complainant filed a timely appeal of the reallocation with the State Personnel Commission. The appeal was given the case number 79-PC-CS-108.

9. On or about May 8, 1981, the complainant filed a charge and complaint of discrimination against the respondent with the EEOC and the Commission respectively. Both the charge and the complaint alleged discrimination on the basis of sex in regards to wages. The gravamen of the charge and complaint was essentially that the complainant was classified as a Clerical Assistant 2, was in fact performing correctional officer duties, but was paid less than male officers with similar duties. The "particulars" of the discrimination alleged were as follows:

1. PERSONAL HARM: I have been employed by the above-named Respondent since 1963, and my current position is Clerical Assistant 2. I am performing the same duties as male employees at other correctional institutions who are classified as Correctional Officers and whose salaries are substantially higher than mine. The Respondent has refused to change my job classification or my salary.
2. RESPONDENT'S REASON FOR ADVERSE ACTION: The Respondent has not given me any reason.
3. DISCRIMINATION STATEMENT: I believe that the Respondent has discriminated against me because of my sex, female, in violation of the Equal Pay Act and Title VII of the 1964 Civil Rights Act, for the following reasons:
  - a. Male Correctional Officers at other institutions are permanently assigned to perform the same duties that I perform at the same level of skill, effort and responsibility.
  - b. Until 1977 or 1978, a male Correctional Officer at the institution where I work was permanently assigned to

perform these duties on the night shift. However, after the issue of sex discrimination was raised, the Respondent split up this job between two (2) male Correctional Officers, each of whom performs it for four (4) hours per night and does other work for the other four (4) hours.

The charge was given case number 055-81-1661; the complaint was given case number 81-PC-ER-144. Ultimately, the responsibility for investigating both the charge and complaint was assumed by the Commission.

10. As a result of a re-review of the clerical survey reallocation, on October 29, 1981 the complainant's position was reallocated from Clerical Assistant 2 to Officer 1, effective August 26, 1979, and the complainant was regraded. Certain payroll adjustment were made in accordance with prevailing rules, policies and salary schedules, but her salary was not adjusted to what it would have been had her position officially been classified in the officer series while she allegedly had performed the duties of an Officer 1 prior to August 16, 1979.

11. On or about March 26, 1982, the complainant was reclassified from Officer 1 to Officer 2 based upon work performance and training achievements. Certain payroll adjustments were made in accordance with prevailing rules, policies, and salary schedules, but her salary was not adjusted to what it would have been had her position officially been classified in the officer series while she allegedly had performed the duties of an Officer 1 prior to August 26, 1979.

12. As of approximately July 1, 1973, adjustments to the base salary of officers, clerks, and clerical assistants were determined and made pursuant to the provisions of the Collective Bargaining Agreements (hereinafter "Contracts") entered into by the State of Wisconsin and the Wisconsin State Employees Union; except adjustments to base salary as a result of reallocations, reclassification, and regrades were determined and made pursuant to the pertinent compensation sections of the Administrative Rules

and the Classification and Compensation Plan adopted by the Department of Employment Relations or its predecessor agencies.

13. At all times material to the above identified Appeals, Charges and Complaints, the pay range minimums, permanent status in class minimums, reclassification pay steps, and pay range maximums for the clerk and clerical assistant classification series were less than those for the officer classification series.

14. After protracted proceedings before the Commission involving the civil Service Appeals and the discrimination Charges and Complaints, the Complainant and the Respondent entered into a Settlement Agreement and Release which was drafted by respondent involving the above-referenced cases, specifically: 78-3-PC, 79-PC-CS-108, 055-81-1661 and 81-PC-ER-144.

15. This agreement was executed on October 19, 1983, and provides as follows:

This Settlement Agreement and Release (document) is entered into by and between Virginia Bartell (Appellant) and the State Department of Health and Social Services (Respondent). In consideration of the mutual promises set forth below, the parties covenant that:

1. The Respondent shall pay the Appellant \$3,100.00 within 30 days of the execution of this document.

2. Upon execution of this document, Appellant shall withdraw or cause to be dismissed, voluntarily and with prejudice, these proceedings and all other pending appeals, charges and/or complaints which have been filed against the respondent, its subunits, or its employes arising out of the subject matter of these proceedings, and further shall not file additional appeals, charges and/or complaints of any nature or type against the Respondent, its subunits, or its employes based on or arising out of events occurring prior to the execution of this document; this document when executed shall be deemed proper authorization for dismissal of all said appeals, actions, or proceedings.

3. This Settlement Agreement and Release is made for the purpose of reaching a mutually acceptable compromise of disputed claims and to avoid the additional burden and expense of litigation. Nothing in this document is intended or should be construed as an admission or indication that any action taken by the Respondent, its subunits, or its employes relating to the subject matter of this proceeding was in any way in violation of State or Federal law.

4. This Settlement Agreement and Release is a full and final settlement of any and all claims, demands or causes of action including attorney's fees, that Appellant has or may have, whether known or unknown, against the Respondent or its employes relating in any way whatsoever to the subject matter of this proceeding, and Appellant expressly acknowledges the extinguishment of any such claims, demands or causes of action.

5. Appellant represents that she has thoroughly discussed all aspects of this Settlement Agreement and Release with her attorney; that she understands all of its provisions, and that she is voluntarily and willingly entering into the Settlement Agreement and Release.

16. On or about January 4, 1984, pursuant to the agreement, the Personnel Commission dismissed with prejudice the proceedings identified in paragraph 14 herein. No Petition for Judicial Review of the Personnel Commission Order was filed.

17. Subsequent to the aforesaid dismissal, the respondent has not adjusted the complainant's salary to bring it to the same or higher salary level of male officers at KMCI.

18. On or about March 24, 1984, the Complainant filed a discrimination complaint with the Commission which is the subject matter of the instant proceeding. This complaint contains the following statement of discrimination:

I've worked at KMCI for twenty years. In 1974 I filed a discrimination suit against K.M. because men were working my positions and received more pay. The case went through the Courts and in 1978 I received back pay but still was not given an equal salary. After five more years of hearing the state gave me a settlement. I am in the same position and my salary still is not equal to the men who work with me. I have had to train these men and we do identical work. These men have been employed at K.M. from 1-5 years and earn 10-30¢ an hour more. I feel I am discriminated against through age and sex and I want equal pay.

19. On December 26, 1984, an initial determination was issued finding no probable cause to believe discrimination occurred. This was duly appealed to the Commission pursuant to §PC4.03(3), Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this complaint pursuant to §§230.45(10(b), 111.375(2), Stats.
2. This complaint is barred by the settlement agreement and release executed October 19, 1983, and must be dismissed.

OPINION

The basic question before the Commission is whether the "Settlement Agreement and Release" set forth in Finding #15 operates as a bar to this proceeding. The complainant has not argued that the agreement that was reached by the parties should be avoided because of fraud, mistake, duress, etc. Rather, she contends the document should not be read or construed so as to include the subject matter of the instant complaint.

This complaint alleges as follows:

I've worked at KMCI for twenty years. In 1974 I filed a discrimination suit against K.M. because men were working my positions and received more pay. The case went through the Courts and in 1978 I received back pay but still was not given an equal salary. After five more years of hearing the state gave me a settlement. I am in the same position and my salary still is not equal to the men who work with me. I have had to train these men and we do identical work. These men have been employed at K.M. from 1-5 years and earn 10-30¢ an hour more. I feel I am discriminated against through age and sex and I want equal pay.

The basic thrust of this complaint is that the complainant is doing the same work as men with less seniority at KMCI but is paid less. The immediate reason for this disparity is relatively straightforward. When the complainant's position was reallocated to Officer 1 on October 29, 1981, with an effective date of August 26, 1979, her salary was adjusted accordingly to the prevailing rules and pay schedules. However, this adjustment did not include factoring in her contention that she had been performing the duties and responsibilities of an Officer for a number of

years before 1979.<sup>1</sup> Since the pay rates of the officer classification have been higher than the clerk and clerical assistant classifications, male employes whose positions had been classified as officers longer than the complainant could be making more money than the complainant notwithstanding that they were doing the same work and had less overall seniority in terms of years of state service or years at KMCI.

The respondent argues that the current complaint stems from this 1981 reallocation and is barred by the settlement agreement and release. The complainant argues that the settlement agreement and release does not cover the reallocation, and, in any event, that there is a cognizable act of discrimination independent of the reallocation and subsequent to the execution of the settlement agreement and release.

The complainant argues at pp. 17-19 of her brief as follows:

In Paragraph Two (2) of the Settlement Agreement and Release, Complainant also agreed to not file any other appeals, charges, or complaints based on or arising out of "events occurring prior to the execution of this document." In order to ascertain the meaning of this phrase, one must read it in the context of the whole paragraph. When used in conjunction with the first clause of Paragraph Two (2), it is clear that "events" refers to the reallocation and sex discrimination violations that constituted the subject matter of the above-mentioned, pre-settlement proceedings. By this clause, Complainant agreed not to file any other charges based on these pre-settlement violations. Thus the parties used the word "...prior...."

Both the Department and the ERO argue otherwise, claiming that the term "events" also encompasses the Department's failure to adjust Ms. Bartell's base pay to that received by male officers one (1) with similar seniority, when it reallocated her to Officer 1 classification on October 29, 1981. See Department's Brief pps. 11, 12; Initial Determination pps. 2, 3, 8. Yet, this argument is seriously flawed for three reasons. First, it takes the term "events" out of context, isolating it from the rest of Paragraph Two (2), the entire focus of which is Complainant's agreement to terminate any and all litigation based on the subject matter of the above-mentioned proceedings. Thus, their argument runs contrary to the primary rule of contract

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<sup>1</sup> The only approach that presumably could have accomplished this would have been to have used an effective date of sometime in 1974, for example.



construction, which mandates reading contract provisions as a whole.

Second, this argument runs contrary to the definition of "event." Webster's New World Dictionary defines "event" as a "happening or occurrence." See Webster's New World Dictionary, Second Edition, p. 485 (1970). The failure to adjust Complainant's base pay to achieve parity with male Officers is the exact opposite of a happening or occurrence. It is a non-event.

Third, and most importantly, even assuming arguendo that the Department's failure to adjust her base pay constitutes an "event", it is an event that occurred both before and after the settlement. Yet Complainant only agreed not to file any complaints on events occurring prior to the settlement. Under the plain language of Paragraph Two (2), Complainant most certainly did not agree to waive her right to litigate the Department's future failure to adjust her base pay properly.

The Department's confusion rests in its view that its failure to properly adjust Ms. Bartell's base pay occurred only once, prior to the settlement. Yet this is clearly not the case. The Commission's own case law reveals that the failure to adjust properly an employee's base pay is not a static event that occurs at one time only. Rather, it is a dynamic, continuously occurring violation. See, e.g., Hoepner v. DHSS, Case No. 79-191-PC, 9 (1981). See also part B of this Brief. In this case, Complainant agreed only to terminate her right to sue on salary violations occurring prior to the settlement. She did not waive her right to sue on any future salary violations, occurring after the settlement. If the Department wished to conduct itself lawfully, then after signing the Settlement Agreement and Release, it was legally obligated to adjust Complainant's base pay so as to achieve parity with male Officers. It failed to do so.

Initially, the Commission cannot agree that the term "events occurring prior to the execution of this contract" is solely a reference to the subject matter of the particular proceedings compromised. Paragraph 2 of the settlement agreement and release reads as follows:

2. Upon execution of this document, Appellant shall withdraw or cause to be dismissed, voluntarily and with prejudice, these proceedings and all other pending appeals, charges and/or complaints which have been filed against the Respondent, its subunits, or its employes arising out of the subject matter of these proceedings, and further shall not file additional appeals, charges and/or complaints of any nature or type against the Respondent, its subunits, or its employes based on or arising out of events occurring prior to the execution of this document; this document when executed shall be deemed proper authorization for dismissal of all said appeals, actions, or proceedings. (emphasis supplied)

If the parties' intent had been as complainant contends, presumably they would have used the same "arising out of" language in the second clause as was used in the first clause -- i.e., "arising out of the subject matter of these proceedings...." rather than "based on or arising out of events occurring prior to the execution of this document."

As to the second argument, that the failure to adjust complainant's salary was not an "event," the Commission notes the definition of "event" in Black's Law Dictionary, Revised Fourth Edition, p. 654, includes the following: "The word is broad enough to include an omission."

The complainant further argues that the failure to have adjusted her salary was not restricted to the reallocation transaction but was a "continuously occurring violation," and that therefore there was no bar to pursuing a claim relating to the post-settlement aspect of this type of violation.

What the complainant is basically charging in the instant proceeding is a failure or refusal by the respondent to have made an adjustment to her salary so that she would not be making less than male officers performing the same duties but who have more time in the officer classification although less overall seniority. The respondent failed or refused to do this on October 29, 1981, when the complainant's position was reallocated to the Officer series. The question before the Commission at the moment is not whether there is a continuing violation, but whether, in the context of the settlement agreement language referring to claims "based on or arising out of events occurring prior to the execution of this document," it can be said that the abstract failure of the respondent to have adjusted the complainant's base

salary after the execution of the document constitutes a separate act of employment discrimination not covered by the terms of the document.

Complainant's current claim that her base salary should be adjusted so that she would earn more than male officers who do the same job, but who have less overall seniority, is necessarily based on or arises out of events preceding the execution of the settlement agreement and release. The complainant is not in a posture where she can rely solely on "current" or post-agreement matters to support her complaint. She cannot simply allege that she is performing the same work as but is paid less than male officers with less overall seniority or less seniority at KMCI, as this would be met with the rejoinder that they have more seniority in the Officer classification, which constitutes a legitimate reason for the salary disparity. The complainant, to have any possibility of stating a claim, must further argue that she performed officer functions for a number of years prior to August 26, 1979, while her position was classified in the clerical series, and that she should be given retroactive officer classification recognition of some sort for that time. The respondent already has failed or refused to do this at least as of October 29, 1981, when it reallocated the position to Officer 1 but with an effective date of August 26, 1979. It has taken no action since then to do what complainant contends should be done with respect to adjusting her salary. To the extent that its continued inaction on this front could be conceptualized as a continuing series of failures or refusals to give complainant the salary to which she argues she is entitled, it also could be conceptualized as a reliance on the 1981 reallocation transaction which fixed the status quo of complainant's position for pay purposes as having become an Officer 1 effective August 26, 1979. Thus, the current failure or refusal to adjust

complainant's base salary, and the complainant's attack on it, is a claim "based on or arising out of events occurring prior to the execution of this document...."

Respondent's position is also supported by paragraph 4 of the settlement agreement provides:

4. This Settlement Agreement and Release is a full and final settlement of any and all claims, demands or causes of action including attorney's fees, that Appellant has or may have, whether known or unknown, against the Respondent or its employes relating in any way whatsoever to the subject matter of this proceeding, and Appellant expressly acknowledges the extinguishment of any such claims, demands or causes of action. (emphasis added)

The underscored language makes it clear this paragraph applies to claims not presently filed. The complainant expressly acknowledged the extinguishment of all such claims "relating in any way whatsoever to the subject matter of this proceeding." Clearly, the subject matter of the claims that had been filed and which were specifically compromised by the document involved the assertion that she had been performing officer duties while only being classified and paid as a clerical. As discussed above, the instant complaint is necessarily related to that subject matter, as the complainant must assert that for salary purposes she should be given credit for the period she was underclassified.

Inasmuch as the Commission concludes the settlement agreement and release acts as a bar to this complaint, it will not address the question of whether the complaint was untimely filed.

ORDER

This complaint of discrimination is dismissed as barred by the settlement agreement and release executed October 19, 1983, and set forth in Finding #14, above.

Dated: September 13, 1985 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

AJT:jmf  
ID5/2

  
LAURIE R. MCCALLUM, Commissioner

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