

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
 JOHN CLEARY,
 Complainant,
 v.
 Chancellor, UNIVERSITY OF
 WISCONSIN - MADISON,
 Respondent.
 Case No. 84-0048-PC-ER
 * * * * *

INTERIM
 DECISION
 AND
 ORDER

On the basis of information provided to the Commission by both parties, the following appears to be undisputed:

1. On April 30, 1984, complainant filed a charge of discrimination with the Commission alleging that Dr. Ray Brown of the University of Wisconsin Clinical Cancer Center with whom complainant had been conducting research as a volunteer, had offered to hire complainant as a project assistant. Complainant further alleged that, while Dr. Brown was on vacation, Dr. Paul Carbone, Director of the University of Wisconsin Clinical Cancer Center, told complainant that he could no longer conduct research at the Center as a volunteer and that Dr. Carbone had withdrawn approval of and funding for the position Dr. Brown had offered complainant. Complainant alleged in his charge of discrimination that Dr. Carbone's actions were based on complainant's national origin or ancestry, his age, and/or his arrest/conviction record.

2. On September 18, 1984, the respondent filed a Motion to Dismiss with accompanying Affidavit. Respondent contended in support of the Motion

that there was no vacancy for the position of a researcher in Dr. Brown's laboratory in the spring of 1984 and that positions at the University of Wisconsin can be created and filled only where a position vacancy listing has been approved and posted which was not done in this case. Respondent further contended that where there is no approved vacancy or job opening, an issue under the law is not raised and the Commission does not have jurisdiction to investigate and cited Acharya v. UW, 78-PC-ER-53 (2/13/81) in support of this contention. Respondent also stated that the only person to receive an appointment in Dr. Brown's laboratory was a graduate student who received a scholarship-type stipend as a research assistant to support her graduate degree research requirements and that complainant was not eligible or qualified for a research assistant or a project assistant appointment because he was not a student at the time.

3. On November 5, 1984, complainant advised the Commission that he still contended that he had been offered a position by Dr. Brown and that he was denied the position by Dr. Carbone because of his arrest/conviction record. Complainant also contended that it had been his plan to become a post-doctoral fellow in the Clinical Cancer Center. It also became apparent to the Commission around this time that complainant was incarcerated at the Federal Correctional Institution in Lexington, Kentucky.

4. On February 26, 1985, respondent filed a further brief in support of its Motion to Dismiss.

5. On April 11, 1985, complainant requested that the Commission appoint counsel for him because he is indigent. He also indicated that he did not wish to withdraw his complaint without discussion of the matter with an attorney and if the Commission was unable to appoint counsel for

him, that he be granted a continuance until he was able to return to Wisconsin and represent himself or retain counsel here.

6. Neither of the parties requested an evidentiary hearing on the Motion to Dismiss.

DISCUSSION

As described above, there is a factual dispute in the instant case. What respondent is trying to accomplish through its Motion to Dismiss is to have the Commission finally resolve this factual dispute based on an incomplete record and one not developed with due process safeguards. The Commission declines to do this and is of the opinion that this complaint should proceed to investigation by one of the Commission's Equal Rights Officers.

As indicated above, the complainant has requested that the Commission appoint counsel for him. In the absence of statutory authority for the Commission to do so, given the fact that a complainant is not required to be represented by an attorney before the Commission, and in the absence of any constitutional right to counsel in an administrative procedure such as this, the Commission cannot grant this request.

Since it cannot be concluded at this point in the proceeding that the investigation would be impeded or prejudiced by complainant's inability to be present in Wisconsin, the Commission sees no reason for granting complainant's request for a continuance, at least at this point. Contacts with the complainant should be possible by letter and perhaps telephone. If necessary, complainant can renew his motion at a later date.

ORDER


Respondent's Motion to Dismiss is denied, complainant's request for the appointment of counsel is denied, and complainant's request for a continuance is denied. The Commission orders that this complaint proceed to investigation.

Dated: November 21, 1985 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

LRM:jmf
ID10/1


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner *v/c*

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