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 HARLAN RICHARDS,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 HEALTH AND SOCIAL SERVICES,
 Respondent.
 Case No. 86-0086-PC-ER
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DECISION
 AND
 ORDER

This matter is before the Commission for a determination as to subject matter jurisdiction.

This matter was initiated by the Commission's receipt on June 16, 1986, of a letter from Mr. Richards dated June 11, 1986, which enclosed a copy of an "inmate complaint" signed by a number of inmates at the Wisconsin Correctional Institution (WCI), Waupun. This letter includes, inter alia, the following:

"Please find enclosed a copy of a complaint and over 300 signatures requesting the removal of Thomas Donovan from his position of Education Director ...

I am bringing this to your attention in the hopes that you will intervene and remove this tyrant from the position he presently holds. The institution complaint system has refused to act on this complaint. I sent copies of the complaint to Walter Dickey, Administrator, Division of Corrections; Linda Reivitz, Secretary, Department of Health and Social Services and the Attorney General's office along with a cover letter explaining the situation. I have received no response ... He is incapable of performing the job that he holds. I request that you conduct an investigation to determine what I say is factually correct, and based upon this, replace him ..."

The enclosed complaint included, the following statement:

Since assuming the position of Education Director at WCI in August 1985, Thomas Donovan has engaged in a pattern of policy making contrary to the best interests of the inmates incarcerated here. He has exhibited, time after time, his complete disregard for the right and privileges afforded to us as inmates and his utter contempt of us as human beings. He has been responsible for or involved in, every negative policy implemented at WCI since he arrived. He has reduced the law library from a constitutional right to a privilege he allows at his whim. He took the overtime pay away from the legal clerks to stop them from doing anyone else's legal work. He caused the law library to be closed for at least ½ day every time a librarian is absent, he banned smoking in 90% of the school simply because he personally does not smoke, he implemented a policy of not allowing inmates in the school program that get a major conduct report in the school, he took the incentive away from the wage set-up for school students, he was involved in the formulation of the policy to dock inmate's wages when they are away from their institution jobs, he is on the Double Celling Committee, and the list goes on ...

By return letter, Commission staff informed Mr. Richards that there did not appear to be any basis for the Commission to conduct the investigation requested. By letter dated June 23, 1986, and filed June 25, 1986, Mr. Richards responded, in part, as follows:

"I also feel that we are state employees. We work for the state and get paid by the state, and Mr. Donovan has exhibited discrimination against us as a select group of individuals."

A subsequent letter from Mr. Richards dated August 17, 1986, and received August 19, 1986, includes the following:

Arrest/Conviction Record

The discrimination prevalent at WCI concerning our status as convicts is perpetuated primarily by Thomas Donovan. There aren't any non-convicted inmates in here so I can't draw any parallels between the two classes of individuals. The discrimination goes deeper than a reliance by Thomas Donovan on the fact that we have arrest/conviction records. It goes to the fact that we are convicted felons and we are being subjected to arbitrary and capricious treatment by Thomas Donovan because we are convicted felons.

* * *

Employment Status

Under Chapter 53 and 56 of the Wis. Stats., there is provision for employment of inmates in the state institutions. Further, in Administrative Code HSS 309.55 is delineated the compensation plan for the work we are hired to do.

As Mr. Donovan is the Education Director and the decisions and policies he implements affects all those who are being paid by the state to fulfill their respective job functions under him, the complaints are related to our work status rather than our inmate status.

The harassment and intimidation that we are constantly being subjected to by him are in his capacity as the head of the school and therefore as our job boss or employment supervisor ...

Pursuant to §111.375(2), Stats., this Commission only has jurisdiction over discrimination complaints "...against the agency as an employer...." Furthermore, the Fair Employment Act's prohibition against discrimination only runs to acts of discrimination with respect to employment matters, §111.322, Stats. While inmates are considered employes for some purposes, it seems clear that the allegations against Mr. Donovan have to do with his actions with respect to Mr. Richards' status as an inmate rather than as an employe.

Furthermore, the United States Equal Employment Opportunity Commission (EEOC) in Case No. 86-7 (4/18/86), 40 FEP Cases 1892, 1893-84, concluded that an inmate was not an employe under Title VII:

However, these individual factors must be considered in light of the total circumstances of the relationship between the Charging Party and the Respondent.

That relationship arose from the Charging Party's having been convicted and sentenced to imprisonment in the Respondent's correctional institution. The primary purpose of their association was incarceration, not employment. Consequently, the Respondent exercised control and direction not only over the Charging Party's work performance but over the Charging Party himself. The conditions under which he performed his job were, thus, functions of his confinement to the Respondent's institution under its control. While the Charging Party received monetary compensation for his work, that compensation was minimal and, arguably, the greater consideration was the opportunity to earn "good time"

credits toward reducing his sentence. Finally, although the Charging Party was not required to work for the Respondent, his very job flowed from his incarceration and was dependent on his status as a prison inmate. Considering these circumstances as a whole, we are persuaded that the reality of the work relationship between the Respondent and the Charging Party was not one of employment. Therefore, we find that, while the Respondent is an employer within the meaning of the Act, the Charging Party was not an employee of the Respondent.

- Our finding in this regard is consistent with the Department of Labor's interpretation of the term "employee" under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 et seq. (1982). Section 3(e)(1) of that Act defines "employee" in virtually the same words as does Title VII. It is the position of the Department of Labor, which enforces the Fair Labor Standards Act, that in circumstances such as those presented by this charge, a prison inmate is not an employee of the prison:

Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, roadgangs, or other areas directly associated with the incarceration program, is not an employee within the meaning of the Act.

Department of Labor, Wage and Hour Division, Field Operations Handbook §10b29(a) (June 24, 1975).

Students also are usually considered not to be employees under Title VII. See, e.g., Cobb v. U.S. Merchant Marine Academy, 38 FEP Cases 1258 (E.D.N.Y. 1984); Pollack v. Rice University, 28 FEP Cases 1273 (S.D. Texas 1982).

Complainant has requested that if the Commission lacks authority over the complaint that it refer it to whoever "has the authority to preside over this issue ...". The appointing authority of a state agency has the authority to manage and discipline its employees, §230.06(1)(b), Stats., and complainant apparently has already petitioned the Administrator of the Division of Corrections and the Secretary of the Department of Health and Social Services.

ORDER

This complaint is dismissed for lack of subject matter jurisdiction.

Dated: Sept. 4, 1986

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

AJT:jgf
JGF002/1

Parties

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