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KATHRYN G. HERRBOLD,
 Complainant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 91-0003-PC-ER

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RULING
ON
TIMELINESS

This matter comes before the Commission on a question of timeliness. This case involves a charge under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, stats.) of sex discrimination with respect to salary.¹ This charge was filed on January 7, 1991, and states, in part as follows:

In December of 1976, I transferred as a Probation/Parole Agent from the Manitowoc Office to Oshkosh In April 1977, Allan Krass was hired to share this service area. He was promoted to a Social Worker III by his former supervisor, however, I remained a Social Worker II. Even though he was functioning at a higher rate of pay, I continued to carry a caseload of adults and juveniles. We, as agents, were both working with difficult male and female cases. I performed all the same job duties The unfairness arises out of the fact that I perform the same difficult tasks as Agent Krass and have for all these years I want this matter rectified financially with a wage equal to that of Agent Krass who, I understand, gets approximately \$100.00 a month more than I do. I want a retroactive reimbursement from April, 1977, when he commenced working in Neenah/Menasha where I have remained since December, 1976, as a Probation/Parole Agent.

For purposes of deciding this motion, the Commission will assume the truth of the material facts in the charge. In addition, it appears to be undisputed, based on subsequent submissions by the parties, that Ms. Herrbold's position was reclassified to Social Worker III effective February 4, 1980, after she had

¹ Also checked on the charge of discrimination form was the box for retaliation based on FEA activities. However, there is nothing in the body of the charge that supports this allegation.

complained to her supervisor verbally and by a letter dated January 11, 1980, about the status of her classification. It can be inferred, and there is nothing in the file that is inconsistent with this inference, that the salary differential between Ms. Herrbold and Mr. Krass is attributable to the fact that he received his reclassification to Social Worker III at an earlier date than she did.

The time limit for filing a complaint of discrimination under the FEA with the Commission is "300 days after the alleged discrimination occurred." §230.44(3), stats. For purposes of deciding this motion, the Commission will assume that complainant has been performing the same duties as Mr. Krass since April 1977. Whether this complaint can be considered timely depends on whether the discrepancy in their salaries is properly conceptualized as a "continuing violation," where the discrimination in effect occurs on a bi-weekly basis when the pay checks are issued, or whether the salary discrepancy is properly conceptualized as the ongoing effect or injury resulting from a discrete employment transaction — respondent's action in 1980 reclassifying appellant's position to Social Worker III with a February 4, 1980, effective date rather than sometime in 1976 or 1977, when complainant claims she began working at the Social Worker III level. If there is a continuing violation, the complaint would be timely, because the discrimination occurs every two weeks. If there is no continuing violation, the complaint is untimely, because it was filed more than 300 days after the discrimination occurred in 1980.

In Pelikan v. DNR & DETE, 87-0043-PC-ER (6/24/87), the Commission discussed the continuing violation concept as follows:

A great many personnel transactions have adverse economic impacts on employees that continue over time. For example, an employee who is involuntarily demoted for disciplinary reasons will continually be paid less than if he or she had not been demoted. These are the employee's monetary damages or loss, and the fact that they continue to accrue indefinitely obviously does not mean that the employee has an indefinite period in which to appeal. The difference between this hypothetical and a true continuing violation is that the reduction in salary in each paycheck following the demotion is essentially a neutral act. If the demotion has not been shown to have been improper, either because the employer demonstrated just cause following a hearing, or because the employee failed to contest it in a timely manner, there is no basis on which to contend that each paycheck constitutes a separate act of discrimination.

A true continuing violation typically involves an employer's ongoing policy that affects that employee continually. For example, an employer may have a salary schedule which calls for a higher salary range for stock clerks, a male-dominated job classification, than for cashiers, a female-dominated classification. A woman hired into the latter classification presumably would not be limited to the 300 days after her hiring in which to file a sex discrimination charge, because there is an ongoing policy that continues to affect her over the course of her employment, so long as the employer continues to maintain the structural salary differential between the two classifications.

In the instant case, Mr. Pelikan is not complaining about how his salary is being computed now that he is retired; his complaint runs to the contention that he was forced into an early retirement, and as a consequence is realizing less compensation from the State.

In United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 52 L. Ed. 2d 571, 578, 97 S. Ct. 1885 (1977), the plaintiff-respondent was a female flight attendant who had been terminated from employment in 1968 because of a subsequently invalidated policy against marriage. She was rehired in 1972, and complained in 1973 about the employer's refusal, pursuant to its uniform policy, to credit her with pre-1972 seniority. The court refused to apply a continuing violation theory:

Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists.

Similarly, in the instant case, Mr. Pelikan is not pointing at any alleged present violation, only at a present effect of an earlier alleged violation.


In the case before the Commission, complainant is being paid less than a male colleague who (the Commission assumes) is performing exactly the same kind of work. The basis for this discrepancy is the fact that the male employee has more seniority as a Social Worker III. This basis in turn rests on certain distinct, separate and discrete personnel transactions, all of which occurred over 10 years ago. Complainant transferred to Oshkosh in December, 1976. In April, 1977, another agent (male) was hired, and he was elevated to Social Worker III while complainant was not, even though they were performing the same duties. Subsequently, in 1980, complainant's position was reclassified to

Social Worker III, but with an effective date of February 4, 1980, rather than the April 1977 date she now is seeking as a remedy in her complaint. At the time of the 1980 reclassification not only could she have filed a complaint of sex discrimination with regard to not having been granted an earlier effective date, but also she could have filed a civil service appeal of the transaction under §230.44(1)(d), stats. Complainant also could have requested reclassification in 1977 and similarly could have pursued the same remedies if she had been dissatisfied with the results of that transaction. Now, in order for respondent to defend against her current complaint, it would have to rely on these earlier transactions by arguing that current salary discrepancy is justified by them. This illustrates that there is no continuing violation. Rather, if this complaint were ruled to have been timely filed, it would have the effect of permitting complainant to litigate classification matters that are 10 years old, and that she could have challenged at the time but did not.


ORDER

This complaint is dismissed as untimely filed.

Dated: May 16, 1991 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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