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HERMAN L. GANDT,
 Complainant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 91-0168-PC-ER

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DECISION
 AND
 ORDER

This matter is before the Commission on respondent's motion to dismiss for failure to state a claim filed December 12, 1991. Both parties have filed written arguments.

This case involves a complaint of discrimination on the basis of military reserve membership. It alleges, in summary, that complainant was displaced from an Officer III position at Sanger B. Powers Correctional Center by a returnee from military leave, and forced to accept a transfer to another institution. Complainant contends he "was discriminated against because Sgt. Jakubanes was given his job back and I was forced to transfer." He also complains that there are less junior officers, including one on permissive probation, who should have been displaced instead.

A motion to dismiss for failure to state a claim tests the legal sufficiency of a charge of discrimination — i.e., it raises the question of whether, assuming the facts alleged in the complaint are true, there is any possible liability under the Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.).

Complainant's allegation that he should have been given priority over less-senior officers involves a contract issue that is not covered by the FEA.¹ Discrimination on the basis of national guard or reserve membership is prohibited by the FEA §§111.321, 111. 322, Stats. However, the transaction in question involved the restoration of another employe following military leave, which is specifically required by §230.32, Stats. The legislature through this

¹ It appears this contention is being grieved.

provision and others² has expressed an intent to protect veterans. The obvious intent of adding guard or reserve membership to the statuses covered by the FEA was to protect individuals from being discriminated against because of their membership in the guard or reserve, not to prohibit the state as employer from complying with a long-standing state law (§230.32) requiring the restoration of employes returning from military leave. Therefore, even assuming for the sake of argument that complainant, who is not in the protected category, has standing to invoke the protection of the FEA's prohibition against discrimination on the basis of guard or reserve membership, it can not be concluded that respondent violated the FEA by restoring the employe returning from military leave, and in the process displacing complainant.

CONCLUSIONS OF LAW

1. Complainant's contention that he should have been given preference over other officers who were less senior and/or in probationary status does not involve a potential claim under the FEA.

2. Complainant's contention that he was discriminated against in violation of the FEA when he was displaced by a returning guard or reserve member fails to state a claim under the FEA as a matter of law.

² See, e.g., §230.16(7), Stats., which provides for a civil service examination preference for certain veterans. The legislature recently expanded this preference, see 1991 Wis. Act 101, effective December 19, 1991.

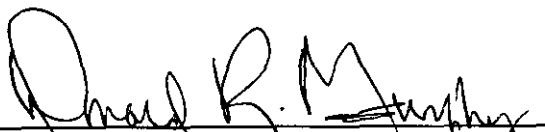
ORDER

This complaint of discrimination is dismissed for failure to state a claim under the FEA.

Dated: January 8, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT/gdt/2


DONALD R. MURPHY, Commissioner

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