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LAURA PURIFOY,
 Complainant,

v.

Secretary, DEPARTMENT OF
 CORRECTIONS,
 Respondent.

Case No. 92-0044-PC-ER

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DECISION
 AND
 ORDER

This matter is before the Commission on a complaint of marital status discrimination under the Wisconsin Fair Employment Act (WFEA). To the extent any of the discussion constitutes a finding of fact, it is adopted as such,

FINDINGS OF FACT

1. Complainant, Laura Purifoy, was hired on January 20, 1992, by respondent at its Dodge Correctional Institution as a limited term employee (LTE) to function as a typist in its records office.
2. Dodge Correctional Institution (DCI), a maximum security institution, is the receiving center for all adult inmates entering the Wisconsin correctional system.
3. The DCI records office is custodian for manual files of all inmates currently released, but not discharged from all other correctional institutions. This office also has computer access to files of inmates currently held in all other institutions.
4. The records office is headed by Geri Youngwirth, an Institution Records Supervisor 2, who supervises ten staff members.
5. The office is responsible for reviewing the admissions status of inmates, acknowledging the appropriateness of the admission, generating a record, processing legal documents, determining when an inmate should appear in court, and determining when paperwork is needed for inmate medical appointments.
6. Purifoy was one of six candidates interviewed by Youngwirth for the LTE typist position. She was Youngwirth's first choice.

7. Prior to hire, DCI made no reference check or background check of Purifoy.

8. As a Typist 1, Purifoy's position description describes her duties as, under general supervision of the Institution Records Supervisor, being responsible for producing typed copy, assembling new admissions files, maintaining official movement of population records, coordinating telephone communications system in absence of regular switchboard operator, and providing miscellaneous clerical services.

9. On February 13, 1992, Associate Warden Kathryn Nagle, received a note from the second shift lieutenant, showing Purifoy was the wife of Randy Purifoy, an inmate at Waupun Correctional Institution.

10. In response to this information, Nagle contacted Personnel Manager Mary Schneider, Treatment Director Jerry Heeringa, and complainant's supervisor, Geri Youngwirth, to determine whether Purifoy had requested an exemption to the Fraternalization Policy.

11. Nagle also talked with Ray Fromholz, Security Director, Fox Lake Correctional Institution, where Purifoy had formerly worked as an LTE and Lynn Oestreich, Security Director at Waupun Correctional Institution, obtaining information regarding exemption requests and visits with Randy Purifoy.

12. Then Nagle contacted respondent's Division of Adult Institutions and talked with the division administrator, Ken Sondalle. Sondalle agreed with Nagle's assessment that Purifoy should be terminated.

13. Just prior to the end of the working day, February 13, 1992, Purifoy was given a letter of termination, effective 4:30 p.m. that day. She was told the reason for her termination was a conflict of interest caused by her husband's status as an inmate in the correctional system.

14. The decision to terminate Purifoy was made by Nagle, who was acting warden that day. Nagle signed the termination letter as appointing authority for Warden Gordon Abrahamson, who was on leave.

15. When terminated, Purifoy had worked for respondent twelve days. Actual duties performed by Purifoy were: typing face sheets for legal files, which included typing in information regarding sentencing, alphabetizing papers to be filed in central storage, entering "T-numbers" to master cards, the permanent record of respondent.

16. As a beginning employe, all work of Purifoy was thoroughly checked by another employee and frequently her supervisor before it was distributed.

17. Purifoy was never given a computer access code and could not use the computer until after computer access was provided by another employee. Purifoy was limited to the "inquiry" or "read only" functions. She could not enter anything into the computerized record system.

18. Two or three inmates also worked in the DCI records office. They had access to certain information in the office, but were not allowed access to the computer system and were forbidden in the central storage area.

19. Inmates working in the records office were confined to a very specific area. They were supervised visually and their work was closely scrutinized until they established the trust of their supervisors.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.455(1)(b), Stats.
2. Respondent is an employer within the meaning of §111.32(6), Stats.
3. Complainant has the burden to show respondent discriminated against her on the basis of marital status in violation of the Wisconsin Fair Employment Act, as alleged in her claim of discrimination.
4. Complainant has failed to sustain this burden of proof.

OPINION

The question before the Commission is whether respondent discriminated against complainant in violation of the prohibition of marital status discrimination as provided under the Wisconsin Fair Employment Act when it terminated complainant from an LTE typist position. Section 111.321 et seq. of WFEA provides that an employer is prohibited from discriminating on the basis of marital status with respect to hire, termination, promotion, compensation or in terms, conditions or privileges of employment. The act defines "marital status" as being married, single, divorced, separated or widowed. The only expressed exception to this general prohibition is in instances where a person is directly supervising or directly being supervised by his or her spouse.

In addition, one declared policy under the act is to: protect by law the rights of individuals to obtain gainful employment ... free from discrimination because of age, race, creed, color, handicap, marital status, sex, national origin, ancestry, sexual orientation, arrest record/conviction record....

In Ray v. Department of Health and Social Services, Case No. 83-0129-PC-ER (10/10/84), and Earnhardt v. Department of Health and Social Services, Case No. 89-0025-PC-ER (11/19/92), the Commission has concluded that "marital status" as defined in the WFEA includes the identity of a person's spouse, and it sees no reason to depart from that conclusion here. Consequently, based on the facts presented, it is clear that complainant, Laura Purifoy, following the McDonnell-Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981) method of analysis, has established a prima facie case. The record establishes that Purifoy was protected under the WFEA marital status class, was hired and performed duties as an LTE typist for respondent at the Dodge Correctional Institution, was terminated and replaced by another LTE typist.

Respondent's stated reason for terminating Purifoy is that her position in the records office of DCI provided access to information about the inmates in the correctional system creating a conflict of interest because her husband was an inmate at Waupun Correctional Institution.

In Ray id., the Commission concluded the one exception in the WFEA regarding marital status discrimination was not meant to be all inclusive. That position was followed in Earnhardt id., where the Commission noted state law and ethics consistently prohibit spousal participation in matters of interest or benefit to another. The Commission does not part from that position. The remaining question then is whether respondent's stated reason for terminating Purifoy was a pretext.

Accordingly, respondent presented several witnesses testifying about DCI as a maximum security prison, its function as a receiving center for all inmates entering the state correctional system, and the functions of the DCI records office in connection with potential breaches of security, if such information was obtained by Purifoy. The witnesses painted various scenarios, including intimidation of Purifoy or her husband, causing her to be a high security risk.

Respondent argues Earnhardt controls, asserting that Purifoy was terminated not because of her marital status, but because she maintained a close relationship with an inmate and affirming that anyone holding her position and in a close personal relationship with an inmate would have been treated the same.

Also, respondent argues that Purifoy had an obligation to self-disclose any conflict of interest, under the conflict of interest policy, that she failed to do so, and that she actively concealed it. In support, respondent references testimony regarding Purifoy's responses to two co-employees on separate occasions, when asked about her husband's work. On both occasions, Purifoy did not disclose that her husband was in prison, but gave an evasive answer. The record shows that neither of these co-employees was a supervisor, and their inquiry was not a part of their job function, but idle curiosity.

Other arguments by respondent in this connection, regarding Purifoy's relationship with her husband prior to marriage, during the mid 80's and prior to her employment at DCI, with the exceptions to her visits with him at WCI, were given no weight by the examiner, because this information was not a part of respondent's decision-making process to terminate her.

Purifoy makes three arguments in her response that respondent's proffered reason for her termination is pretext: (1) she was not a security risk, (2) respondent's security procedures in the DCI records office belie its claim of security commitment, and (3) she did not violate respondent's conflict of interest policy.

Purifoy argues that respondent's conflict of interest policy requires self-reporting based on information she had in her possession at that time, that she was an LTE typist with very specific tasks and with specific guidance, and that she possessed no information that required reporting.

Respondent never specified a particular section of its conflict of interest policy Purifoy violated, but makes a general assertion that such information existed in the records office and Purifoy could have obtained it. Respondent's conflict of interest policy is defined in its Employees Handbook, Chapter 2, as follows:

Conflict of Interest refers to a situation in s.ER-Pers 24.04 in which:

1. a public official or state employee must take official action, and substantially affect, a matter in which the employee, or a

member of the immediate family, or an organization with which the employee is associated, has a substantial financial interest.

2. a public official's or a state employee's failure to act forthrightly could reasonably be expected directly or indirectly to create or result in a private benefit for the employee, a member of the immediate family, or an organization with which the employee is associated.

§ER-Pers 24.04, Wis. Adm. Code, provides that a conflict of interest exists when a state employee's action or inaction could directly or indirectly produce a benefit to the employee or immediate family, or the matter is one in which the employee or immediate family has a substantial interest.

The policy's self-reporting aspect, referred to by Purifoy and respondent, requires an employee to notify the appointing authority in writing, if he or she, in discharging job duties, is involved or about to be involved in a conflict of interest. Other than testimony that any given information in the records office might constitute a conflict of interest for Purifoy, no specific claim of such conflict was provided by respondent. It is questionable whether Purifoy violated this policy. However, a potential for conflict of interest existed because of the substantial potential for breaches of security in connection with the inmate status of complainant's husband -- e.g., the possibility of her husband being threatened by other inmates to attempt to obtain information about other inmates through complainant.

Also, complainant did not appear to be in violation of respondent's fraternization policy in place at that time, which was designed to eliminate potential conflict of interest. The fraternization policy specifically provided an exception for relationships between employees and inmates, who were immediate family members.

Regarding her assertion that she was not a security risk, Purifoy directs attention to testimony about her job duties of typing file record face sheets, using the computer system solely to read stored file information and being closely supervised by co-workers and her supervisor, who checked and rechecked her work.

Regarding respondent's stated security concerns about her, Purifoy points to these facts: Prior to employment at DCI, Purifoy and her children visited Randy Purifoy at Dodge. Respondent never asked Purifoy any questions about her background or relationship with anyone incarcerated in

the correctional system during her job interview or any time afterwards. Two or three inmates worked in the records office and handled records files.¹

Complainant's contentions provide some evidence of pretext, but do not outweigh the evidence adduced by respondent.

It is the conclusion of the Commission that respondent's reason for terminating complainant is exemplified by the appointing authority's testimony on this point. Associate Warden-Security, Nagle testified the basis for termination was: the potential for misuse of information; the concern regarding the complainant's judgment; and the concern regarding how the complainant could or would use the information. Nagle testified she originally knew complainant as Laura Bandemer, an Aide 3 at the Wisconsin Resource Center, but made no connection with complainant until this matter arose and she reviewed complainant's employee photograph. Nagle testified that after making the connection, she concluded Purifoy, formerly Bandemer, met, had a relationship with and married her husband -- inmate Randy Purifoy, whom Nagle had met at Central State -- during the course of her employment, and that Purifoy's relationship with an inmate during the course of her employment as an Aide 3 did not demonstrate a person with judgment who could be trusted. Nagle testified that she did not in fact know how complainant met Randy Purifoy and her conclusions in this regard were not based on any investigation.

In conclusion, the evidence presented clearly establishes that Nagle was concerned about Purifoy's judgment. This fact, albeit based on unverified assumptions, together with the potential for misuse of accessible, sensitive information and her marriage to an inmate in a maximum security prison caused Nagle to conclude Purifoy should be terminated. Therefore, the Commission cannot conclude Purifoy was terminated because of her marital status. Instead the evidence establishes that respondent terminated Purifoy because of its belief that Purifoy lacked good judgment, was untrustworthy and was a high security risk.

Finally Purifoy makes two other arguments: Respondent's conflict of interest policy violates her first amendment right to freely associate with anyone, including the right to marry. Respondent's dismissal of her violated

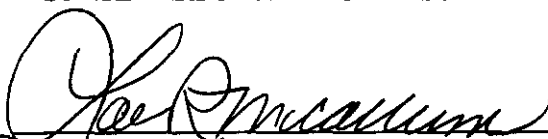
¹ Respondent's position was that this was unfortunate but was compelled by budgetary reasons, and these inmates worked under close security oversight.

due process. These constitutional claims appear independent of Purifoy's WFEA claim which provides the sole basis of the Commission's subject matter jurisdiction over this case, and Purifoy having not previously established them as issues before the Commission, they will not be addressed.

ORDER

This complaint is dismissed.

Dated: December 22, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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**NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION**

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats.,

and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)