

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JAMES GANTHER,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
REVENUE,**  
*Respondent.*

**RULING ON PETITION  
FOR REHEARING**

Case No. 97-0152-PC-ER

**NATURE OF THE CASE**

This case involves a complaint of discrimination on the basis of disability. In an order entered March 22, 2000, the Commission established the following issue for hearing: "Whether respondent discriminated against complainant on the basis of disability when it allegedly failed to rehire him on a permissive transfer basis into a Revenue Auditor position in Office Audit Unit K between October 1996 and July 1997 " In a decision and order dated October 15, 2001, the Commission ruled against complainant and dismissed this complaint. On November 2, 2001, complainant filed a petition for rehearing which the Commission now addresses.

Pursuant to §227.49(3), Stats., a petition for rehearing will only be granted on the basis of:

- (a) Some material error of law;
- (b) Some material error of fact;
- (c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

Many of the points raised in the petition involve differences of opinion and reargument with regard to matters in the final decision with which complainant disagrees. While the Commission has considered the entire document, it will not address every point included in the petition. Also, it should be noted that in its decision, the Commission concluded that complainant did not establish a prima facie case because he did not show he was "an individual

with a disability” pursuant to §111.32(8), Stats., and because he did not show that the members of management responsible for the transaction in question had an awareness of a disability or perceived complainant as disabled. While the failure to establish a prima facie case was fatal to complainant’s case, the Commission proceeded to analyze whether respondent’s rationale for its decision was pretextual. Most of complainant’s arguments in his petition run to the pretext issue, which is technically moot unless the Commission were to change its ruling on the prima facie case issue.

Complainant contends the Commission erroneously dismissed portions of his claim prior to the hearing. This contention is apparently with regard to the Commission’s rulings of April 21, 1999, which dismissed parts of his complaint due to untimely filing<sup>1</sup>, its ruling of March 22, 2000, establishing the issue for hearing, and its ruling of April 19, 2000, denying his request to reconsider the March 22, 2000, ruling. Complainant has not advanced any reasons why these rulings should be overturned.

Complainant contends that Finding of Fact 2 is incorrect because it refers to a reprimand he received for “placing harassing telephone calls to a female co-worker,” and he says he actually received a reprimand “for contacting a female employe when there was a no contact order in effect.” Petition for rehearing, p. 1. He submits with his petition a copy of the actual written reprimand dated July 26, 1996. However, he does not attempt to explain why this document was not submitted in connection with the hearing.<sup>2</sup> In any event, this finding simply provides background with regard to the complainant’s psychological evaluation respon-

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<sup>1</sup> Among other things, this ruling dismissed as untimely filed complainant’s claim that he was discriminated against with regard to his “failure to be reassigned/reallocated to a Revenue Auditor position in the Audit Bureau as a result of the department reorganization.” April 21, 1999, ruling, p. 2. During the course of this hearing, a good deal of evidence was taken concerning that matter as well as other matters that preceded the sole remaining issue for hearing (“failure to be ‘rehired’ into a Revenue Auditor position in the Audit Bureau between October 1996 and July 1997”, *id.*). While these events may have some relevance to the actual issue before the Commission, they are not issues per se, notwithstanding that a number of complainant’s arguments seem to address these ancillary matters as if they were actual issues in the case.

<sup>2</sup> Respondent entered into evidence at the hearing a copy of the July 26, 1996, letter informing complainant of his three day suspension without pay and referring to making “five telephone calls from your work telephone” of a harassing nature. Respondent’s Exhibit 5.

dent eventually required, which is relevant to complainant's disability claim. A change in this finding could not possibly have any effect on the outcome of this case.

Complainant objects to finding 7, and the determination by a majority of the Commission that complainant did not establish that he suffered from depression on a continuous basis during the period in question, that his depression interfered with his ability to work, or that it made it difficult for him to concentrate. He also requests the opportunity to produce additional medical evidence.

Complainant refers to the medical documents in evidence, and points out that he denied at hearing he had made the statement that he had stopped taking medications in 1994 during his evaluation, that Dr. Hummel attributed to him in his report. In the report, he (Dr. Hummel) states:

Mr. Ganther has previously been prescribed antidepressant medications which he believed he took in "early 1994, roughly." He did not continue taking the medication, however, because "I didn't think it helped me a lot" and he "thought I was better off without them." Respondent's Exhibit 9.

The Commission notes there is an approximate three year gap (March 1994-May 1997) in the medical records complainant submitted. If he had been taking antidepressant medications during this period, as complainant indicates, but which is contradicted by the quote attributed to him in Dr. Hummel's report, presumably he would have been able to produce some kind of medical records which would have reflected these prescriptions in order to contradict Dr. Hummel's statement, which complainant knew about prior to the hearing. In a somewhat related vein, complainant now requests the opportunity to provide additional medical evidence "indicating he suffers from depression." Petition for rehearing, p. 4. He provides no showing that this additional evidence is newly discovered or that it "could not have been previously discovered by due diligence." §227.49(3)(c), Stats. Complainant has not established a material error of fact or law, or that there was any reason he could not have presented the additional evidence at the hearing. Furthermore, this evidence would only run to one of the two elements of a prima facie case complainant failed to establish, and would not affect the outcome of this case.

Complainant objects to finding 9, which includes the statement that the Revenue Agent 4 lead worker position which had been occupied by Ann LaForce was filled in January 1998, at the Revenue Auditor 1 level. This finding was based on testimony by supervisor Greg Frazier that what happened to this position was that it was included with other accumulated vacancies, which were filled when respondent hired its next "class," and that this was a class of Revenue Auditor 1's. Frazier also testified that he did not know who filled the position, that the agency hired a class of Revenue Auditor 1's, and assigned them position numbers. Frazier did testify that respondent did not fill a Revenue Agent 4 or equivalent position derived from the LaForce position. While the record reflects some ambiguity about what happened to this position, it is reasonable to conclude it was utilized for hiring a class of Revenue Auditor 1's. The Commission also notes that a change of this part of this finding would not affect the outcome of this case.

Complainant objects to the statement in finding 10 that "[m]anagement decided that the most senior employee in each pay range (11, 12 and 13) in the Sales Tax Office Audit Unit would be reassigned to Office Audit Unit K, leaving the least senior employees remaining in the Compliance Bureau." This testimony was based on Frazier's testimony at the hearing and his statement in an affidavit submitted as Complainant's Exhibit 9. The latter document includes the statement that "It was decided that each of the pay ranges should be represented in the Office Audit Unit K in the Audit Bureau. The most senior persons in each of the pay ranges were reassigned to the Audit Bureau." The finding is consistent with this statement. It is a corollary of this statement by Frazier that the least senior employees in each classification level would remain in the Compliance Bureau. It is correct that Frazier testified at hearing that there were additional factors he considered in deciding who would be reassigned to Office Audit Unit K. *But he explicitly explained why he wanted all classification levels of the Revenue Agents represented in Office Audit Unit K, which was his statement in his affidavit.* Frazier also testified that Stanley Hook's class level (Revenue Agent 2) was not the only reason Hook

was assigned to Office Audit Unit K. This also was not inconsistent with management's interest in having all classification levels represented in Office Audit Unit K.<sup>3</sup>

Complainant objects to the statement in finding 11 that the positions reassigned to the audit bureau were reallocated to Revenue Auditor 2 or 3, claiming that this was actually Revenue Auditor 1, 2, or 3. Complainant's objection to this point is well-founded based on Terri Wilke's testimony, but this has no bearing on the outcome of this case. With regard to the Commission's determination that no salary changes resulted from the reorganization, complainant did not produce evidence on this point that would have been needed to sustain such a finding.

Complainant objects to finding 12 regarding the effective date of his reassignment to the Vehicle Review Unit. This finding was based on the official certification request for this transaction, Respondent's Exhibit 2, which explicitly provides an effective date of "101396." Regardless of complainant's contention that the reorganization could not be effective until it received the required approval in January 1997, this would not have any effect on this finding.

Complainant objects to finding 14, which states that during the time period in question there were no vacancies in any position in Office Audit Unit K to which complainant was eligible to transfer, as well as to finding 13, which includes the statement that management never "informed complainant there were vacancies in Office Audit Unit K to which complainant would have been eligible for transfer at that time." In the Commission's opinion, a great deal of the controversy in this case has been engendered by semantic issues regarding the meaning of the term "vacancy." The civil service code defines "vacancy" as "a classified position to which a permanent appointment may be made after the appointing authority has initiated an action to fill that position." §ER-MRS 1.02(34), Wis. Adm. Code. As discussed in the deci-

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<sup>3</sup> The Commission also notes that as a result of the Commission's April 21, 1999, ruling, the complainant's claim that he was discriminated against in connection with the decision as to whom to assign to Office Audit Unit K in connection with the reorganization was dismissed as untimely filed. While there was considerable testimony on a number of matters that preceded the subject matter of the actual issue remaining before the Commission ("Whether respondent discriminated against complainant on the basis of disability when it allegedly failed to rehire him on a permissive transfer basis into a Revenue Auditor position in Office Audit Unit K between October 1996 and July 1997."), including the reassignments that went along with the reorganization, respondent's initial decision as to whom to assign to Office Audit Unit K was not an issue before the Commission.

sion, the only potential vacancy during the period in question was that previously occupied by Ann LaForce. On the one hand, Frazier did not consider this position vacant because no decision was ever made during the relevant time frame to fill the position and to initiate the administrative steps that would have been necessary for filling by whatever means that management would have considered to have been appropriate—eg., transfer, competition, etc. On the other hand, there was a position that was not occupied by an incumbent, and it is conceivable management could have decided to have taken the steps necessary to have staffed this position during the relevant time period (October 1996 to July 1997), and then presumably complainant would have been eligible to have been appointed if he had submitted the necessary paperwork.<sup>4</sup> However, Frazier testified that he decided to incorporate this position with other vacancies that occurred in the department, and to fill them when the respondent started another Revenue Auditor 1 “class,” which occurred in January 1998, consistent with his usual practice. As indicated in the October 15, 2001, decision, even if it were assumed that complainant had established a *prima facie* case,<sup>5</sup> respondent had a legitimate, *non-discriminatory* reason for having decided not to have filled the position during the subject time period. There is little or no evidence that this approach, which was in keeping with management’s usual practice, was a pretext for disability discrimination.

Complainant objects to finding 15, arguing that the record shows that Elaine Larson’s position was classified at the Revenue Auditor 3 rather than the Revenue Auditor 4 level. However, this point could have no effect on the outcome of this case. First, this filled position was reassigned in the quarter ending March 1998, which is outside the relevant time period (October 1996-July 1997). Second, because the position was already filled, there was no vacancy to which complainant could have transferred, regardless of the classification level of the position. Complainant is essentially arguing that, rather than having reassigned this filled position to Office Audit Unit K during the first quarter of 1998, management could have decided to

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<sup>4</sup> Complainant did not submit the paperwork necessary to have been considered for a permissive transfer until March 30, 1998.

<sup>5</sup> The complainant did not establish that he was an individual with a disability or that anyone in management responsible for the transaction in question had any awareness of a disability or perception that complainant had a disability.

have filled the vacant position LaForce formerly occupied by transferring complainant into it during the relevant time period (October 1996-July 1997). As discussed above, Frazier said that he did not fill the LaForce position during the time frame in question because it was in keeping with his usual practice to periodically fill accumulated positions with a class of entry level auditors once sufficient vacancies had accumulated. This was not shown to have been pretextual,<sup>6</sup> and on this record, the bare hypothetical scenario with regard to the Larson position would not change the conclusion that no pretext was shown.

Complainant objects to finding 17 that the members of management involved in the transaction in question were neither aware of complainant's disability nor perceived him as disabled. Complainant argues that since Frazier should have reassigned complainant to Office Audit Unit K due to the fact he had a BBA degree in accounting, which complainant contends was basically a prerequisite to be hired as a Revenue Auditor, his failure to have done so leads to the conclusion that he must have perceived complainant as disabled. This does not follow. First, complainant's premise is inconsistent with Frazier's testimony that while it was helpful to have an accounting degree, they had a lot of auditors with varying degrees of education, including some without college degrees. Furthermore, since Frazier was not privy to either the decision that complainant have a psychological evaluation, or Dr. Hummell's ensuing report, and was not aware that complainant had been on administrative leave, there is no reason for him to have perceived complainant as mentally ill. That is, even if it were concluded that Frazier's handling of complainant's transfer situation made no sense, there is no reason to attribute his true motivation to a perception that complainant had a mental disability, as opposed to some other reason, such as complainant's disciplinary record.

Finally, complainant contends that Chairperson McCallum has a conflict of interest because she is married to the Governor. The Commission discussed a similar issue in *Balele v. DHFS, DER, & DMRS*, 00-0133-PC-ER, 8/15/01, at pp. 5-14, and denied a request that Ms. McCallum be removed from that case. Laying to one side the issue of waiver (Mr. Ganther did not raise this point when this case was before the Commission to consider the proposed de-

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<sup>6</sup> Again, the issue of pretext is only reached if complainant had established a prima facie case, which he has not.

cision issued June 8, 2001), the Commission sees nothing in the current objection to merit a different result.

This case was filed prior to the time (February 1, 2001), when Governor McCallum was appointed Governor to replace Governor Thompson,<sup>7</sup> and it concerns matters which occurred during Governor Thompson's administration. The potential impact that the disposition of this case could possibly have on any interests of Governor McCallum (and, through him, on his wife) are somewhere between infinitesimal and none. The only potential monetary remedy in this case would have required complainant to have shown that he would have had a higher salary if he had been transferred to a Revenue Auditor 3 position from his Revenue Agent 3 position during the relevant time period, which he failed to do, so the actual amount of money potentially involved in this case is unknown. Even if it were assumed that complainant could show lost salary as the result of not having been transferred, there is no reason to think this could possibly involve an amount of money that would be more than *de minimis*<sup>8</sup> in comparison with the state's budget. With regard to the possible political impact of a ruling in complainant's favor, in the *Balele* case the Commission noted that as Lieutenant Governor, Mr. McCallum had no line function in the administration, that he had no alleged personal connection to the appointment decision in question, and that:

No reasonable person could believe that a ruling favorable to the complainant in this case, which involves the appointment of a mid-level employe of DHFS prior to the time the Governor assumed his office, could somehow redound to the detriment of the current Governor, either from a political or a pecuniary statement. *Balele*, at p. 14.

The Commission sees no reason to reach a different conclusion in this case now before the Commission.

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<sup>7</sup> Chairperson McCallum has recused herself from cases that were filed after her husband became Governor.

<sup>8</sup> A transfer can only occur between positions in the same or counterpart pay ranges. §ER-MRS 1.02(33), Wis. Adm. Code.



ORDER

Complainant's petition for rehearing filed November 2, 2000, is denied.

Dated: December 3, 2001

STATE PERSONNEL COMMISSION

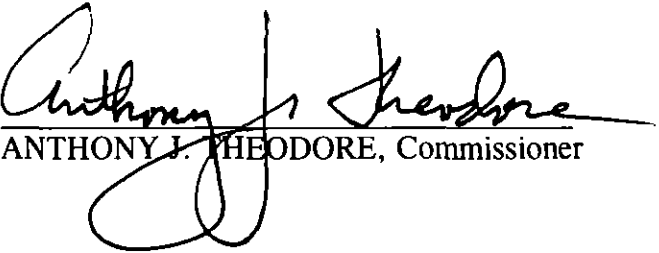
  
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

CONCURRING OPINION:

While I continue to disagree with the majority's determination that, on the evidence of record, complainant failed to establish that he was an individual with a disability, I concur in all other aspects of this ruling, including the conclusion that complainant has not established that he could not have produced additional medical evidence regarding his psychological condition by the exercise of due diligence. However, it should be noted that even if it were concluded that complainant was an individual with a disability, he did not establish an additional element of a prima facie case—i.e., that the members of management responsible for the failure to appoint him to a position in Office Audit Unit K were aware that he was a person with a disability, or perceived him as such. He also did not establish that respondent's rationale for not appointing him to that unit during the time period in question was pretextual. Therefore, even if complainant were considered to have been an individual with a disability, this would not change the final result of this case.



ANTHONY J. THEODORE, 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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.)

2/3/95