

SHRI KRISHAN,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

DECISION
AND
ORDER

Case No. 99-0171-PC-ER [REDACTED]

This matter is before the Commission as a complaint of discrimination under the Wisconsin Fair Employment Act (WFEA), subch. II, ch. 111, Stats. The issue for hearing, established by ruling of the Commission dated January 9, 2002, reads as follows:

Whether the respondent discriminated against complainant on the basis of age, color/race, creed or national origin/ancestry with respect to the denial by Thomas Haack in October of 1999 of complainant's 6 requests for compensatory time for tutoring.

FINDINGS OF FACT

1. Complainant is male and is of Indian descent. He was born in India in 1932. Complainant's religion is Hindu.
2. Complainant has worked as a math teacher at respondent's Ethan Allen School (EAS) since 1977.
3. While the regular workday for teachers at EAS was 7:45 until 4:30, some teachers have elected to work flextime. At all relevant times, the complainant's approved flextime hours were from 6:45 a.m. until 3:30 p.m.
4. Richard Winz served as the EAS Director of Education from approximately 1990 until approximately 1997. Kathy Alderman became the Director of Education upon Mr. Winz's departure.

5. Tom Haack has served as a teacher supervisor at EAS for approximately 10 years. His duties include reviewing all compensatory time (comp time) requests for EAS teachers. Mr. Haack became complainant's supervisor when complainant was transferred from Vilas Cottage to Andrews Cottage during the spring of 1999, while complainant was on medical leave.

6. Teachers at Ethan Allen School are employed year round, in comparison to typical public school teachers. Ethan Allen teachers earn vacation time and sick time and may also earn comp time. Comp time may be substituted for other leave.

7. Teachers earn comp time by participating in some EAS activity that is approved by management. Some examples of comp time activities are serving as a coach for football, basketball and several other sports, serving as supervising teachers for Alcoholics Anonymous (AA), tutoring students in specific areas, and supervising the night library or computer labs. Some comp time activities involve a team of teachers, while others are conducted by a single teacher.

8. Every hour of comp time taken by a teacher translates into one less hour of instruction by the teacher during the regular school day.

9. The use of comp time has been a longstanding bone of contention between management at Ethan Allen and the union that represents the teachers at the school. The union simply sees comp time as an extension of the regular school day and believes tutoring of students (which earns comp time for the teacher providing the tutoring) is an appropriate part of educational services. Management believes that because earning comp time means that classes will, on some later date, be cancelled during the regular school day, students are losing out on educational services.

10. At least some EAS teachers view comp time as a method for increasing their annual vacations. As a consequence, management has chosen to more closely regulate comp time. Complainant viewed comp time as "extra vacation which you can take at your convenience." T22¹

¹ This is a reference to page 22 of the transcript.

11. Over the last several years, EAS management has tightened up the procedures for obtaining comp time and has implemented new written procedures. This process has been a gradual one.

12. At all relevant times, respondent required comp time requests for planned activities to be submitted in writing for approval.

13. At the time Kathy Alderman became Director of Education in approximately 1997, she instituted a policy that all comp time activities, except sports and certain other activities, had to be conducted after 5:30 p.m. T19

14. The school day at EAS is divided into school "hours" and 8th and 9th hours at EAS run from approximately 3:15 until approximately 4:30.

15. Since approximately 1996, management had directed the teachers to submit their comp time requests for each calendar year by the beginning of February of that year.

16. Beginning with 1999, management directed each individual teacher who was going to participate in an activity to submit their own separate comp time request rather than relying on the lead-teacher for that activity to submit one request for all teachers who would be participating in the activity.

17. Respondent did not consider all activities as equally deserving in terms of comp time. During the time period in question, there was a priority system for comp time activities. There were 3 tiers in this system. The highest tier included sports activities. The intermediate tier was for treatment programs and the lowest tier included tutoring.

18. During the period that is relevant to the issue for hearing, complainant frequently chose to send students out of his classroom during regular school hours as a behavioral control mechanism. When this occurred, the practice was for Mr. Haack to talk with the student and de-escalate the situation.

19. While student attendance during regular classes is mandatory, attendance for tutor sessions is voluntary. T97

20. During calendar year 1997, complainant earned 160 hours of comp time.

21. Complainant took a vacation commencing November 24, 1997, to visit his elderly parents in India. While there, complainant became ill or was injured and he advised respondent that he would be away from work for an additional period by using comp time in lieu of sick time, or that he would be substituting comp time for his previously scheduled vacation time. Complainant did not return to work at EAS until March 24, 1998, after a four-month absence.

22. After complainant returned to work he was very interested in earning comp time. Ms. Alderman, the Director of Education, admitted telling complainant that she would not allow him to earn additional comp time until he exhausted his vacation time. T191 She also acknowledged directing the person in charge of the AA activity (Ms. Dargin) not to use complainant as a substitute teacher for that program. Ms Alderman's motivation in limiting complainant's ability to earn comp time was based, in part, on the fact that the other teachers who might serve as substitutes had not been gone for a substantial period of time. Ms. Alderman was also motivated by the facts that complainant was a math teacher, math was a critical area of study for EAS students during their regular school day, and approval of comp time for complainant would ultimately reduce the time he spent teaching math to students during the regular school day. T204.

23. Complainant only earned 5.5 hours of comp time in 1998.

24. On September 15, 1998, complainant again left on a vacation to visit his parents in India. While there, complainant again became ill or was injured and he advised respondent that he would be away from work for an additional period by using comp time in lieu of sick time, or that he would be substituting comp time for his previously scheduled vacation time. Complainant did not return to work at EAS until May 17, 1999, after an eight-month absence.

25. During this period, complainant was reassigned from Vilas Cottage to Andrews Cottage. T203 The students in complainant's cottage did not receive standard math instruction during complainant's absence because there was no one who could step in and teach complainant's classes for him. T68

26. Mr. Haack was frustrated during complainant's absence and by complainant's use of comp time. T67, T160

27. When he returned to work on May 21, 1999, complainant was desperate to earn comp time. He frequently contacted the teacher who headed the AA program, Ms. Seehafer, and asked to be used as a substitute whenever a scheduled teacher cancelled. He also contacted the teacher who had formerly headed the AA program, Ms. Dargin, and who later reassumed that role from Ms. Seehafer, with the same goal.

28. Mr. Haack was willing for complainant to be listed at the bottom of the AA substitute list, but complainant wanted to be at the top of the list so that he would be the first person selected if there was a need for a substitute. T116

29. After complainant returned to work, Mr. Haack approved a couple of complainant's time sheets that included comp time hours even though complainant had not filed a written comp time request. T121 It was only after he had approved those time sheets that Mr. Haack told complainant that he needed to submit a written request before any additional time would be approved.

30. Mr. Haack expressed his frustration about complainant's comp time practice.²

² According to complainant's testimony, in approximately June of 1999, Mr. Haack said to him: "You go to India and become sick." Mr. Haack denied making this statement. T160.

Mary Turnbull, EAS speech pathologist and president of the teachers' union, testified, T61, that she had a conversation in which Mr. Haack explained to her why he was denying comp time for complainant:

[H]e had some grave concerns about the fact that you [Mr. Krishan] were using comp time to go to visit your aged parents in India. And that when you went there you would get ill and you would stay longer than you had anticipated in the first place and that you were using comp time to do this. There was an expression on it that perhaps by limiting your comp time then that would also curtail some of this activity because you were absent from your job too much.

Ms. Turnbull did not recall when this occurred. T70. Mr. Haack denied making this statement. T160.

Mary Joas, another EAS teacher and a member of the union board, testified, that on another occasion, T94:

31. Mr. Haack also suggested that complainant submit a written request to staff a night library program in the library/computer lab. Complainant submitted such a request on September 30, 1999. (Comp. Exh. 13, p. 1) Complainant estimated that the activity would take 6 hours per week. He proposed that his co-teacher for the program would be a new teacher, Harold Hack.

32. Mr. Haack denied this request because of "security concerns." During the night library, the two teachers who staff the program provide security for each other. Mr. Haack was concerned that Mr. Hack, who was a new teacher and was confined to a wheelchair, would be unable to provide adequate security during the program.

Comp time requests at issue

33. On October 7, 1999, complainant submitted 6 separate requests for comp time. None were group requests. All 6 listed the following for the "goals and purpose" of the activity: "Improve & enhance math skills & for HSED [High School Equivalency Diploma]."

a. Marked as request #1 of 6. For: "Teaching after school" during 8th and 9th hours, daily (Monday through Friday) at Andrews Cottage. Complainant estimated the activity would take 10 hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "Not approving comp time for this type of activity during the times listed."

b. Marked as request #2 of 6. For: "Teaching after school" during 8th and 9th hours, daily (Monday through Friday) at Stout Cottage. Complainant estimated the activity would take 10 hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "See 1 of 6."

Mr. Haack's answer was the only reason Mr. Krishan wants comp time is so he can go to India and abuse the comp time.

Ms. Joas testified that this occurred in the fall of 1999. T107

c. Marked as request #3 of 6. For: "Teaching after school" from 5:30 to 8:00 p.m., daily (Monday through Friday) in Room 108. Complainant estimated the activity would take 10 hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "Security concern."

d. Marked as request #4 of 6. For: "Teaching after school" from 5:30 to 8:00 p.m., daily (Monday through Friday) in Stout Cottage. Complainant did not provide a separate estimate of the hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "Security concern."

e. Marked as request #5 of 6. For: "Teaching after school" from 5:30 to 8:00 p.m., daily (Monday through Friday) in Andrews Cottage. Complainant estimated the activity would take 10 hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "Security concern."

f. Marked as request #6 of 6. For: "Teaching after school" during 8th and 9th hours, daily (Monday through Friday) in Room 108. Complainant estimated the activity would take 10 hours per week. Mr. Haack denied this request on October 15, 1999, and wrote: "See 1 of 6."

34. Mr. Haack denied complainant's 6 comp time requests for several reasons. He denied all of the requests because they were for tutoring in math. As of October of 1999, tutoring was very low on the EAS comp time priority list. T141

35. Mr. Haack denied requests #1, #2 and #6 because complainant had proposed them for 8th and 9th hours and tutoring was not an approved exception to the general prohibition against comp time activities prior to 5:30 p.m.

36. Mr. Haack was also reluctant to permit complainant to teach after 5:30 p.m., because of complainant's practice of sending his students out of the classroom as a behavioral control mechanism, and because of the more limited availability of appropriate staff at the institution after 4:30 who could then talk with the student in an effort to de-escalate the situation.

37. Because Room 108 is in a relatively isolated area of the school, Mr. Haack had an additional security reason for rejecting requests #3 and #6.

38. HSED students are relatively self-motivated. They typically have the skills to work independently, without tutoring. T145

39. In 1999, complainant only earned 24 hours of comp time.

40. On an unspecified date, but after complainant had returned from his extended leave that ended in May of 1999, complainant took a vacation to California, was injured and converted vacation leave to sick leave. T162

41. Respondent only approved 3 comp time tutoring requests at EAS during 1998 and 1999 (Resp. Exh. 101):

a. Mr. Brookhyser, who is white, of U.S. national origin and unknown date of birth, earned 62.45 hours of comp time as a reading tutor at EAS in 1998 but he left employment there in September of 1998 and he was not employed by EAS in 1999.

b. Ms. Smith, who is white and was born in the U.S. in 1943, earned 53.45 hours of comp time as a reading tutor in 1998. Her request to serve as a reading tutor in 1999 was approved at the beginning of the year for up to 90 hours.

c. Sharon Matuszewski, who is white and was born in the U.S. in 1955, submitted a comp time request on December 21, 1998, for the following calendar year, to provide math tutoring to the residents of Bruce Cottage. Ms. Matuszewski's religion is not of record.

42. The respondent's decision to approve comp time for both Mr. Brookhyser and Ms. Smith was because EAS had vacant reading teacher positions at that time and it was unable to offer regular reading classes to certain students. The only way to get reading taught at all to those students was through a tutoring program. Respondent's decision to approve comp time for Mr. Brookhyser and Ms. Smith as reading tutors was temporary and was only to continue for the duration of the absence of the regular reading teachers. Neither Mr. Brookhyser nor Ms. Smith earned comp time as reading tutors once permanent reading teachers were hired to fill the vacancies.

43. At the time Ms. Matuszewski submitted her request, two math teachers, complainant and Ms. McCallum, were on extended leaves and the residents of Andrews and Bruce cottages were not receiving math instruction. Respondent had no method to

provide math instruction to the students during the regular school day. Respondent approved Ms. Matuszewski's comp time request for up to 90 hours, until such time that permanent math teachers became available to provide math instruction during the regular school day. Ms. Matuszewski only earned 30 hours of comp time for this activity during 1999. Permanent math teachers were in place by October of 1999 and Ms. Matuszewski was not earning comp time for math tutoring by that time.

44. Ms. Matuszewski submitted a comp time request for a PM math program for calendar year 2000. Respondent denied the request because tutoring was very low on respondent's comp time priority list. T150

CONCLUSIONS OF LAW

1. Complainant has the burden of establishing that respondent discriminated against him based on his age, color/race, creed or national origin/ancestry when it denied his 6 comp time requests submitted on October 7, 1999.
2. Complainant failed to sustain his burden.
3. Respondent did not discriminate against the complainant as alleged.

OPINION

In cases of this nature involving disparate treatment claims, the initial burden of proceeding is on the complainant to show a *prima facie* case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. See *Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

Where a case has been tried fully, it is unnecessary to analyze whether a *prima facie* case has been established, and the Commission should go ahead and address the question of pretext. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) An exception to this ap-

proach is where there is a missing element of a prima facie case which is also an essential element for establishing liability. The Commission will proceed on the assumption that complainant has established a prima facie case of discrimination and will go directly to the question of pretext.³

Respondent established numerous, valid reasons for denying the complainant's six comp time requests that he submitted on October 7, 1999. By that time, respondent was no longer approving requests for tutoring programs because the reading and math teacher positions had been filled. By October, respondent was not granting comp time to teachers who had previously been approved for tutoring during the 1999 calendar year. Three of complainant's October 7th requests were for 8th and 9th hours and were inconsistent with the general policy established in 1997 that required comp time activities to be conducted after 5:30 p.m. (Findings 13 and 14) The evening staffing pattern at EAS made it unlikely that someone on the teaching staff could respond if complainant continued his practice of sending his students out of the classroom as a behavioral control mechanism. Respondent had reasonable security concerns about evening activities in Room 108. These were all reasonable and valid reasons for rejecting complainant's October 7th comp time requests for math tutoring programs.

Complainant contends that Mr. Haack actually denied the requests because of complainant's age, color/race, creed and national origin/ancestry. The comparisons to Mr. Brookhyser, Ms. Smith and Ms. Matuszewski do nothing to support the complainant's claims. The record shows that all three of these teachers are white, were born in the U.S., and are younger than complainant. The complainant failed to establish the creed of these three teachers. Even if complainant had established that information, he failed to establish that these three individuals were similarly situated to him. To the

³ In its posthearing brief, respondent argues that the complainant was not subjected to an adverse employment action because an award of comp time is a privilege rather than a right and because the denial of comp time is comparable to a "mere inconvenience or an alternation of job responsibilities" as referenced in *Oest v. Ill. Dept. of Corrections*, 240 F.3d 605, 612 (7th Cir. 2001). Because of how this case was tried and because the Commission concludes that respondent's decision to deny complainant's October 7th comp time requests was for reasons that were not discriminatory, the Commission declines to address this argument.

contrary, respondent established that it had approved their tutoring requests because EAS was unable, at that time, to provide the students in question with their regular classes in reading or math. Tutoring was the only way to provide those students with teaching in those areas at that time. This situation no longer existed at the time of complainant's October 7th requests. This conclusion is confirmed by the respondent's subsequent decision to deny Ms. Matuszewski's comp time request for a PM math program for calendar year 2000.

Complainant points to several statements allegedly made by Mr. Haack in which he expressed frustration with complainant's extended leaves to India.⁴ Complainant, Ms. Turnbull and Ms. Joas all testified to having heard such comments. Mr. Haack denied having making the statements but admitted that he was frustrated with complainant's practice of earning and using comp time despite having taken two leaves totaling 12 months during the previous two years.

The Commission finds that the majority of the evidence supports the conclusion that Mr. Haack did refer to "India" when he expressed his frustration about complainant's extended leaves. However, the Commission also concludes that the reference to India did not indicate a discriminatory animus on the part of Mr. Haack. It merely described the destination of complainant's first two trips that resulted in his extended leaves. It is very difficult to believe that respondent would have acted any differently with respect to complainant's October 7th comp time requests if the complainant had experienced his extended vacations/illnesses in Boston or Las Vegas rather than in India. Complainant acknowledged the lack of evidence of a discriminatory animus in the following exchange at hearing:

Q (by Respondent) Now do you have any reason to believe that Mr. Haack would have treated your comp request any differently if you had instead of going to India you had gone to California and gotten sick for those extended periods of time?

A Only Mr. Haack - only Mr. Haack can answer that question. I do not know the answer to that question. . . .

⁴ See the footnote to Finding 30.

A My absence whether it is in this country or in India as far as the effect of my absence is concerned yes it do not be any different. T231

The record shows that the complainant and management had different views of comp time. Complainant saw it as "extra vacation." Management at EAS focused on the fact that each hour of comp time translated into one less hour of regular classroom time for that teacher. Complainant's status as a Hindu of Indian descent born in 1932 was irrelevant to respondent's decision to deny the 6 comp time requests he submitted on October 7th. Respondent based its decision on other, non-discriminatory factors.

Complainant's objection to consideration of respondent's post-hearing brief

In his reply brief, the complainant reiterated an objection to respondent's post-hearing brief that was due on September 11, 2002.

The hearing in this matter was held on July 22 and 23, 2002. At the conclusion of the hearing, the examiner established a schedule with the parties for submitting post-hearing written arguments. Respondent stated that it would prepare, internally, a transcript of the hearing and submit a copy of the transcript with its post-hearing brief. Complainant's brief was to be received no later than August 21, 2002, respondent's response was to be received no later than September 11, 2002, and complainant's reply was to be received no later than September 23, 2002. Complainant filed his brief on time. Respondent sent an email to the Commission and to the complainant during the afternoon of September 10, 2002, and attached to the email its post-hearing brief, the transcript and a cover letter. Respondent's brief was 19 pages in length, while the transcript ran more than 260 pages, single-spaced. Respondent also mailed a hard copy of these documents to both the Commission and to the complainant.

Complainant has acknowledged that he received respondent's email transmission on September 10th, but he states he was unable to open it because of "technical problems" and because of his "lack of computer skills." Both the Commission and complainant received the hard copies of the respondent's submissions by the end of the day on September 12th.

On September 12th, complainant filed, by fax, a motion to disregard respondent's posthearing brief as untimely. After both parties had a chance to submit arguments regarding complainant's motion, the hearing examiner issued a ruling by letter dated September 16th and denied complainant's motion. However, the examiner extended the due date for complainant's reply brief so that he had 12 days from receipt of the letter ruling in which to file his reply brief. Complainant disagreed with this ruling and reiterated his objection to consideration of respondent's posthearing brief. In an email message dated September 18th, the hearing examiner denied reconsideration of his September 16th letter ruling. Complainant raised the issue again in his submission dated September 26th and it is this objection that is now before the Commission.

The Commission declines to alter the hearing examiner's ruling. Pursuant to §PC 1.09, Wis. Adm. Code:

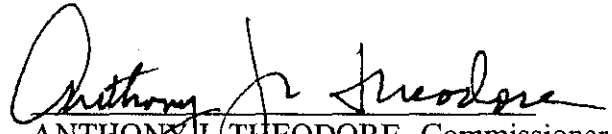
The hearing examiner or the commission may establish a briefing schedule on any issue or motion pending before it and *may* decline to consider any brief that is filed after the brief is due. (Emphasis added.)

Even if the Commission were to conclude that the respondent had not been in technical compliance with the original posthearing briefing schedule, the Commission would exercise its discretion and consider respondent's brief because it was emailed to the Commission and to complainant on September 10th and because respondent followed up with a hard copy of the brief that reached both the Commission and the complainant on September 12th, the day after the due date. Complainant received an extension for filing his reply brief so he had the same number of days to prepare his reply brief after he received the ruling on his objection that he would have had if the hard copy of respondent's brief had reached him on September 11th rather than on September 12th.

ORDER

This complaint is dismissed.

Dated: January 23, 2003 STATE PERSONNEL COMMISSION


ANTHONY J. THEODORE, Commissioner

KMS: 990171Cdecl

Commissioner Theodore is the sole sitting commissioner; the other two commissioner positions are vacant. Therefore, Commissioner Theodore is exercising the authority of the Commission. *See* 68 Op. Atty. Gen. 323 (1979).

Parties:

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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