STATE OF WISCONSIN STATE PERSONNEL COMMISSION

DAVID CHRISTENSEN,

Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES & DIVISION OF PERSONNEL,

Respondent.

Case No. 77-62.

DECISION

NATURE OF THE CASE

This is an appeal pursuant to section 16.05(1)(f), Stats., of a decision of the Director upholding an appointment by respondent to a position for which appellant was among those certified.

FINDINGS OF FACT

1. Appellant applied and was one of 3 applicants certified for a position as Administrative Assistant 3 - Inmate Complaint Investigator - Confidential in the classified state civil service.

2. The selection process for this position was conducted by the respondent on a delegated and open competitive statewide basis.

3. The certification for the position was not on a selective or Ch. Pers. 27, W.A.C., basis.

4. The appointing authority, Warden Israel, Wisconsin State Prison - Waupun, appointed a black male certified applicant to the position on March 27, 1977.

5. The appellant is a white male.

6. The appointment was made following a recommendation by a committee of associate wardens, who had interviewed all 3 certified applicants, that the prison hire the black male certified applicant.

7. The achievement of affirmative action goals regarding the establishment of a balanced work force at the prison was one factor among several involved in the decision by the committee to recommend the black applicant.

8. The Division of Corrections's affirmative action plan (Appellant's Exhibit 9A) included the following directive:

> "...each request to fill a position must be reviewed against past accomplishments and established Affirmative Action goals."

(emphasis in original).

9. The Division of Correction's affirmative action plan (Appellant's Exhibit 9A) contained the following statement by the secretary of Department of Health and Social Services:

> "I believe affirmative action is our legal and moral obligation, but also has a direct effect on the quality and credibility of the services this agency delivers."

10. As of July 3, 1976, there were 21 females and 12 minorities out of 326 staff at the prison.

11. As of December, 1974, the minority adult resident (institutional) clientele percentage was 45%.

12. As of December, 1975, the percentage of minority staff in the Division of Corrections was 3.9%.

13. The relatively small percentage of minority staff was despite the following efforts to increase the percentage of minority staff:

A. The state Positive Action Program, initiated in 1968, which was designed to increase the number of individuals from socially or economically disadvantaged groups in all areas of state civil service employment through:

(1) The recruitment and hiring of disadvantaged applicants from all segments of the population, and at all levels of state service;

(2) Elimination of non-job related qualifications;

(3) Identification of suitable entry level positions for persons who have completed poverty program counselling or training;

(4) Participation in federally sponsored counselling and training programs designed to help people bridge the gap between poverty and full employment.

B. The Public Services Careers, a federally funded program initiated in 1971 with the purpose of hiring disadvantaged people into state service and to upgrade currently employed disadvantaged people.

C. The state Emergency Employment Act initiated in 1971 with the purpose of providing meaningful job opportunities to unemployed persons with the emphasis on Vietnam era veterans and disadvantaged/minority job seekers through:

(1) Providing funding in order to employ minorities in Division of Corrections positions.

(2) Providing financial relocation assistance to individuals so employed.

D. The departmental affirmative action master plan began in 1972 with a goal of increasing the number of minorities and women at all levels in the work force through human relations training for all staff and continuing efforts at minority recruitment.

E. The funding of correctional positions through the Comprehensive Employment and Training Act.

14. The small percentage of minority staff indicated in findings 11 and 12 was due at least in part to the following problems:

A. Division of Corrections recruitment efforts have failed to attract adequate numbers of minority applicants, due to the poor image of corrections in the minority communities and the lack of a coordinated aggressive recruitment program.

B. The prospective minority employe has faced substantial problems relocating to institutions located for the most part considerable distances from urban areas of high minority concentrations. This problem area includes specific problems in locating housing, providing sufficient money for initial utility hook-up costs, rent deposits, transportation, social life, community attitudes, and the frequent need to maintain two households while serving the initial six month probationary

period required by section 16.22(1)(a), Wis. Stats., (1975).

C. There has been a lack of assistance to enable minorities to adjust successfully to the new work and living environment, including the failure of the Division of Corrections to develop an effective program in the area of human relations training for all personnel or mechanism for resolving conflict which will create an atmosphere conducive to successful adjustment.

D. There has been an absence of standardized personnel policies and practices in the Divison of Corrections which has worked to exclude minorities by the subjective interpretations of personnel practices which vary throughout the division in all areas, including recruitment and application, selection and appointment, training, transfer, promotion, discipline and termination.

15. The imbalance between the percentages of minorities employed by the division and the institutions has lead to an environment that has been counterproductive to the division's rehabilitative goals.

16. The division listed as goals in its fiscal year 1977 affirmative action plan, the hiring of 8 females and 6 minorities out of 71 projected hires on a one year basis and the hiring of 25 females and 28 minorities out of 240 projected hires on a 5 year basis.

17. These affirmative action goals were objectives and not requirements.

18. The prison has an internal policy effectuated by Warden Israel that associate wardens have the authority to hire the persons ranked first in the certification. If they wish to hire someone other than the individual ranked first they must present the reasons therefore to the warden who then makes the final decision.

19. This procedure was followed with respect to this position, the appellant having ranked first.

20. The Warden's decision to appoint the black applicant was not based on affirmative action considerations, but primarily on the investigative experience of the black applicant acquired during a number of years of employment by the Milwaukee Police Department.

21. The director affirmed the action of the appointing authority with regard to this appointment. See Board's Exhibit #2.

22. The appellant filed an appeal with the Personnel Board within 15 days of the aforesaid decision of the director. See Board's Exhibit #3.

23. The issues which were agreed to at the prehearing conference and which served as the basis of notice of hearing are as follows (see Board's Exhibit #4):

A. "Whether or not the Director's decision as contained in the April 11, 1977, letter affirming the department's decision was correct."

B. "Whether or not the appointment was in violation of s. 16.14, Wis. Stats."

CONCLUSIONS OF LAW

1. This case is properly before the commission pursuant to section 16.05(1)(f), Wis. Stats., (1975).

2. The prohibition against discrimination on the basis of race contained in section 16.14, Wis. Stats., (1975), is coextensive with the equal protection clause of the fourteenth ammendment to the United States Constitution.

3. The appointment by Warden Israel to the position of Administrative Assistant 3 - Inmate Complaint Investigator - Confidential was not in violation of section 16.14, Wis. Stats., (1975).

4. The director's decision as contained in the April 11, 1977, letter affirming this appointment was correct.

OPINION

The issues in this appeal, as stated in the prehearing conference report, are whether or not the appointment was in violation of section 16.14, Wis. Stats., (1975), and whether the director's decision affirming that appointment was correct. Subsequent procedural issues were raised concerning the admissibility into evidence of expert testimony regarding the results of a polygraph test.

In an interim decision dated January 5, 1978, the hearing examiner ruled that the appellant would not be barred from introducing evidence concerning the results of a polygraph test

solely because of the absence of a stipulation by the parties regarding the test. This decision, a copy of which is attached, is incorporated by reference and adopted as a part of this decision as if fully set forth. Thereafter, the appellant submitted to a polygraph examination and sought to introduce the opinion of the polygraph examiner as expert testimony regarding the honesty of his responses during the test. The respondent objected to the admission of this testimony on the grounds that it lacked sufficient foundation, and a ruling was reserved. This objection is now overruled. Both the qualifications of the expert examiner and the procedures used in the examination were presented in sufficient detail to provide an adequate foundation for the testimony in question. Moreover, it was not essential that the test sheets from the examination be introduced into evidence as a foundation for the examiner's testimony. For, section 907.03, Wis. Stats., (1975) states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This statute clearly establishes that the polygraph examiner could give opinion testimony which was based on facts or data he perceived during the polygraph examination--regardless of whether or not those facts or data were themselves presented

as evidence. Thus arguments that the admission of the graphs was necessary to establish a foundation for the opinion testimony are not convincing.

The substantive issue on this appeal is whether or not the appointment was in violation of section 16.14, Stats. The applicable provisions of this statute state:

> No discrimination shall be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of his political or religious opinions or affiliations or because of his age, sex, handicap, race, color, national origin, or ancestry except as otherwise provided.

The key word in this statute is "discrimination." This word is not defined in subchapter II of chapter 16, which contains section 16.14, and there are no Wisconsin Supreme Court cases that interpret this section. BLACK'S LAW DICTIONARY 553 (4th edition, 1968) contains a number of definitions. The most general definition is:

> "In general, a failure to treat all equally; favoritism."

A more specific definition is:

> "In constitutional law, the effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privilege granted and between whom and those not favored no reasonable distinction can be found."

With respect to the first and more general definition, it is clear that at least in terms of constitutional analysis under the equal protection clause of the fourteenth amendment to the United States Constitution, absolute equality of treatment by the government at all times and under all circumstances is not

required. In other words, it is not impermissible per se to classify on the basis of race. The United States Supreme Court has refused to adopt such a rule on a number of occasions when it was reviewing such legislation. See Korematsu v. United States, 323, U.S. 214, 65 S. Ct. 193, (1944); Hirabayshi v. United States, 320 U.S. 81, 65 S. Ct. 1375, (1943); McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, (1964); Loring v. Virginia, 388 U.S.1, 87 S. Ct. 1817, (1967); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, (1973).

The question remains, however, whether the prohibition on discrimination contained in section 16.14 is more restrictive than that found in the equal protection clause and prohibits any kind of unequal treatment or any classification on the basis of race.

As noted above, there have been no Supreme Court cases interpreting section 16.14, and the commission has been unable to find any legislative history with respect to the legislation which added the language after "affiliations," Laws of 1971, ch. 270, section 41. However, it does not make sense that the legislature intended that the state could not take into consideration whatsoever in "recruitment, application, or hiring," a person's "age, sex, handicap, race, color, national originor ancestry." Such an interpretation would mean, for example, that the state would not refuse to hire a blind person as a pilot or to hire a twelve-year old person as a police officer.

In the absence of some tangible indication of legislative intent, the commission will not conclude that by its amendment (Laws of 1971, ch. 270, section 41) to section 16.14 the legislature intended to impose more stringent requirements on the state civil service than that imposed by the equal protection clause. Inasmuch as the equal protection clause of the United States Constitution applies to the states, it should not be presumed that the legislature intended that less stringent requirements be imposed.

The latest detailed pronouncement by the United States Supreme Court on the subject of the equal protection clause and "reverse discrimination" in the context of a governmental affirmative action program was Regents of the University of California v. Bakke, 46 U.S. Law Week 4896, (6/28/78). This case involved a medical school's special admissions program which reserved a specific percentage of seats in the entering class for minorities. Bakke, a white male, was refused admission as a regular applicant for the non-reserved seats. Because he was not a minority he was not permitted to compete for the reserved seats. There were minority students admitted under the special admissions program who had lower undergraduate gradepoint averages and other objective scores than Bakke.

The judgement of the court was expressed in an opinion by Justice Powell in which four other justices concurred. The court held that "benign" discrimination against a member of the white race in the context of a governmental affirmative action program was not insulated against the full requirements

of the equal protection clause of the fourteenth amendment:

> When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. E.g., McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-642, (1950).
>
> We have held that in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary...to the accomplishment' of its purpose or the safeguarding of its interest.' In re Griffiths, 413 U.S. 717, 722-723, (1973) (footnotes omitted); Loring v. Virginia, 388 U.S.1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196, (1964)." 46 U.S. Law Week at 4906.

The medical school argued that its special admissions program was justified by four purposes or goals:

> "(i) 'reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession...(ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." 46 U.S. Law Week at 4906.

The court held that the first reason, standing above, was improper. The second reason was held to be improper in the absence of a showing of constitutional or statutory violations for which the reverse discrimination constituted a remedy. The third purpose was rejected because there was no showing that the special admissions program would in fact promote that goal. The fourth purpose was determined to be a constitutionally permissible goal for an institution of higher education:

> 'Physicians serve a heterogenous population. An otherwise qualified medical student with a particular background--whether it be ethnic, geographic, culturally advantaged or disadvantaged--may bring to a professional school of medicine experiences, outlooks and ideas that

> enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.
>
> Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a hetergeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges--and the courts below have held--that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest. In re Griffiths, 413 U.S. 717, at 721-722 (1973)." 46 U.S. Law Week at 4908.

The court went on to hold that while race could be taken into account as one factor in the admissions decision, the special admissions program's use of an absolute racial preference for the positions in the class which are set aside for minorities was impermissible. While the interest or purpose was appropriate, the classification was not determined to be necessary to that end. The court described the appropriate type of approach as follows:

> "In such an admissions program [the kind acceptable to the court] race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> This kind of a program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been

> weighed fairly and competitively, and he would have no basis to compalin of unequal treatment under the Fourteenth Amendment." 46 U.S. Law Week at 4909.

The first step in analyzing the case before the commission is to determine whether the selection process used by the prison in filling the inmate complaint investigator position involved the making of a racial distinction which triggered the type of analysis used by the Supreme Court. The court held: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 46 U.S. Law Week at 4902. In the selection process used at the prison, race was a factor which worked to Mr. Christensen's disadvantage; therefore, "exacting" scrutiny under the equal protection clause of the fourteenth amendment is indicated.

The next step, again following the line adopted by the court in the Bakke decision, is to determine whether there is a "constitutionally permissible and substantial purpose," 46 U.S. Law Week at 4906, in the utilization of this racial classification. It is the opinion of the commission that the purpose of increasing the minority percentage of correctional staff to more nearly approximate the minority percentage of the inmate population, in order to correct an environment that has been counterproductive to the division's rehabilitative goals, satisfies this criterion.

The third question is whether the racial classification utilized by the respondent was necessary to promote the interest

or purpose identified. The policy utilized by the prison and under review here did not constitute an absolute preference as was struck down in Bakke. Rather, its policy, like the admissions policies cited with approval by the court, included the consideration of race as one factor among many in the appointment process. Furthermore, in the opinion of the commission, this approach is in keeping with the traditional approach to appointment contained in the statutes governing Wisconsin's civil service since its inception in 1905. The examination process is subject to requirements of competition on the basis of relatively objective criteria. Once the top-ranked applicants have been certified, the appointing authority has considerable discretion as to whom to appoint, and is not required to appoint the person at the top of the list. See, eg., State ex rel Buell v. Frear, 146 Wis. 291, 301, 302-303, (1911), where the civil service law was challenged on a number of grounds including that "...the act is invalid in that it deprives the person exercising the power of appointment to public office of the right to employ a reasonable discretion in making a selection of persons qualified for office." The court answered this contention as follows:

> "The opinion doubtless also prevailed in the legislature that a selection from three candidates on the certified eligible list would provide a sufficient scope for the exercise of a reasonable discretion by the appointing officer in making appointments of persons found to be qualified to perform services under the appointing officer."

See also Brom v. DILHR, Wis. Pers. Bd. No. 77-109, (11/15/77).

For these reasons the commission concludes that the appointment did not violate section 16.14 and that the director's decision affirming the appointment was correct.

ORDER

The decision of the director is affirmed and this appeal is dismissed.

Dated: September 13, 1978.

Edward D. Durkin, Commissioner

Dated: September 13, 1978.

Charlotte M. Higbee, Commissioner

CONCURRING OPINION

While I concur in the final order in this case, I disagree with the determination of the hearing examiner to admit into evidence the results of a polygraphic examination. In my opinion, the polygraph is too unreliable to be used as evidence, particularly when there are other forms of competent evidence available relating to the issue in question.

Dated: Sept 13, 1978.

Joseph W. Wiley, Chairperson

STATE OF WISCONSIN | STATE PERSONNEL BOARD

DAVID CHRISTENSEN,

Appellant,

v. | INTERIM DECISION

SECRETARY, DEPT. OF HEALTH & SOCIAL SERVICES and DEPUTY DIRECTOR, BUREAU OF PERSONNEL,

Respondents.

Case No. 77-62

This is an interim decision by the hearing examiner on appellant's request that the board require certain of respondent Department of Health and Social Service's employes submit to polygraph tests and that these tests and a polygraph test of the appellant be admitted in evidence. The respondent has refused to stipulate to have its employes so examined and has indicated it would object to the introduction of any polygraph examinations offered.

The Wisconsin rule as set forth by the Supreme Court, at least in criminal cases, completely excluded polygraph tests prior to State v. Stanislowski, 62 Wis. 2d 730, 216 N.W. 2d 8 (1974). In that case the court held that in criminal cases the results of polygraph tests henceforth would be admissible on the issue of credibility, for corroboration or impeachment purposes if four preconditions were met:

(1) a written stipulation,

(2) notwithstanding the stipulation that the admissibility of the test results is subject to the discretion of the trial court,

(3) right to cross-examine the polygraph operator as to qualifications, conditions under which the test was administered, and

the limitations of and possibilities for error in the technique of polygraphic interrogation, and

(4) appropriate jury instructions.

It is unquestioned that an administrative agency is not bound by the rules of evidence that govern court proceedings, see s. 227.08(1), Wis. Stats. The strict rules set out in the Stanislowski case are not automatically transferrable to an administrative proceeding. The court did note:

> "Experts in the field give a high degree of accuracy or dependability to polygraph examinations, conducted by a competent examiner. Polygraph test accuracy is viewed as comparing favorably with other types of expert psychiatrists, document examiners, and physicians . . . While experts agree that the training and experience of the examiner are crucial in attaining accurate results, those most familiar with the field believe that polygraph examinations constitute a reasonably reliable diagnosis of truth and deception responses to questions asked." 62 Wis. 2d at 738-739.

Despite this relative degree of reliability of competently administered polygraph tests noted by the court, there are policy factors peculiar to criminal trials that underlie the requirement of a written stipulation between the parties. In an administrative proceeding there is no basis for a blanket exclusion of what might well be highly probative evidence, depending on the skill of the examiner and the nature of the facts, because both parties have not agreed on the use of such evidence. Therefore, it is the preliminary ruling of the hearing examiner that the appellant will not be barred from introducing the results of any polygraph tests solely because of the absence of a stipulation. The offer of any such evidence must be accompanied by the appropriate foundation by a competent examiner, who will be subject to cross examination. Only then will a ruling on admissibility be made.

The question of whether the board can or should order the examination of respondent's witnesses is another matter. There is a dearth of authority or precedent for such action. See, e.g., note, 29 U. of Florida Law Review 286

(1977); 29 Am. Jur. 2d Evidence §831. Given the lack of precedent and the cautious approach taken by the Supreme Court in the Stanislowski case, an order compelling examination appears to be a step beyond that which the distinction between a criminal and an administrative proceeding will support. Therefore, the hearing examiner will not enter an order requiring the examination of respondent's witnesses.

Dated: January 5, 1977.

STATE PERSONNEL BOARD

Anthony J. Theodore, Hearing Examiner