Ret: Record 9/6/82 appeal from Anderson v. DILHR 79-320-PC 79-PC-CE-173, 7/2/81

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

SECRETARY, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Petitioner,

v. Case No. 81-CV-4078

WISCONSIN PERSONNEL COMMISSION STATE OF WISCONSIN,

Respondent.

JUDGMENT

The court rendered a memorandum decision dated June 7, 1982, wherein it found that the respondent Commission's findings of fact are supported by substantial evidence, its conclusions of law are supported by the findings of fact and its decision is based on correct interpretations of law. In its memorandum decision, the court therefore affirmed the Commission's conclusions that (1) petitioner discriminated on the basis of sex in not appointing Ms. Anderson to the Madison District Director position; (2) it was illegal and an abuse of discretion in violation of sec. 230.44(1)(d), Stats., not to so appoint her; and (3) petitioner discriminated on the basis of sex in not extending the Temporary Interchange Agreement past its one year expiration date.

The court also found that the Commission did not discuss whether Ms. Anderson failed to mitigate her damages in the form of back pay when she refused the Janesville District Director's position. The court therefore remanded the matter to the Commission for the limited purpose of making further findings, or taking further

testimony, if necessary, concerning Ms. Anderson's obligation to mitigate her damages by accepting the Janesville position.

Finally, the court directed the Commission to incorporate within the body of Findings of Fact the finding contained in the Commission's accompanying opinion that petitioner offered no legitimate nondiscriminatory reason for refusing to extend the Temporary Interchange Agreement.

IT IS THEREFORE ORDERED AND ADJUDGED that the decision of respondent Commission is affirmed. IT IS FURTHER ORDERED that the case is remanded to respondent for the limited purpose of making further findings, or taking further testimony, if necessary, concerning Ms. Anderson's obligation to mitigate her damages by accepting the Janesville position. IT IS FINALLY ORDERED that respondent incorporate within the body of its Findings of Fact the finding contained in its accompanying opinion that petitioner offered no legitimate nondiscriminatory reason for refusing to extend the Temporary Interchange Agreement.

Dated this 2nd day of July, 1982.

BY THE COURT:

ROBERT R. PEKOWSKY, Judge
Dane County Circuit Court
Branch 5

TO: Daniel Stier
6-3067

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 5 DANE COUNTY

SECRETARY, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, Petitioner, v. WISCONSIN PERSONNEL COMMISSION, STATE OF WISCONSIN, Respondent.	MEMORANDUM DECISION Case No. 81-CV-4078

The Department of Industry, Labor, and Human Relations (DILHR) seeks judicial review of a final decision issued by the Wisconsin Personnel Commission (Commission) concerning certain hiring practices involving Pamela Anderson. The matter has been briefed for some time, but resolution of the merits necessarily awaited a review of Ms. Anderson's earlier motion for disqualification of counsel for respondent. That issue has been resolved in a separate opinion of this Court and it is appropriate to now proceed with review of the Commission's decision.

Ms. Anderson served as District Director for the Madison Job Service Office for one year pursuant to a Temporary Interchange Agreement between the City of Madison and DILHR in accordance with sec. 230.047, Wis. Stats. During that one year term, it was announced that the District Director positions for both the Madison and Janesville offices would be filled on a permanent basis. Ms. Anderson applied for and was certified for both positions, but the Administrator of the Job Service Division decided to upgrade the classification of the Madison position and Ms. Anderson was not appointed to that position. Upon expiration of the Temporary Interchange Agreement on November 2, 1979, the agreement was not

renewed and someone else was appointed the District Director for Madison on an acting basis.

In its final decision, the Commission concluded that (1) it was discrimination based on sex for DILHR not to appoint Ms. Anderson to the Madison District Director position, (2) it was illegal and an abuse of discretion in violation of sec. 230.44(1)(d) not to so appoint her and (3) it was discrimination based on sex for DILHR not to extend the Temporary Interchange Agreement past its one year expiration date. The Commission ordered DILHR to offer Ms. Anderson the next available equivalent position along with all the rights, benefits, and privileges to which she would have been entitled from November 3, 1979 until the time she is offered an equivalent position, she indicates she is no longer interested in a position, or she becomes unavailable to accept a position, whichever occurs first.

In its petition for review, DILHR requests this Court to reverse the Commission's decision because (1) certain findings of fact in it are not supported by substantial evidence, (2) its conclusions of law are not supported by the findings of fact, and (3) it erroneously interpreted provisions of law. Furthermore, petitioner asserts that the Commission failed to make findings as to whether Ms. Anderson's rejection of the Janesville director's position constituted a failure on her part to mitigate damages. Counsel for DILHR insists that Ms. Anderson failed to establish a prima facie case of sex discrimination, petitioner satisfied its burden of articulating a legitimate, nondiscriminatory reason for not appointing Ms. Anderson to the Madison position, and that she failed to prove that DILHR's proferred reasons for not appointing her to the Madison position were a pretext for discriminating

against her on account of her sex.

I.

As spelled out thoroughly in the parties' briefs, the Court's scope of review of an agency's findings of fact is governed by sec. 227.20(6):

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

Furthermore, the weight and credibility of the evidence are matters for the agency to evaluate and not for the reviewing court. Bucyrus-Erie Co. v. ILHR Department, 90 Wis. 2d 408, 280 N.W. 2d 142 (1979). Pursuant to sec. 227.10, every final decision of an agency shall be accompanied by findings of fact which in turn shall consist of a concise and separate statement of the ultimate conclusions upon each material issue of fact without recital of evidence (emphasis added). With regard to reviewing the sufficiency or completeness of a finding of fact, the Court should reverse or remand the case to the agency only if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law. Sec. 227.20(8). The findings of fact objected to by petitioner shall be reviewed one at a time.

Finding Number 8

Finding number 8 reads as follows:

> The termination of the temporary interchange agreement, or the extention (sic) of the agreement was within the authority of Mr. Robert Polston, who was the Administrator of the Job Service Division from late July, 1979 through the end of January, 1980. By its terms the temporary interchange agreement expired if it was not specifically renewed or extended; the consensus among the individuals involved in the process of interviewing candidates for the permanent Madison position was to allow the agreement to expire.

Although DILHR admits that this finding is correct, it asserts that it is incomplete because it did not mention the numerous obstacles and difficulties in actually extending the agreement. Petitioner relies upon the requirement found in Wis. Adm. Code sec. Pers. 31.04(2) that an "urgent need" must exist before such an assignment can be extended and then all parties to the agreement must agree to the renewal. However, counsel for Ms. Anderson is correct when she states that it is sec. Pers. 31.04(1) that is applicable to the present facts. Ms. Anderson's assignment was still in its first two years, thus continued assignment to the director's position would be available when justified merely by the nature and complexity of the tasks involved. This is borne out by reading sec. Pers. 31.04 as a whole: subsection (1) applies to the first two years of any assignment, subsection (2) applies to the third and fourth years of any assignment, and no assignment involving the same employee shall exceed that total of 4 years.

Additional findings as to the City of Madison's willingness to renew the agreement or Ms. Anderson's attempt to initiate such renewal are not necessary to the Commission's legal conclusions. It was the concensus of the administrators at DILHR not to extend the agreement, regardless of the position of either the city or Ms. Anderson. Their positions are not

material to the legal issues involved and it was not an abuse of the Commission's discretion to omit reference to any of the above facts.

Finding Number 19

Finding number 19 reads as follows:

> Appellant's second interview for the Madison job deviated from the standard format used with previous interviews. Polston stated that he wanted to ask appellant questions specific to her performance in the Madison job over the previous year and not cover ground already covered by the questions asked during the Milwaukee interviews. Complainant did not have a choice of the manner in which the interview would be conducted. Polston proceeded to question appellant about the performance statistics of the Madison office with respect to the time within which first payments of unemployment compensation were made, statistics for individual job placements, rumors of low office morale, public complaints received about the office, and appellant's motivation for applying for a management position with a planning background, and other questions all tending to show a negative attitude toward appellant's experience, ability and performance. Ed Kehl did not participate in the interview until the end, when he focused attention to positive aspects of appellant's performance in the Madison office.

Petitioner does not dispute that the finding accurately reflects what questions were in fact asked in Ms. Anderson's second interview and, upon review, the testimony does fully support the making of this finding. Petitioner's sole objection to the finding is that it implies that it was somehow unfair for Mr. Polston to ask Ms. Anderson about these performance problems during her interview. Reviewing the above finding, it cannot be inferred that the Commission thought that these questions were "unfair"; it can be inferred, however, that the Commission thought that this line of questioning reflected Mr. Polston's negative attitude toward Ms.

Anderson. As amply illustrated in respondent's brief, such an inference is fully supported by the testimony. Furthermore, this issue is extremely material to the question of whether Ms. Anderson was discriminated against on the basis of sex. The Commission's finding will not be disturbed.

Finding Number 27

Finding number 27 reads as follows:

> Polston had discussed with Kehl, prior to the Madison interviews his concern with the level at which the Madison job was classified and the possibility of upgrading the position. The idea of upgrading Madison had been discussed for several years at DILHR, in the context of a review of the level of several offices at once, to determine whether there should be a group of Job Service offices at Pay Range 1-17. As of the date of the interviews for the Madison office, there were no Job Service Director positions at that range. The existing pay ranges were Pay Range 1-15, 1-16 and 1-18. The 1-18 was assigned only to the Milwaukee Metropolitan District office.

Petitioner asserts that this finding fails to mention that a 1973 classification study recommended that in the future the Madison office was to be considered for allocation to level 17 and that Mr. Polston's idea of upgrading only the Madison position was supported by others within DILHR. On the contrary, however, the finding adequately reflects that the upgrading had been discussed for several years within the department and to now include the source of such discussions would not add significantly to the finding.

Furthermore, the testimony indicates that Mr. Polston was not as wholeheartedly supported in his idea of only upgrading the Madison position as counsel for DILHR asserts. In order to make a finding of this kind, the Commission would have had to have weighed the testimony of those who were against the proposal as well

as those in support of the plan. The Commission's determination that such facts were not material to the legal conclusions to be drawn, expecially in light of the conflicting testimony on this point, was not an abuse of discretion and the finding will not be altered in any way.

Finding Number 34

Finding number 34 reads as follows:

> Female managers at the administrative level of the Madison office were underutilized by DILHR as a whole, according to statistics produced by its affirmative action officer. Female professionals at a level just below the Madison level were also underutilized. The under-utilization is approximately 5.68% agency-wide, compared to the parity figures which call for 30% of positions at the level of the Madison office at Range 1-16 or higher. The percent of female managers at that level at the Job Service Division was actually lower than the 5.68% agency-wide figure, since there were no women at Range 1-16 or higher after appellant left and she was the only one at that level during her tenure. (App. Ex. 7; Tr. 173-175; 182-187).

Petitioner argues that while it has not met its affirmative action goal for women in the administrative category, women may not be as underutilized as the finding suggests. However, the statistics speak for themselves. It is not disputed that the statistics are accurate and furthermore they are based upon classification guidelines set by the federal government and used by DILHR itself. While classifications can be somewhat arbitrary, it has not been suggested that the Commission placed undue emphasis upon the statistics in reaching its conclusion of sex discrimination. As such, the finding is neither inaccurate nor misleading and it will not be changed by this Court upon review.

Finding Number 35

Finding number 35 reads as follows:

> Polston did not want to change the duties of the Madison Director but only wanted to upgrade the pay range of the position (Tr. 243).

Petitioner insists that the testimony indicated the opposite of this finding; that Mr. Polston envisioned more than merely upgrading the pay grade of the Madison position. Mr. Sallstrom did testify that he felt Mr. Polston foresaw a change in the duties of the director's position once it was reclassified to level 17 (Tr. 88). However, Mr. Kehl did not believe that Mr. Polston's plan would involve adding more duties (Tr. 338). Moreover, Mr. Polston himself testified that he had no specific plan to add more duties, only to carry out existing functions more effectively and efficiently (Tr. 123).

The Commission indicates that testimony in the transcript at page 243 is the basis for finding number 35. While a reference to Mr. Polston's own testimony on page 123 would better support the Commission's conclusion, there is no reason to change the finding as issued. The Commission undoubtedly weighed the conflicting testimony and assessed the credibility of the witnesses presenting the testimony. Such matters are for the agency to evaluate and not for this Court upon review. Bucyrus-Erie.

Finding Number 39

Finding number 39 reads as follows:

> It is very unusual for an appointing authority to decline to fill a position after certification and interview of candidates. If such a decision is made, it is normally for reasons such as budget problems within the employing agency, change in the duties of a position so that the

examination and register created from it are no longer job-related, or because of filling a position on a transfer basis.

Petitioner objects to the Commission's characterization of the failure to fill a position after certification and interview of candidates as "very unusual." Mr. Kehl's testimony was that in general it was "unusual but not unique" to "proceed to a final interview for filling the position and then decid(e) not to fill that position" (Tr. 352). While Mr. Kaisler did testify that this was "not an unusual circumstance", his complete testimony indicates that he was referring to the situation where "a job was not filled after certification and after the interview process had been completed for such reasons as budgeting or organization." (Tr. 167, emphasis added). Both Mr. Sallstrom and Mr. Kaisler noted other instances where a position had been certified and interviews held and then the decision not to fill it had been made.

From all the testimony presented, it was reasonable for the Commission to conclude that it was very unusual to not fill a position after certification and interviewing, and that when it does occur, it is normally for reasons other than a decision to upgrade the job classification of the available position. The finding as written by the Commission reflects just these facts. The facts are supported by substantial evidence in the record and will not be disturbed upon review.

Finding Number 40

Finding number 40 reads as follows:

None of the reasons cited in Finding 39 were given as a reason for not filling the Madison position. Polston reported to the Equal Employment Officer of Job Service that the reason for not filling Madison with a

protected candidate (i.e., a female) was that an upgrade request had been put in for that office and that if the upgrade were approved, a new testing procedure would have to be started. (Resp. Ex. 4).

Petitioner makes no particular argument as to how this finding should be changed. In light of the facts in finding number 39 and the discussion immediately above, the Commission obviously felt that it was very unusual to not fill the Madison director's position because of a decision to upgrade its job classification. Such a conclusion is further supported by the testimony of Mr. Sallstrom (Tr. 81). It is extremely material to the issue of DILHR's discrimination in its hiring process and the finding will not be altered in any respect.

Findings Number 45 & 47

Finding number 45 reads as follows:

Appellant could have been appointed to the position when it was at Pay Range 1-16 and could have stayed in the position when it was upgraded at Pay Range 1-17. (Tr. 80-82).

Finding number 47 reads as follows:

Appellant was the most qualified candidate for the Madison position and was also recommended as the first choice for hire by Kaisler and Anderson (App. Ex. 15). Kehl would have supported Polston in a decision to appoint appellant as well in his decision not to appoint her.

Finding number 45 states only two facts. First, that Ms. Anderson was certified for the director's position as classified at level 16 and second that, had she been appointed to the position, she would have been automatically regraded to the level 17 classification when the position was later upgraded to that level. The former fact is agreed to by all parties and reflected in finding number 11 made by

the Commission. The latter fact assumes a hypothetical situation and, as such, is fully supported by the testimony of Mr. Sallstrom (Tr. 80).

Petitioner contends that finding number 47 presumes that Ms. Anderson was more qualified than any of the certified candidates and that that presumption is contrary to civil service law. Counsel for Ms. Anderson admits that any "certified" candidate is considered qualified and may be selected for the position regardless of his or her particular certification score. However, she also correctly notes that to imply that the candidates could never be evaluated or ranked after the interview process and review of the candidates' job experience and performance would be to effectively render meaningless all parts of the hiring process other than the certification test. Especially in the context of hiring discrimination charges, the "informal" rankings prepared by the interviewers themselves give insight into the propriety of the process used to hire or not hire a particular applicant. According to the interviewers' notes and testimony only, not the individual certification scores of the candidates, Ms. Anderson had been ranked number one among the several applicants. This is what is reflected in the first sentence of finding number 47 and those facts are fully supported by the testimony of the interviewers at the hearing.

Finding Number 48

Finding number 48 reads as follows:

> The person appointed to replace appellant as acting Madison District Director was a District Manager whose job was at Pay Range 1-15 and who competed for but was not certified and qualified for the Madison position.

Petitioner admits that this finding is correct but that it fails

to mention the department's reasons for choosing Mr. Friedl as the acting director in Madison. Simply put, those facts are not material to the Commission's examination of whether it was discriminatory or illegal to not have extended Ms. Anderson's Temporary Interchange Agreement. The threshhold requirement is to be certified at the classification that the position demands; in Madison it was level 16. Even given Mr. Friedl's willingness to perform only as an acting director, he was not as qualified as Ms. Anderson whom DILHR declined to reappoint to the director's position on a temporary basis. The finding will not be amended in any way.

II.

Petitioner maintains that Ms. Anderson did not present sufficient facts at the hearing to establish a prima facie case of sex discrimination in her application for the director's position in Madison. In particular, counsel for DILHR asserts that one of the four necessary elements for proving discrimination by desparate treatment -- that the employer after rejecting the complainant continued to seek applications for the position from persons with qualifications equivalent to those of the complainant -- was not sufficiently shown by Ms. Anderson. Petitioner notes that DILHR did not permanently fill the Madison District Director position and that that decision affected all certified candidates equally and uniformly.

The Commission explicitely addressed this issue in its opinion when it stated at page 17, "Polston continued to look for candidates with complainant's qualifications, i.e., certified eligible candidates." The record sufficiently supports this conclusion based on the technical requirements of the civil service

law. Yet beyond such technicalities, the record also indicates that DILHR, recognizing that it would be necessary to have the position filled by someone at least on a temporary basis, in fact did continue to look for a party to assume the position. The department did find someone, Glen Friedl, whose certification qualifications were not even equivalent to those of Ms. Anderson, but rather less than her certification at level 16.

While it is true that all the other certified candidates were also rejected for the Madison position, what is important here is that Ms. Anderson was denied the position and DILHR did complete its hiring process, at least temporarily, by appointing Mr. Friedl. Admittedly the circumstances surrounding this certification process and the ultimate decision to upgrade the available position were unusual and might not fit neatly into the traditional sex discrimination elements. Yet whether the position was filled temporarily or permanently, DILHR had successfully gotten around the hiring process that included Ms. Anderson as a candidate. The Commission was correct in concluding that Ms. Anderson established a prima facie case of sex discrimination.

III.

Once a complainant has established a prima facie case of discrimination, the burden is then on the employer to articulate a legitimate, nondiscriminatory reason for not hiring the complainant. If the employer is able to present such a reason, the complainant would then have to prove that the employer's proferred reason for not hiring him or her was a pretext for discriminating against the complainant. Petitioner asserts that it more than satisfied its burden of articulating a legitimate, nondiscriminatory reason for

not appointing Ms. Anderson to the Madison position. DILHR also argues that the Commission was in error when it concluded that the decision to upgrade the Madison position to a level 17 classification was merely a pretext for its desire to discriminate against Ms. Anderson because of her sex.

In the hearing before the Commission, petitioner really only articulated one reason for not appointing Ms. Anderson. DILHR maintained that the hiring process was interrupted by the department's decision to upgrade the position to level 17 and, as upgraded to that level, Ms. Anderson was not qualified for the Madison Director's position. While petitioner asserts that a decision to upgrade or reclassify the position on its fact is a legitimate and nondiscriminatory reason for not filling the position, the Commission concluded otherwise, noting that it was not a "credible legitimate nondiscriminatory reason ... for the failure to appoint (Ms. Anderson) to the permanent position." Petitioner counters by arguing that an employer need only articulate the reason for its hiring decision, not persuade the tribunal that it is not merely a pretext for discrimination. Counsel for petitioner claims that the Commission's finding thus improperly shifted the burden of persuasion to DILHR when it refused to believe the testimony of department members in this regard.

While the employer at this stage need not persuade the tribunal that the stated reason was legitimate and nondiscriminatory, the tribunal is certainly free to believe or not believe the testimony of those witnesses who are establishing the background for the employer's decision to not hire the complainant. If the Commission did not believe that the desire to upgrade the Madison position was even a reason for not appointing Ms. Anderson, it needn't accept

the broader assertion that the reason was legitimate and non-discriminatory. If it had chosen to believe that the upgrading was a reason behind the rejection of Ms. Anderson, the Commission would then need to leave it to Ms. Anderson to show that the reason was not truly legitimate and nondiscriminatory, but rather a pretext for not hiring her because she was a woman.

In this three-stage analysis of discrimination, the second and third stages can become quite intertwined. The Commission's use of the word "credible", in what was apparently "stage two" of the analysis, may not have been as precise as DILHR would have liked, but it adequately portrayed the Commission's feeling with regard to the reason offered by the department for not hiring Ms. Anderson. Furthermore, going beyond the Commission's finding that DILHR did not sustain its burden in stage two of the discrimination analysis, there is ample support in the record for a finding that the decision to upgrade the position was merely a pretext for not appointing Ms. Anderson as Madison Director. The lengthy discussion at pages 16-19 of its opinion completely details why the Commission felt that DILHR discriminated against Ms. Anderson when it rejected her application. The evidence cited in those pages is, upon review, completely supported by the testimony of the witnesses. Coupled with the Commission's findings of fact, findings left intact by part I of this decision, the Commission did not erroneously interpret sec. 230.18, Wis. Stats. or the accompanying case law which refines and clarifies that provision of the statutes. Sec. 227.20(5).

IV.

The Commission also concluded that it was illegal and

an abuse of discretion under Ch. 230, Wis. Stats. not to have appointed Ms. Anderson to the District Director's position in Madison. Ch. 230 provides a comprehensive procedure to insure that the hiring of employees for state agencies is performed as fairly, efficiently, and effectively as possible. Deviations from this procedure are open to review by the Wisconsin Personnel Commission, which will evaluate whether the personnel action in question was performed within the guidelines of Ch. 230 and, if not, impose the appropriate sanctions on the administrator of the division. Sec. 230.44(1)(d).

The Commission found several procedures to be in violation of guidelines prescribed in Ch. 230. The chapter contains its own provision forbidding discrimination in the hiring process, sec. 230.18, and the Commission concluded that since the determinant factor in the decision not to hire Ms. Anderson was her sex, DILHR acted illegally when it did not appoint her to the director's position. The Commission further concluded that Mr. Polston irrationally refused to recognize Ms. Anderson's professional experiences, concentrated disproportionate attention to the weaker areas of her actual Job Service performance, and simply disregarded the significance of the examination and certification process. Mr. Polston also erroneously assumed that, if Ms. Anderson were appointed and the position was later upgraded, she would have to go through another competition for the position as reclassified. The Commission determined that these discretionary actions were exercised in an arbitrary, unreasonable, and irrational manner. Sec. 230.44(1)(d).

Upon review of the entire record, it is clear that each

of the above incidents are substantially supported by the testimony of the witnesses before the Commission. Furthermore, viewing the incidents as a whole, it can reasonably be concluded that the manner in which DILHR conducted its hiring process was illegal and an abuse of the discretion delegated to it under Ch. 230. It is not appropriate for this Court on review to set aside that legal conclusion by the Commission.

V.

Many of the same facts that support the Commission's finding of discrimination in DILHR's failure to appoint Ms. Anderson permanently to the director's position also are used to support its finding of discrimination when the department failed to extend the Temporary Interchange Agreement with Ms. Anderson. Petitioner maintains that (1) there was no requirement, legal or otherwise, that the agreement be extended, (2) to so extend the agreement is extremely difficult because an "urgent need" must exist pursuant to Wis. Adm. Code sec. Pers. 31.04, and (3) Ms. Anderson did not sufficiently dispute petitioner's articulation of legitimate, nondiscriminatory reasons for not renewing the agreement. However, as discussed in part I above, petitioner misreads the requirements of sec. Pers. 31.04 and thus misinterprets the thrust of the Commission's conclusion in this regard.

There existed no great obstacle for the department to have extended the interchange agreement as suggested by counsel for petitioner. Ms. Anderson could have continued as temporary director under the agreement if justified by the nature and complexity of the tasks involved. Sec. Pers. 31.04(1). No findings of fact were made by the Commission about the urgency of

the need to extend the agreement because none were necessary under Ms. Anderson's circumstances.

Petitioner is correct when it states that there was no requirement, legal or otherwise, that DILHR have extended the agreement. Likewise there was no requirement that DILHR begin certification and interviews to permanently fill the director's position when it did. Yet once it began the process, there existed procedures and guidelines with which the department had to comply. So too with the director's position that became vacant on November 3, 1979. Once the department determined that it needed to continue filling the position on a temporary basis, it was constrained by certain hiring procedures and rules against nondiscrimination. Competing for the director's position were city employee Anderson via an extension of the interchange agreement, Mr. Friedl via an outright appointment as acting director, and other candidates who would be appointed under an appropriate employment contract. It was the department's choice of Mr. Friedl over Ms. Anderson, irrespective of the nature of the employment contract that would legally assign him or her to the job, that was at issue before the Commission. The minimal burden of the "nature and complexity of the tasks" requirement does not play a major role in the Commission's analysis.

As with the department's failure to permanently appoint Ms. Anderson to the director's position, she satisfactorily proved the four elements of a prima facie case of discrimination with regard to the department's failure to extend her temporary agreement (Finding number 48). Contrary to how petitioner views the facts, the Commission then concluded that petitioner had not sufficiently articulated a legitimate, nondiscriminatory reason for not renewing

Ms. Anderson's employment agreement (Opinion, p.20). Unlike the situation in part III of this decision, this was not a case where the Commission chose not to believe the testimony articulating the legitimate, nondiscriminatory reason; there in fact was no reason presented that explained why Mr. Friedl was appointed as acting director instead of Ms. Anderson. In addition, and most importantly, the record supports the Commission's finding that no explanation was offered by the department. Since the department failed to meet its burden in stage two of the discrimination analysis, Ms. Anderson was relieved of any further burden of proof in stage three.

Although the Commission sufficiently notes in the opinion its finding that no legitimate nondiscriminatory reason was offered, such a finding is not included in the separate Findings of Fact. Such a finding would be appropriate in light of the Commission's conclusions in Conclusions of Law numbers 3 and 4. The Commission is thus directed to reiterate that finding from its accompanying opinion within the body of Findings of Fact. As amended, the findings of fact sufficiently support the Commission's legal conclusion that Ms. Anderson was discriminated against when DILHR refused to extend the Temporary Interchange Agreement and appointed Mr. Friedl instead as acting director of the Madison office. Sec. 111.32(5)(g) 1., Wis. Stats.

VI.

Finally, petitioner insists that Ms. Anderson failed to mitigate her damages in the form of back pay when she refused the District Director's position in Janesville offered to her by DILHR. Counsel for petitioner correctly notes a complainant's obligation to seek and accept other acceptable employment in order to reduce

back pay otherwise allowable. Furthermore, counsel for Ms. Anderson admits that the Commission did not explicitely deal with the mitigation issue although both she and counsel for the Commission present arguments on the merits of Ms. Anderson's obligation to accept the Janesville position in order to mitigate her damages.

While neither the Commission's opinion nor the accompanying findings of fact contain discussion on this issue, the record may very well already include sufficient testimony for such findings to be made. A cursory review plainly reveals that the facts are not as characterized by counsel for Ms. Anderson on page 22 of her brief. Ms. Anderson's own testimony indicates that the offer of the Janesville position was made in the same October 26, 1979 phone conversation in which Ms. Anderson was told that the department was going ahead with upgrading the Madison position instead of filling it from among the certified candidates (Tr. 21). She further testified that she was informed by Mr. Kaisler in that same conversation that she would not continue in the position under the Temporary Interchange Agreement (Tr. 21), contrary to the assertion of her counsel in briefing. There thus exists the possibility that Ms. Anderson could have done more to mitigate the amount of back pay owing to her by the Commission's decision.

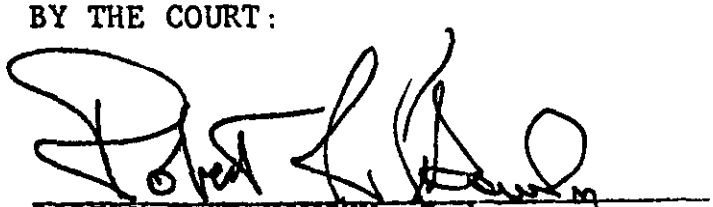
However, it is the Commission who would appropriately have made such findings in the first instance and should still retain that responsibility upon review by this Court. The hearing examiner should be the one to draw appropriate findings of fact and make corresponding conclusions of law in this regard. She is the one best suited to evaluate and weigh conflicting testimony and assess the credibility of the individual witnesses. As such,

the matter will be remanded to the Commission for the limited purpose of making further findings, or taking further testimony if necessary, as to Ms. Anderson's obligation to mitigate her damages by accepting the Janesville director's position.

Counsel for Wisconsin Personnel Commission shall prepare the appropriate orders consistent with this Memorandum Decision.

DATED: June 7, 1982

BY THE COURT:



ROBERT R. PEKOWSKY, Judge
Dane County Circuit Court, Br. 5

cc: Atty. Nadim Sahar
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Atty. Gretchen T. Vetzner