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CAROL J. LONG,

Complainant,

v.

Secretary, DEPARTMENT OF
INDUSTRY, LABOR AND HUMAN
RELATIONS,

Respondent.

Case No. 81-PC-ER-1

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

This is a complaint of discrimination pursuant to §230.45(1)(b), stats., which is before the Commission following an initial determination of probable cause to believe that the respondent discriminated against the complainant.

FINDINGS OF FACT

1. The complainant, a black female, has been employed by the respondent at the Racine Job Service office at all material times. (Subsequent to the events in question, she was laid off due to funding cuts and eventually reinstated to a Milwaukee district position.)
2. The complainant began her employment as aforesaid on February 12, 1979, as a Job Service Specialist 1 as a Line Interviewer/Placement Specialist. Effective January 13, 1980, she was reclassified to the objective level of Job Service Specialist 2.
3. Throughout her period of employment as aforesaid, the complainant's performance has been good, and she has been so evaluated by management.

4. In November, 1980, the complainant applied for the position in the classified civil service at the Racine District Job Service office of Job Service Supervisor 2 - Intake and Processing. This position was responsible for the supervision of the intake and processing of unemployment compensation (UC) claims.

5. This position vacancy resulted from the voluntary demotion of Beverly Stegman, a white female, who had received her permanent appointment after she had served in the position in an acting capacity.

6. The complainant passed a civil service examination for the position with a rank of fifth.

7. The effective appointing authority for this position was the Racine Job Service District Director, Robert Brandl, a white male.

8. Mr. Brandl interviewed all certified candidates including the complainant.

9. Mr. Brandl's appointment to the position was Georgia Eckhoff, a white female, who had ranked seventh.

10. A substantial reason for his appointment of Ms. Eckhoff was the fact that she had served in an acting capacity in the position in question since the voluntary demotion of the prior incumbent.

11. When the position was filled on an acting basis, this was done informally and without posting a notice of vacancy.

12. After learning of the vacancy and before appointing Ms. Eckhoff on an acting basis to the position in question, Mr. Brandl received an unsolicited recommendation for the acting appointment of Ms. Eckhoff from George Thomas, the Racine Special Applicant Services Supervisor, Job Service Supervisor 4, a black male.

13. Mr. Thomas also mentioned Ms. Wesleyanne Brown, a Manpower Counselor 3 in the Racine Office, a black female, but Ms. Eckhoff was his strong first choice.

14. Mr. Thomas's recommendation of Ms. Eckhoff was based on her performance under his supervision. Ms. Eckhoff had demonstrated substantial knowledge of UC procedures while under his supervision through her work on the Trade Readjustment Act (TRA) program, which was involved with UC, she had had prior experience with UC, and he felt that she was just the person for the acting appointment. He explained this rationale in detail to Mr. Brandl.

15. Mr. Brandl relied substantially on Mr. Thomas's recommendation in appointing Ms. Eckhoff on an acting basis.

16. There had been many serious problems with the UC claims program under Ms. Stegman which had resulted in considerable pressure from legislators and others, and Mr. Brandl felt it was important to appoint someone with UC program knowledge.

17. The complainant was never asked to interview for the acting position, which had never been formally announced. She had had no background or experience in UC.

18. Ms. Eckhoff had done a good job in the acting assignment. While she had technical advice and assistance from DILHR management from Madison and the assistance of experienced claims processors from the offices who helped to reduce the claims backlog, her supervisory and other skills also contributed to a marked improvement in the UC claims processing program.

19. In the fall of 1980, there had been five supervisory positions under Mr. Brandl's supervision in the Racine Job Service. This included two blacks (Mr. Thomas, and Ms. Willis in the WIN office) and three whites.

Mr. Brandl had effectively promoted Ms. Willis in 1975 or 1976. Neither black was in a Job Service Supervisor 2 position; both were at higher levels.

20. In 1980, a vacancy had developed in the position of Racine WIN director due to the voluntary demotion of John Toutenhoofd in approximately May of that year. This position was filled temporarily on an acting basis by Mary Witt, who at that time was the immediate supervisor of the position.

21. Subsequently, Marla Mayer, a white female, was appointed on an acting basis and subsequently was appointed on a permanent basis following civil service competition.

22. The acting appointment of Ms. Meyer was effectively made by George Kaisler, head of Job Service Field Operations following a recommendation by an informal panel consisting of Ms. Witt, Rollie Odlund (statewide WIN director), Mr. Brandl and Al Jaloviar, A Management Specialist with Job Service.

23. Prior to the acting appointment, there was no announcement of the vacancy. The panel determined in the exercise of its discretion who they would consider for appointment.

24. The panel determined that they needed someone who knew the program area, including its social services aspect, who had managerial experience and who could handle heavy pressure and a big workload.

25. The panel considered approximately six possible appointees, including three blacks. The panel considered Ms. Willis for this appointment but rejected her because of certain performance deficiencies perceived at that time by Job Service management, as well as lack of program knowledge.

26. Ms. Mayer was chosen because she best met the criteria for the position, having WIN program knowledge, supervisory experience with income maintenance at the Racine County Human Services Program, which was operated in conjunction with WIN and funded at least in part by WIN funds, and having demonstrated good judgment in dealing with pressure.

27. The decision to appoint Ms. Mayer, as opposed to anyone else, in an acting capacity, was not in any way motivated by racial considerations.

28. The decision to appoint Ms. Stegman, as opposed to anyone else, in an acting capacity, was not motivated in any way by racial considerations.

29. The decision to appoint Ms. Eckhoff, as opposed to anyone else, including the complainant, to the position in question in an acting capacity, was not motivated in any way by racial considerations.

30. The decision to appoint Ms. Eckhoff, as opposed to anyone else, including the complainant to the position in question in a permanent capacity, was not motivated in any way by racial considerations.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), stats.

2. The complainant has the burden of proving that the respondent discriminated against her on the basis of her race with respect to not appointing her to the position in question.

3. The complainant has not sustained her burden of proof.

4. The respondent did not discriminate against the complainant on the basis of her race with respect to not appointing her to the position in question.

OPINION

The framework for analysis of a charge of discrimination in hiring was set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 5 FEP Cases 965, 969 (1973). The complainant establishes a prima facie case as follows:

- , This may be done by showing (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In this case, the complainant established a prima facie case. She is a member of a protected class, she applied for a vacancy and was qualified, and the respondent proceeded to appoint someone other than her.

At this point, the respondent must produce evidence that the complainant "was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S. ct. 1089, 67 L. Ed 2d 207, 216, 25 FEP Cases 113, 116 (1981).

The respondent here satisfied its burden of proceeding by enunciating legitimate, nondiscriminatory reasons for the appointment, primarily relating to the appointee's demonstrated performance while serving in an acting capacity. At this point, the focus shifts to whether the proffered reason was a pretext for discrimination.

In this case, there was no substantial dispute over the fact that there were strong reasons for the respondent to have favored Ms. Eckhoff for the appointment. Rather, the complainant argued that the respondent improperly favored Ms. Eckhoff by having given her the opportunity to have

served in the position in an acting capacity, which gave her both on-the-job training and experience and an opportunity to have demonstrated her performance capabilities.

Acting appointments are recognized by the civil service rules, see Chapter Pers 32, Wis. Adm. Code, and must be considered, in and of themselves, as an appropriate means for management to deal temporarily with position vacancies. Wisconsin's Fair Employment Act, subchapter II of Chapter 111, would prohibit any racial discrimination with respect to acting assignments. Acting appointments must be made in a non-discriminatory manner and cannot be used as a means of discriminating with respect to permanent appointments.

In the instant case, the complainant attempted to demonstrate a pattern of acting appointments of whites which were followed by their permanent appointments. The acting appointments, other than that of Ms. Eckhoff, were the appointments of Ms. Mayer to the vacant WIN position, and the prior appointment of Ms. Stegman on an acting basis to the position in question.

There was conclusive evidence with respect to the Mayer acting appointment that the best qualified person for that position was appointed. Similarly, it seems quite clear that Ms. Eckhoff was the best qualified to be appointed as acting head of the position in question. She was the only one who had any UC background, and she was highly recommended for the position by her supervisor, Mr. Thomas.

Given these factors, there is no basis for a determination that the permanent appointment of Ms. Eckhoff was discriminatory. It is true that her exam score ranked below the complainant, but the civil service law does not require appointments to be made from the register in rank order, and in

terms of evaluating overall qualifications, it was not inappropriate under the circumstances for the respondent to have considered Ms. Eckhoff's experience and demonstrated performance.

There was very little evidence presented on Ms. Stegman's acting appointment to the position in question. The complainant testified that Ms. Stegman had received an acting appointment, but there was no evidence as to the circumstances surrounding the appointment. There is no basis for a determination that this acting appointment was in and of itself discriminatory.

The complainant's statistical showing was inconclusive. While there were no black Job Service Supervisor 2's at the time in question, there were only five supervisory positions altogether, and this included two black supervisors at higher levels. As to the appointments of three whites on an acting basis followed by their permanent appointments, this must be evaluated in the context of the small sample size. See, e.g., Williams v. Tallahassee Motors, Inc., 21 FEP Cases 626 (U.S. Court of Appeals, 5th Circuit 1979), Mayor of City of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-621, 94 S. Ct. 1323 1333, 39 L. Ed. 2d 630 (1974).

While the Commission must conclude that the complainant has failed to prove her case by establishing by a preponderance of the evidence that the respondent discriminated against her, the Commission wishes to add the following dictum.

The Commission suggests to the department that it evaluate its policy as to acting appointments in the context of the state's general policies on fair employment and affirmative action. While this hearing did not produce proof that there was any discrimination with respect to the acting

appointments in question, it appears that such appointments are administered in an informal, discretionary fashion, with few records kept and without posting of the vacancies to permit those interested to apply. While no formal process is required by the civil service code, and the need for flexibility and expedition with respect to such situations is apparent, such informal processes are inherently more susceptible to abuse and have aroused feelings of resentment and suspicion. It is recommended that an effort be made to determine whether policies and procedures can be used that will address these concerns while still permitting the requisite flexibility and expedition.

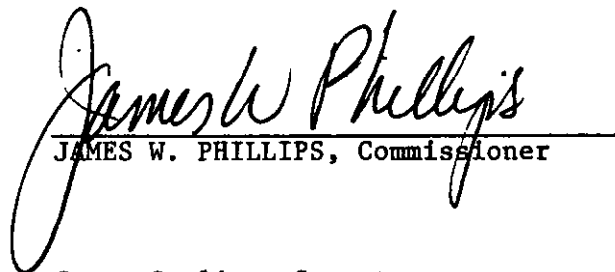
ORDER

The Commission having found no discrimination, this complaint is dismissed.

Dated: November 24, 1982 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Commissioner

AJT:jmf


JAMES W. PHILLIPS, Commissioner

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