STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD L. PAUL,

Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 82-PC-ER-69

INTERIM DECISION AND ORDER*

NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of race with respect to a selection process. The procedural background of this matter has been extensive, including extensive periods when it has been held in abeyance pending other, related proceedings. For present purposes, the most significant aspect of prior proceedings was a commission decision that was entered June 19, 1986, which addressed the matters of probable cause in this case, and the merits in Mr. Paul's related civil service appeal concerning the same transaction (Case No. 82-156-PC). The commission's conclusion on probable cause was:

> 8. There is probable cause to believe that respondents discriminated against the appellant in violation of Subch. II of Ch. 111, Stats., as to race and color with respect to the decision not to select him for the ISD 1 position at MMHI and, therefore, the initial determination of no probable cause must be reversed.

The issue for hearing on the merits was set forth in the conference report dated May 8, 1987, as follows:

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* This decision is being promulgated as an "interim" decision so that the commission can retain jurisdiction over this case to consider the matter of attorney's fees and other remedial aspects of this case.

Issue: Whether the respondents discriminated against the complainant on the basis of race in violation of the Fair Employment Act, by not hiring him for the position of Institution Security Director I for the Mendota Mental Health Institute as set forth in his complaint of discrimination. If so, what is the appropriate remedy?

Subissue: Whether expanded certification as applied in this case is in violation of the Fair Employment Act.

FINDINGS OF FACT

The parties submitted this matter on the basis of a written stipulation of fact. Therefore, the commission will adopt this stipulation as its findings of fact. A copy of these stipulated findings are attached hereto and incorporated by reference as if fully set forth.[1]

DISCUSSION

In his briefs on the merits, complainant does not contend that Mr. Schnapp (the appointing authority) exercised intentional discrimination in making the specific decision to appoint Mr. Young rather than Mr. Paul.[2] Rather, complainant's argument basically is that: 1) the certification of Mr. Young was in violation of the FEA (Fair Employment Act) (Subchapter II, Chapter 111, stats.); 2) Mr. Young would not have been able to have been considered for appointment but for his illegal certification; 3) therefore, Mr. Young's appointment, and concomitantly, complainant's nonappointment, were in violation of the FEA.

Respondent DHSS argues that it did not discriminate against complainant inasmuch as it requested expanded certification under a duly promulgated administrative rule, and the expanded certification merely gave it the right to consider Mr. Young for the final appointment, at which stage race did not play a factor. Respondent DMRS argues that respondents did not refuse to hire complainant because of his race and that "[a]ll the expanded

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[1]The documents which are attached to, and part of the stipulation, are attached to the original of this decision, but are not attached to the copies thereof.

[2]Such an assertion obviously would be foreclosed by the provision in stipulated finding #19 that: "Mr. Schnapp did not consider the race of the candidates in making his appointment decision."

certification program did was make the complainant compete with three additional people for the position he sought." DMRS brief at p. 9. Respondent further argues that it acted in good faith and that even if it acted on the basis of an erroneous interpretation of the law, there was no intentional discrimination.[3]

In cases of this nature, the method of analysis is essentially as set forth in Johnson v. Transportation Agency, 480 U. S. 616, 626-627, 94 L.Ed. 2d 615, 627, 107 S. Ct. 1442 (1987):

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

In the instant case, the stipulation establishes that race played a role in the decision to certify Mr. Young, who did not score high enough on the civil service exam to have been certified pursuant to s. 230.25(1), stats., for further consideration in the selection process. The rationale for this action is also contained in the stipulation--DHSS utilized expanded certification for minorities after going through a workforce/labor force analysis. As to the final step, the stipulation contains the following: "22. The certification of Warren Young was illegal because it was not effected in accordance with s. 230.03(4m), Stats.[1985-86][4]"

The commission's decision in this case on probable cause, dated June 19, 1986, contains the following:

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[3]The commission will not address respondents' arguments running to the proposition that there was no discrimination with respect solely to Mr. Schnapp's final decision to choose Mr. Young over complainant. Respondents apparently interpreted complainant's citation to Kesterson v. DILHR, Nos. 85-0081-PC, 85-0105-PC-ER (4/4/88), as arguing this point. To the extent that complainant's citation to Kesterson might be so interpreted, such argument would not be viable, as noted above.

[4]230.03(4m). "'Balanced work force' means representation in a classified civil service classification in an agency of any racial, ethnic, gender or handicap group at the rate of that group's representation in that part of the state labor force qualified and available for employment in such classification."

> The Fair Employment Act provides that hiring decisions are to be made without consideration of the race of the candidates. However, as noted above, affirmative action in state employment is specifically provided for in Ch. 230, Stats. A strong argument can be made that the legislature intended that these provisions would not be in conflict with the Fair Employment Law, and that transactions consistent with these provisions would not violate the Fair Employment Law. If the personnel actions in issue here fell within the definition of affirmative action in s. 230.03, Stats., and were carried out consistently with the remaining provisions of Ch. 230, Stats., and the rules promulgated thereunder, the actions would presumably also be consistent with the Fair Employment Act. Here, the certification action was outside the scope of permissible affirmative action as specified in Ch. 230, Stats. p. 21.

The commission also decided that the use of expanded certification under the circumstances did not meet all the criteria for valid affirmative action under Title VII, and thus concluded:

> The instant plan therefore fails to meet one of the four criteria mandated by Title VII . . . The plan is also inconsistent with applicable [Wisconsin] statutory requirements. Therefore, there is probable cause to conclude that the respondent's actions in using expanded certification to add Mr. Young's name to the list of eligible [sic] was discriminatory. p. 25.

While this decision was reached in a probable cause context, where the complainant's burden of proof is lighter than at the merits stage, the facts to which the parties have stipulated at this (merits) stage do not differ in any material respect to the findings on which the commission relied in reaching the aforesaid conclusions. Not only is there no apparent reason why a different result should be reached now, the decision on probable cause has been reinforced by a subsequent decision in Oestreich v. DHSS & DMRS, No. 87-0038-PC-ER (2/12/91), involving the improper use of handicapped expanded certification. Therefore, the commission concludes that under the facts of this case, the use of expanded certification violated the FEA.

The commission disagrees with respondents' assertion that they are insulated from liability under the FEA because they were acting in good faith reliance on existing rules and policies and did not have a specific intent to discriminate against complainant on the basis of his race. This is frequently the case in personnel transactions taken as part of an illegal affirmative

action plan, but it is not a recognized defense. See, e. g., Kober v. Westinghouse, 480 F. 2d 245-246 (3d Cir. 1973):

> [D]iscrimination based on reliance on conflicting state statutes is an intentional unfair employment practice. Intentional unfair employment practices are those engaged in deliberately and not accidentally. No wilfulness in the part of the employer need be shown to establish a violation of section 706(g) [Title VII, 42 U.S. s 2000e-5(g)]. (citations omitted)

Accord, Sprogis v. UAL, 444 F. 2d 1194, 1201 (7th Cir. 1971); Norris v. Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, 28 FEP Cases 369, 372 (9th Cir. 1982).

The next question is whether the final hiring decision was discriminatory. The commission addressed this point in its June 19, 1986, decision on probable cause as follows: "[t]o the extent that Mr. Young would not have been eligible for appointment absent the certification decision for which probable cause has already been found, the subsequent decision to select Mr. Young was also discriminatory." p.25. Again, although this was a decision on probable cause, inasmuch as the material facts remain the same there is nothing to suggest that a different result should be reached at this time.

Respondent DMRS argues that the only effect of expanded certification "was [to] make the complainant compete with three additional people for the position he sought." p.9. This argument ignores certain facts. This was not simply a situation where the pool of people eligible to compete for the position was enlarged by, for example, enlarging the recruitment base from agency promotional to open competitive for the affirmative action purpose of enhancing the opportunity of minorities to compete for the position. Under that kind of circumstance, the commission would agree that a nonminority candidate would have no basis for a claim under the FEA that he or she was required to compete against additional candidates. Rather, expanded certification was used in this case after the completion of the competitive examination process, whereby all those eligible to compete had been examined. As a result of this process, complainant's exam score had qualified him for further consideration for final appointment. At this point, the civil service code provided that the appointing authority had the right to make an

appointment from among complainant, the four other highest-scoring candidates who had been certified on that basis, and those other candidates who lawfully could be considered on the basis of transfer/reinstatement eligibility or a lawfully-conducted expanded certification. However, what actually occurred was that there was an expanded certification on the basis of race of the ultimately successful candidate. The parties have stipulated that this certification "was illegal because it was not effected in accordance with s. 230.03(4m), Stats.," stipulated finding #22, and the commission also has concluded that it was in violation of the FEA. The appointing authority's decisional process came down to a choice between complainant and Mr. Young, and he chose Mr. Young. Since clearly Mr. Young would not have been in the running at this point but for the facts that he had minority status and he had been certified in a manner that was illegal under both the civil service code and the Fair Employment Act, the conclusion that complainant was discriminated against on the basis of race when he was not hired for this position ineluctably follows.

These facts parallel a hypothetical situation where, after an examination, the five highest-scoring candidates are minorities. The appointing authority then decides he or she does not want to have to make an appointment decision from a pool made up completely of minority candidates, and arranges to have a nonminority considered on the basis of transfer, notwithstanding that that candidate is technically ineligible for transfer. If that nonminority candidate is then correctly determined to be the best qualified, and receives the appointment to the position in question, it seems apparent that the five minority candidates would have a basis for a claim of race discrimination under the FEA. They are not merely being forced to "compete" in the broad sense against a larger field. Rather, they are being deprived of a status they achieved through competition--that of being among the five legally-qualified finalists--based solely on race. In the instant case, complainant also was deprived of this competitive status through the additional certification, which also was based on race. If this additional certification had followed the requirements found in the civil service code governing affirmative action, and the criteria for affirmative action provided

by the FEA,[5] the transaction presumably would have been legal. However, since it did neither, the transaction stands on no sounder legal footing than the additional certification of the nonminority candidate in the foregoing hypothetical.

With respect to remedy, since it is clear that complainant would have been appointed to this position in the absence of respondents' discrimination, he is entitled to appointment to this or a similar appropriate position upon the next vacancy, if qualified at that time, plus back pay and benefits less mitigation pursuant to s. 111.39(4)(c), stats.,[6] as well as a cease and desist order. Respondent DHSS argues that it is inappropriate to require an appointment because appellant is no longer "qualified" since sometime prior to the issuance of the June 19, 1986, decision, he had been discharged for cause and this transaction ultimately was upheld on appeal, see Paul v. DHSS, No. 87-0147-PC (4/19/90). However, it does not necessarily follow that because appellant was discharged for cause sometime before June 19, 1986, he will not be eligible for appointment to an ISD 1 position sometime in 1991 or later. Such a result is not required by the civil service code, although s. ER-PERS 6.10, Wis. Adm. Code, provides:

> [t]he administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:
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> (4) Who has been dismissed from the state service for cause, and the action is requested by the appointing authority; (emphasis added)[7]

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[5]As discussed in the commission's June 19, 1986, decision, "Wisconsin courts have frequently looked to federal court decisions under Title VII to interpret Wisconsin law." p.21.

[6]In its June 19, 1986, decision of complainant's civil service appeal involving the same transaction (Case No. 82-156-PC), the commission ordered appellant's appointment: "'if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy.'" The commission rejected a back pay award at that time because of the limitations on this remedy in civil service appeals (see s. 230.43(4), stats.), but there is no such limitation imposed by the FEA, and s. 111.39(4)(c) explicitly contemplates this remedy.

[7]Section. 230.17(2), stats., provides for a right to appeal to the commission a refusal to examine or to certify.

There is an insufficient basis in the record before it for the commission to conclude that appointment is not an appropriate remedy, and therefore, this will be included in the order.[8]

CONCLUSIONS OF LAW

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

2. Complainant has the burden of establishing that respondents discriminated against him.

3. Complainant having satisfied his burden, the commission concludes that:

a) respondents discriminated against complainant on the basis of race in violation of the Fair Employment Act by not hiring him for the position of Institution Security Director 1 for the Mendota Mental Health Institute;

b) the expanded certification of the successful candidate was in violation of the Fair Employment Act.

4. As a remedy, respondents are ordered:

a) To appoint complainant to the position in question or an appropriate comparable position on the next available vacancy, if he then is qualified;

b) To compensate complainant for back pay and benefits, subject to mitigation as provided for in s. 111.39(4)(c), stats., and as discussed above;

c) To cease and desist from discriminating against complainant in a like manner in the future.

d) To pay complainant the reasonable attorney's fees incurred by him in connection with this proceeding, see Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984).[9]

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[8]Complainant is not entitled to back pay for any period of unemployment following complainant's discharge from employment for misconduct. See Brady v. Thurston Motor Lines, Inc., 753 F. 2d 1269, 36 FEP Cases 1805, 1814 (4th Cir. 1985).

[9]The parties are directed to consult to attempt to reach agreement on remedy and to advise the Commission within 30 days of the service of this order as to

ORDER

This matter is remanded to respondent for action in accordance with this decision. The Commission will retain jurisdiction for the purpose of dealing with the remedial phase of this proceeding. The Commission will enter a final order once the specific details of the remedy have been determined.

Dated: March 30, 1993 WISCONSIN PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:ajt

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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the status of those negotiations. The Commission will retain jurisdiction until the matter of remedy is resolved, and will conduct a hearing on remedy if necessary.