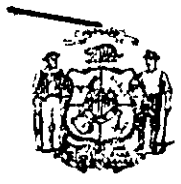


7-8-88



State of Wisconsin \ PERSONNEL COMMISSION

2nd Floor  
121 East Wilson Street  
Madison, Wisconsin 53702  
(608) 266 1995

Dennis P. McGiligan  
Chairperson

Donald R. Murphy  
Commissioner

Laurie R. McCallum  
Commissioner

July 12, 1988

Attorney Michael J. Fox  
44 E. Mifflin St., #403  
Madison, WI 53703

Attorney Barbara Bird  
DOT  
P. O. Box 7910  
Madison, WI 53707

Re: Winters v. DOT  
84-0003-PC-ER

Dear Counsel:

*and second*

Please note that on the first <sup>and second</sup> pages of the final decision of this matter dated July 8, 1988, Mr. Winters' other related case is erroneously referred to as No. 84-0119-PC-ER. This should be 84-0199-PC-ER. This will be corrected on the original and you are requested to conform your copies.

Sincerely,

*Anthony J. Theodore*  
Anthony J. Theodore  
General Counsel

AJT:jmf



as alleged in Case No. 84-0003-PC-ER but no probable cause to believe discrimination had occurred as alleged in Case No. 84-0179-PC-ER. Following oral argument in August of 1986, counsel for complainant was permitted to submit in writing his position on respondent's motion to dismiss Case No. 84-0003-PC-ER due to the allegedly illegal inclusion of the complainant on the civil service certification list of candidates for the subject position. The motion was filed with the Commission on August 19, 1986, and complainant's response was filed on August 26, 1986.

On September 7, 1986, the Commission adopted as its final decision and order the proposed decision and order of the Hearing Examiner and, in addition, denied respondent's motion to dismiss. Complainant did not appeal the dismissal of Case No. 84-0119-PC-ER. A hearing on the merits of Case No. 84-0003-PC-ER was held in April and May of 1987, before Dennis P. McGilligan, Commissioner, and the briefing schedule was completed on October 13, 1987. A proposed decision and order was issued by Commissioner McGilligan on March 15, 1988, and oral argument was heard by the Commission on May 11, 1988. The Commission has consulted with the examiner. As a result of its perusal of this record, the Commission has determined that the proposed decision is incorrect in its conclusion that respondent discriminated against complainant in connection with this hiring decision, for reasons which are set forth in the following decision.

#### FINDINGS OF FACT

1. This case involves the staffing of a classified civil service position in the office of the Secretary of the Department of Transportation (DOT), classified as an Equal Opportunity Officer 7 (EOO 7) - Management with the working title of DOT Affirmative Action/Equal Employment Opportunity Officer.

2. The duties and responsibilities and reporting relationship of this position are in summary as follows:

This position is responsible for the management of a comprehensive departmentwide AA/EEO program. The position has direct access to the Secretary of the DOT to recommend AA/EEO policies, plans and programs or to seek action on AA/EEO issues. The position operates on a day-to-day basis under the general direction of the Director of the Bureau of Personnel Management. (Position Description, Complainant's Exhibit 11)

3. The goals and worker activities of the position are set forth in the position description as follows:

- 25% A. Development and implementation of departmentwide AA/EEO policies, plans and programs.
- A.1 Develop or update, as needed, and present for the Secretary's approval a comprehensive internal AA/EEO policy, which meets the requirements of state and federal legislation and executive orders.
  - A.2 Work with the Bureau of Personnel Management in integrating AA/EEO issues into all personnel policies and practices, where appropriate.
  - A.3 Develop and disseminate Division and Bureau/District guidelines for annual or biennial AA/EEO plans, required by the Department of Employment Relations or the Federal Highway Administration.
  - A.4 Provide data to Divisions and Bureaus/Districts for reviewing their current workforce, their achievements, and in developing their numerical goals for annual or biennial plans.
  - A.5 Provide technical assistance and leadership to the Divisions and Bureaus/Districts in identifying or designing program goals for annual or biennial plans.
  - A.6 Review Division and Bureau/District plans, work directly with Administrators and Bureau/District Directors in revising them, as needed, and compile from the separate plans a total DOT plan for the Secretary's approval and for submission to the DER or FHWA.
  - A.7 Devise methods of informing supervisors, employees, and the interested public of the contents of the Department AA/EEO policy and plan or the individual Division or Bureau/District plans.

- A.8 Insure the implementation of programs detailed in the Department, Division, or Bureau/District AA/EEO Plans.
- A.9 Manage the on-going implementation of DOT AA/EEO programs.
- 10% B. Development of avenues for employes or applicants to raise concerns about discrimination and investigation of concerns or complaints of discrimination based on protected class.
  - B.1 Establish informal routes for employes to raise concerns about discrimination, using the employe assistance coordinators, the affirmative action committee, the district affirmative action contacts, etc.
  - B.2 Train contacts, identified in B.1, supervisors, personnel managers, etc. in methods of investigating and resolving informal complaints of discrimination.
  - B.3 Insure that the formal internal procedures for handling grievances adequately allow for the processing of discrimination complaints and recommend revisions in procedures, as needed.
  - B.4 Investigate directly concerns regarding discrimination brought to your attention by supervisors or employes.
  - B.5 Present to managers and supervisors recommendations for resolution of complaints brought to your attention.
  - B.6 Disseminate to all employes or applicants for employment information on how to raise concerns about discrimination.
  - B.7 Respond to requests for data from investigators for outside equal employment opportunity agencies.
  - B.8 Participate in negotiation of conciliation agreements, where appropriate.
- 20% C. Development and presentation of training programs, seminars, briefings, and printed and audio/visual materials to increase the skills and awareness of managers, supervisors, and employes regarding their roles in implementing the DOT AA/EEO program.
  - C.1 Design and present an annual AA/EEO update for all supervisors as part of the DOT supervisory certification program and to meet each Division's program goals.
  - C.2 Develop and present an annual briefing on the status of the DOT AA/EEO program for all Administrators and Bureau/District Directors.

- C.3 Work with the Transportation Information Office in writing articles on the AA/EEO program for inclusion in the DOT bimonthly newsletter.
  - C.4 Work with the producers of the DOT bimonthly video newsletter in identifying topics which highlight AA/EEO efforts or which show target group employes in successful roles in DOT.
  - C.5 Meet with each Division Administrator, at least, twice per year to review the Division's progress in implementing its AA/EEO program.
  - C.6 Make presentations on topics of departmentwide interest at Administrator's meetings, called by the Secretary's office.
  - C.7 Meet with the Secretary and the Deputy Secretary, at least, twice annually to brief them on the status of the DOT program and to identify new directions for the program.
  - C.8 Provide printed materials to supervisors and personnel managers on an on-going basis as AA/EEO legislation changes or new program ideas are developed.
  - C.9 Train new Motor Vehicle Services Specialists, Enforcement Cadets and other employes with extensive public contact on their roles in implementing the internal EEO program and their responsibilities in providing services to the public.
  - C.10 Develop special events, such as job fairs, career awareness weeks, "Handicap Awareness Month," etc., to focus employes' attention on AA/EEO and opportunities available in the DOT.
  - C.11 Conduct training through the Human Resources Section for the Career Development program, the DOT Supervisory Certification Program, and the Leadership Identification Program.
- 10% D. Design and implementation of recruitment campaigns for statewide and competitive promotional permanent openings and for limited term openings in the DOT.
- D.1 Insure that for each permanent job opening, with underrepresentation of target group employes, a special recruitment effort is made.
  - D.2 Maintain mailing lists by geographic areas for recruitment target group applicants for statewide openings.

- D.3 Develop specific telephone contacts for organizations representing minorities, females, and handicapped persons, to be used in recruiting for permanent and LTE positions.
  - D.4 Use mailing lists of persons, who previously applied for related DOT jobs, to recruit for current vacancies.
  - D.5 Research and recommend target group newspapers, newsletters, radio stations, television stations, or other media for advertising jobs.
  - D.6 Work with personnel managers and the staff of the Transportation Information Office in developing comprehensive recruitment campaigns for major recruitments, such as Enforcement Cadet, Civil Engineer, Engineering Aid or Technician, Police Communication Officer, Motor Vehicle Services Specialist.
  - D.7 Recruit on campuses and at career days or job fairs sponsored by educational institutions or community organizations.
  - D.8 Recruit and provide target group referrals for every LTE opening at the Hill Farms or Kinsman Blvd. sites.
  - D.9 Assist the Transportation, State Patrol and Motor Vehicles Districts in recruiting target group applicants for LTE positions, on an as needed basis.
  - D.10 Develop with the personnel managers study guides for major recruitments (e.g. Engineering Aids, Enforcement Cadets, etc.) and set-up through community organizations orientation sessions or tutoring for civil service examinations.
- 10% E. Development and implementation of methods to monitor personnel transactions to prevent discrimination or adverse impact and development of annual or biennial self-evaluations for inclusion in the federal and state program reports.
- E.1 Work with personnel managers in developing examinations, reviewing the examinations for bias, developing appropriate supervisory questions on AA/EEO, and recommending balanced rating panels or oral boards.
  - E.2 Review applicant flow statistics to identify problems with adverse impact in the examination and hiring process.
  - E.3 Insure that each certification with target group applicants is accompanied by a sign-off for the Division Administrator.

- E.4 Follow-up periodically on the sign-off process to insure that supervisors are presenting their hiring justification to Administrators and that Administrators are aware of the status of the Division in relation to its numerical AA goals.
  - E.5 Review hiring, promotion, demotion, and termination statistics, at least annually, to identify potential problems in these personnel transactions.
  - E.6 Coordinate the mailing of follow-up surveys to all terminating employes and the compilation of survey results.
  - E.7 Review on a quarterly basis the hires of each Bureau/District (information compiled by the Personnel Assistant responsible for certification) and disseminate this information to the Divisions and Bureaus/Districts.
  - E.8 Monitor the effectiveness of the handicap self-identification process for new employes currently established in the DOT through the timekeepers.
  - E.9 Survey employed periodically [sic] to determine, if individuals with handicaps have been given the opportunity to identify themselves and whether their needs for accommodations are being met.
  - E.10 Present to the Secretary for special recognition information on work units that have been successful in meeting program or numerical goals.
  - E.11 Develop annually or biennially a report evaluating the DOT AA/EEO program for submission to state and federal agencies.
  - E.12 Involve in the annual or biennial evaluation, as needed, teams of DOT employes, the DOT Affirmative Action Committee or representatives of interested community organizations (e.g. organizations representing handicapped persons).
  - E.13 Prepare exhibits and schedule interviews for the annual federal and state on-site audit of the internal employment program.
- 10% F. Identification of special programs, which increase the participation of target group or disadvantaged people in the DOT workforce.
- F.1 Work with Goodwill, Vocational Education Alternatives, and the Division of Vocational Rehabilitation in providing work experience or job evaluation



opportunities for individuals entering or re-entering the workforce.

- F.2 Provide supervisors with information on an on-going basis on work experience or "volunteer" programs, which give opportunities to target group or disadvantaged persons and which provide assistance to the Department.
  - F.3 Develop with supervisors "volunteer" opportunities for developmentally disabled persons, who are unable to hold permanent jobs or who need work experience in order to obtain paid employment.
  - F.4 Research and develop proposals for funding for positions for disadvantaged persons through programs, such as WIN/PSE and JPTA.
  - F.5 Work with supervisors in identifying potential for COOP positions and recruiting target group students for those positions.
  - F.6 Work with the personnel managers in effectively utilizing the Summer Minority Intern Program.
  - F.7 Provide additional information on how to gain permanent state employment to persons placed in the DOT under special programs.
- 5% G. Coordination of the departmentwide Affirmative Action Advisory Committee, the District Affirmative Action Contacts, and other ad hoc teams or committees.
- G.1 Insure that the DOT Affirmative Action Advisory Committee and the District AA Contacts are provided information necessary for their effective functioning.
  - G.2 Assist the Committee in seeking new members on an annual basis and in issuing letters of appointment from the Secretary's office.
  - G.3 Assist the DOT AA Committee in carrying out its mandated functions.
  - G.4 Establish through the Secretary's Office additional teams or committees to address specific AA/EEO issues, such as Alternative Work Patterns, follow-up surveys for employes who have terminated, etc. and coordinate the work of these committees.
  - G.5 Serve as member of other DOT committees addressing personnel issues having implications for AA/EEO.
- 5% H. Provision of consultant services or resources to other state agencies or public organizations.

- H.1 Serve as the DOT representative on task forces, established by DER, to develop guidelines on AA/EEO for state agencies and institutions.
  - H.2 Provide assistance to other state agencies in establishing AA/EEO programs, which have been piloted in DOT.
  - H.3 Provide presentations or training to personnel in other state agencies on successful AA/EEO programs in DOT.
  - H.4 Serve on inter-agency committees, established to address personnel concerns with AA/EEO implications.
- 5% I. Performance of related administrative, public relations and informational work as required (Position Description, Complainant's Exhibit 11)

4. The subject position was occupied by Anna Biermeier from 1980 to 1983. In Ms. Biermeier's opinion, the primary focus and the most important aspects of the position were program management and development and the least important aspects of the position and those most easily learned were the technical aspects, e.g., collection and analysis of work force statistics and applicant flow statistics, the establishment of hiring goals, and the preparation of affirmative action plans and other required reports.

5. In early October of 1983, Ms. Biermeier accepted an appointment to an EEO 8 - Supervisor position at the Department of Health and Social Services and vacated the subject position at DOT. DOT requested and received approval from the Department of Employment Relations (DER) to use a related register that had been established with respect to the EEO 8 - Supervisor classification. DOT further requested expanded certification of minorities and handicapped, and pursuant to this request, DER certified 6 applicants on the basis of exam scores, 3 applicants under handicapped expanded certification, 3 applicants under minority expanded certification, and 2 applicants who qualified by the addition of veterans' points. The

complainant, a black male, was included on this list of certified applicants as a result of minority expanded certification.

6. John Roslak, Director of respondent's Bureau of Personnel Management, contacted each of the 14 candidates on the certification list to determine if they were interested in being considered for the position. One of the applicants added through handicapped expanded certification was not interested (Sharon Loshaw) and 2 of the applicants added through minority expanded certification (Nathaniel E. Robinson and Kirbie G. Mack) were not interested. John Roslak directed his assistant, James Zegers, to request names of additional candidates from DER to replace these 3 on the certification list. DER provided the name of Regina Fultz under handicapped expanded certification to replace Sharon Loshaw and the names of Thomas Lee and Joseph D'Costa (an Asian male) under minority expanded certification to replace the other two. Thomas Lee indicated he was not interested in the subject position and DER provided the name of Stephanie Thorn to replace him. Of these final 14 certified candidates, 6 are black.

7. The 14 candidates were interviewed on November 14 and 15, 1983, by a panel consisting of DOT employees John Roslak; David Bohlman, Administrator of the Division of Business Management; and Cynthia Morehouse, a member of the Department's AA/EEO Committee. Prior to the interview, candidates were sent information regarding the position which included a position description, a copy of the Department's organizational chart and a copy of the mission statement for the Department's Bureau of Personnel Management. Each candidate was asked the same six questions.

1. What do you view as the major responsibilities and duties you would carry as the AA/EEO Officer in the Department of Transportation? How would you view your relationship and role to each of the following DOT staff levels?  
Executive-Management-Supervisory-General.

2. Keeping in mind the duties and responsibilities of the DOT AA/EEO position, describe the scope and level of your training and experience that qualifies you for this position. Describe one major AA/EEO project or program that you were responsible for setting up and administering; including the problems you encountered and how you resolved these problems.
3. What are some of the methods and processes that you would follow to become effectively operational and personally accepted as the DOT AA/EEO Officer? What role and responsibility would you like to see the executive and management of DOT fulfill in this process?
4. Have you ever served on or helped to organize an agency AA/EEO committee? If you have, describe the setting; composition and role of the committee. What are some of the factors and decisions that you feel are necessary and important to consider in setting up a committee? What do you view as the role of the DOT AA/EEO committee in their relationship to you if you are appointed as the DOT AA/EEO Officer?
5. As important as it is for each of us to evaluate our strengths, accomplishments and abilities when interviewing for a position, it is equally important to recognize areas in which personal improvement may be necessary to avoid failure or ineffective program and/or personal performance. In assessing yourself, what areas of personal development do you recognize as needing added attention?
6. How specifically does this position fit into your personal and professional goals and objectives?

The questions asked by the panel were developed by John Roslak and no instruction was given to the panel from Lowell B. Jackson, Secretary of the Department of Transportation, as to which traits Secretary Jackson was looking for in selecting an applicant. The panel had a resume for each candidate at the time of the interview. The candidates were not given scores or numerical rankings. The interviewers did not take or keep notes with regard to the interviews or assign specific weights to any of the questions that were asked. The panel selected the 6 candidates they considered the best qualified for further consideration by Secretary Jackson. The candidates were not ranked for, nor was a recommendation made to, the Secretary. Of these six candidates whose names were sent to

Secretary Jackson, there were 2 white females (Barbara Bitters, Rita Hagen-Aleman), one handicapped white male (David Dunham), 2 black males (complainant and Adrian McCullom), and one Asian male (D'Costa). Ms. Bitters withdrew from competition prior to consideration by Secretary Jackson.

8. In addition to his resume, complainant brought written materials with him to the initial interview. The materials themselves were unsolicited and were not considered by the panel in reaching a decision on which six of the 14 certified candidates should be referred to Secretary Jackson.

9. On November 21, 1983, Secretary Jackson interviewed the remaining 5 candidates. Also in attendance were DOT employes John Roslak, David Bohlman, and Sue Gallagher, Secretary Jackson's executive assistant. Secretary Jackson conducted the interviews and made the final appointment decision. Mr. Roslak and Mr. Bohlman gave their impressions with regard to the qualifications of the candidates being interviewed to Secretary Jackson.

10. Each of the candidates was asked the same 5 questions. The first question asked the candidates to describe their educational and employment background which they felt applied to the position being sought. The second question related to the candidate's management style. The third question asked about the candidate's style of conflict resolution. The fourth question asked the candidate to comment on the particular position being sought and what he/she could bring to the job. The final question gave each candidate an opportunity to add any additional information he/she desired.

11. Secretary Jackson kept no notes with regard to the interviews nor did any of the others present during the interviews with Secretary Jackson

keep any notes or written records of the interviews. The questions used by Secretary Jackson were not weighted nor was any numerical ranking or grading used with regard to the responses to each question. The questions also were not written out and may have been asked in an extemporaneous manner or a little bit differently for each candidate. Secretary Jackson did not review any written materials supplied by the candidates prior to making the subject selection decision.

12. Secretary Jackson followed his normal procedure of designating 2 top candidates -- a first (D'Costa) who was offered the job following a satisfactory reference check by Mr. Roslak and a second (McCullom). Mr. Roslak inquired of Mr. D'Costa's references as to Mr. D'Costa's judgment, organizational skills, program management skills, practicality, honesty, ability to develop loyalty, ability to accept different management styles, ability to set correct priorities, ability to meet goals, and the references' impression as to whether Mr. D'Costa was an antagonistic, discouraging, or negative person. Mr. D'Costa's references rated Mr. D'Costa very favorably in regard to each of these factors.

13. Mr. D'Costa accepted the offer and commenced employment on December 26, 1983.

14. At the probable cause hearing, Secretary Jackson testified as follows in regard to the subject selection decision (Tr. pp. 172-173):

Q. And, in conducting your interview of the five candidates who were referred to you, were there specific factors, traits, which you were looking for in the candidate that you wished to appoint?

A. Yes.

Q. And can you relate what those are?

A. Well, the successful candidate was selected primarily upon my judgment, reinforced by the others there, that in an organization that is as highly decentralized as we are and

in which the decentralized elements have a substantial amount of autonomy, that Mr. Dekosta's (sic) experience in dealing out of the office, if you will, with a wide disparate (sic) clientele, particularly local officials, fit, certainly in terms of experience, and also in our extraction of how he did that and what he did, as to the way we saw his action within the Department of Transportation.

Q. With respect to Mr. McCullom, who was your second choice, can you indicate what it was about that particular candidate that you ranked him as your back-up appointee?

A. The characteristics of the two candidates were quite different. Mr. McCullom, is somewhat more outspoken. He handled himself very well in the interview and subsequently in employment, in terms of making presentations of himself and his program. And, I think, a decision, in comparing to all the other candidates, of him coming up number two rested substantially on that fact, that he handled himself well in the interview. He described his interests and background probably more eloquently than any of the other candidates, which I'm sure is the reason why we rated him number two.

15. At the hearing on the merits, Secretary Jackson testified as follows in regard to the subject selection decision (Tr. pp. 205-208, 241-242):

Q. Now, following at the time that you conducted the interview and designed the questions you were going to ask the candidates, did you have any particular traits which you were looking for in evaluating those candidates?

A. Well, yes. They grow off the questions asked. By its nature, this position is one that has potential conflicts associated with it. This is an agency, a large decentralized agency which inevitably there would be a need to convince people to establish programs and carry them out. That would be new to them in some cases they may have some concerns about change in direction if that would apply. So one of the features that I was looking for and it was inclusive primarily in my discussion of management style and interpersonal conflict resolution, it is my belief that how this person working directly for me and representing me throughout the agency would in fact interact with other people. Would they be believable. Would they essentially be regarded as having the requisite understanding, patience, and ability to help the individuals in my agency carry out the program. And I spent a good deal of time on that point with all of the candidates.

\* \* \*

Q. Did you feel that prior experience with a State Agency as an Equal Employment Opportunity Officer was in fact of any particular...

A. Well, obviously...

Q. ...relevance to the selection process?

A. Obviously it is an important characteristic. My tenure (sic) in making the decision, however, has not been characterized by selection of the next person up, if you will, in terms of experience. And it more relates, as a matter of fact, given relevant experience. Given some association with the way government works, it is important to me to have personal characteristics in someone working directly for me that I admire and can interact with well. I don't believe, from my recollection, of discussing their qualifications with any of the five that there was any one who was completely unqualified to be there for fear that they have different degrees of specific involvement with Affirmative Action.

Q. Can you explain, based upon your statements as to what characteristics you were looking for in this position. Why you rated Mr. D'Costa and Mr. McCullom as your top two choices?

A. Probably driven off the experience that I had had with the prior Affirmative Action Officer. I was looking for someone who had and expressed a good deal of enthusiasm, who, you know, was just not producing a wrote (sic) an, reproduction of what they may have read or thought about Affirmative Action. I was looking for someone who brought experiences, specific experiences of interacting with other desperate (sic) clientele, which our organization has. I was looking for someone in an interpersonal relations area that gave every evidence of being someone who, as a matter of fact, could persuade people to do something they might not want to do with methods other than just a rule or a statement. And ah, generally looking for someone that fit into well with my relatively close attachment to Affirmative Action and who I thought could carry it out in a way that would make it believable, saleable to the Department. I say that that was driven off of my experience with the prior Affirmative Action Office who did bring those qualities to the job, even though she, as a matter of fact, had not had a long term degree of experience specifically in Affirmative Action.

Q. And was your assessment of those characteristics based upon the interaction that you had with the candidates who you interviewed?

A. Yes.



Q. Now you did not rate the complainant in this case among the top two candidates?

A. That is correct.

Q. Along with two other individuals.

A. That is correct.

Q. And ah, can you explain why?

A. Well obviously in terms of the two individuals that were ranked #1 and #2, my assessment after the interviews was that they fit those qualifications that I was looking for, that I have already explained, better than the others. In terms of the other three, my assessment of Rita Hagen was that although she did resent (sic) herself well in terms of enthusiasm, that she was not able to relate to me enough specific instances where she had had related activity that I thought would be as valuable as those that D'Costa did. As far as Mr. Dunham was concerned, I think he had a perhaps not one of his best interviews in terms of what I was looking for in terms of a positive outlook for the position. And in terms of Mr. Pickens, I think that it is fair to say that the difficulty in rating him any higher was my belief that even though he certainly had served in the position, I found his answers to be wrote (sic), to be relatively shallow renditions of Affirmative Action cant in many respects, and I was not favorably impressed with the ability that he would have certainly compared to Mr. De'Costa (sic), to have the kind of interpersonal interaction with me and the Department that I was looking for. I did find those characteristics in the other two gentlemen, at least in terms of the interview. And, as a matter of fact, in actual practice, Mr. D'Costa both in terms of the next process of what went on in determining what his prior employer thought of him and in terms of our experience with him in the Department for the time that he was there, that judgment was well borne out.

\* \* \*

Q. Now, your prior testimony at the prior hearing, when you mentioned or made reference to experience with contact with outside agencies, etc., were you in fact in making your evaluation, looking for any particular type of experience in terms of any particular type of experience per se?

A. Well, I, I wasn't per se looking for the exact type of experience that Joe offered because, the interview was the thing that made that available to me. Ah, the thing that I was impressed about, ah, aside from the fact that he was, ah, enthusiastic and very positive about representing what he had done, and, as someone who has had a good deal of

experience both good and bad myself, in interacting with local officials, the fact that he was able to make a good case, that he had successfully pursued interaction with local county officials in circumstances and in areas of the state which ah, ah, in my ah, estimation, experience, would not necessarily be very amenable to dealing with the minority and dealing with issues, of, of ah, handicapped, that he represented successfully to me that he had been very successful at that, and that was impressive to me that ah, ah, he seemed to know something about that interaction that struck a cord (sic) with me.

16. At the time he was hired for the position in question, Mr. D'Costa had been employed since 1978 by the Department of Health and Social Services (DHSS), Division of Vocational Rehabilitation (DVR), as the Field Office Supervisor of the Portage field office, responsible for the supervision of 8 professional and 3 clerical staff. This position involved substantial interaction with local units of government. Before that, he had worked in DVR from 1974 to 1978 as a vocational rehabilitation counselor. Mr. D'Costa's experience in the areas of personnel or affirmative action/equal employment opportunity included job placement of handicapped individuals, and the preparation and monitoring of an affirmative action plan for the unit he supervised. During Mr. D'Costa's tenure as supervisor, the Portage field office had received an award relating to the job placements of handicapped persons.

17. At the time he was considered for the position, complainant had been employed by DHSS as the Affirmative Action/Civil Rights Compliance officer for the Division of Community Services (DCS), responsible for the Affirmative Action/Civil Rights Compliance program for DCS. From 1976-1978 he had been employed by DHSS as a Project Director within the Division of Corrections (DOC), responsible for the administration of certain project grants, including administrative, fiscal, personnel, program and public relations functions, and the investigation of complaints of racial



Duties: Office Manager, Committee Clerk for Wisconsin State Assembly on Family and Economic Assistance; Writing testimony, speeches, weekly news articles, letters, research and propose legislation and provide assistance to constituents.

Title: Legislative Aide/Research Clerk

1976 - 1981

City of Madison  
210 Monona Avenue, Madison, Wisconsin 53709  
Mayor's Office: Special Services (Affirmative Action Office)

Duties: Personnel Management

Title(s): Personnel Analyst and Employee Relations Specialist

1975

State of Wisconsin, Equal Rights Division  
Department of Industry, Labor and Human Relations  
201 East Washington Avenue, Madison, Wisconsin 53702

Duties: Enforcement of the State Fair Employment Practices Act

Title: Equal Rights Officer

1974

State of Wisconsin Council on Criminal Justice  
122 West Washington Avenue, Madison, Wisconsin

Title: Planning Analyst (Internship)

1974

Ohio Medical Products - Purchasing Department  
3030 Airco Drive, Madison, Wisconsin

Title: Purchasing Expeditor

1970 - 1973

State of Wisconsin, Division of Corrections  
Bureau of Probation and Parole  
818 West Badger Road, Madison, Wisconsin 53713

Title: Probation and Parole Officer (Student Internship)

OTHER EXPERIENCE:

1980

Producer and Moderator of a weekly television program evaluating human and technical resources related to minority groups. Channel 4, Madison, Wisconsin

1979

Broadcast Commentator on International, National, State and Local issues affecting minority groups. WHA Radio 970 AM, Madison, WI

Mr. McCullom described his experience in both of his interviews with respondent prior to the appointment of Mr. D'Costa.

19. The primary selection criterion utilized by Secretary Jackson in making the subject selection decision was the ability of a candidate to interact successfully and persuasively with a wide range of individuals. Secretary Jackson assessed this ability on the part of a candidate by assessing the quality of the candidate's presentation at the interview, i.e., the candidate's eloquence, persuasiveness, enthusiasm, believability, and spontaneity, and by assessing the candidates' discussion at the interview of his/her experience interacting with a wide range of individuals, i.e., with whom they interacted, how they interacted, what they interacted about, and with what result.

20. In Secretary Jackson's opinion, based on his application of the criterion outlined in Finding 19, Mr. D'Costa's presentation at his interview was superior to that of the other candidates and, as a result, Mr. D'Costa was the best candidate for the subject position. Mr. Roslak agreed with Secretary Jackson's opinion in this regard and there is no evidence in the record from which it is possible to conclude that this was not Secretary Jackson's opinion at the time or that it was not reasonable for Secretary Jackson to form such an opinion based upon the application of the criterion he had established to the interview presentations of the candidates.

21. The complainant's experience in working with a disparate clientele and with entities and individuals outside his work unit was more varied and extended over a longer period of time than Mr. D'Costa's. In this regard, complainant's relevant work experience began in November, 1969, while Mr. D'Costa's began in March of 1974; and complainant held several personnel positions in the private sector, was a program administrator and assistant to the Dean of the University of Wisconsin-Milwaukee,

was assistant personnel manager for Dane County, and held progressively more responsible positions with DHSS involving AA/EEO and civil rights programs, whereas Mr. D'Costa worked as an assistant tutor/ counselor with Jewish Vocational Services of Milwaukee, was assistant manager of a bowling alley in Madison, was a vocational rehabilitation counselor for DVR, and was a field office supervisor for that agency; complainant's experience was statewide, whereas Mr. D'Costa's experience had been primarily in two specific regions of the state (Racine and Portage); and complainant was experienced in working with all groups that were the subject of affirmative action/equal employment opportunity whereas Mr. D'Costa was experienced primarily but not exclusively in the placement of vocationally handicapped individuals. Secretary Jackson was aware of the employment backgrounds of complainant, Mr. D'Costa and Mr. McCullom at the time the subject selection decision was made. Secretary Jackson was made aware of the employment backgrounds as a result of information provided to him by the candidates during the course of their interviews.

22. Mr. McCullom's and complainant's technical expertise in the area of affirmative action/equal employment opportunity was superior to Mr. D'Costa's. Although both complainant and Mr. D'Costa had experience in the job placement of affirmative action group members, it is not possible to conclude from the record the relative success of such efforts or whether it would have been possible on the basis of the information provided to Secretary Jackson at the time of the interviews for him to draw a valid conclusion as to such relative success. Secretary Jackson was aware at the time of the interviews that complainant had designed and helped to implement a program for the recruitment of minorities for positions in state correctional institutions and that such program had been praised by Mr.

Wagner but there is no evidence in the record that information was provided to Secretary Jackson as to the actual results of such program. Secretary Jackson was aware at the time of the interviews that Mr. D'Costa was responsible for placing handicapped clients of DVR in positions in the public and private sectors and the record indicates that information was provided to Secretary Jackson by Mr. D'Costa confirming Mr. D'Costa's success in placing such clients. Secretary Jackson was aware at the time of the interviews that Mr. McCullom had experience as an investigator of equal rights complaints for the State Department of Industry, Labor and Human Relations during 1975, as an affirmative action/equal employment opportunity officer for the City of Madison from 1976 to 1981, and as an aide to Assembly Representative Marcia Coggs since 1983.

23. Both parties introduced statistical evidence relating to respondent's affirmative action record. Complainant's statistical evidence detailed the percentage of racial/ethnic minorities in respondent's various job categories as of July 1, 1983, and compared these percentages with those for the Department of Health and Social Services as of the same date. Respondent's statistical evidence details the percentage of racial/ethnic minorities involved in certain personnel transactions for fiscal years 1979-80 through 1982-83. Not only is it difficult to draw any conclusions from such statistics since they are conflicting and were compiled using different bases and procedures but it is not possible to draw any conclusions from such statistics regarding Secretary Jackson's affirmative action record since he was DOT Secretary from January of 1979 through August of 1981 and again from January of 1983 through December of 1986 but not from September of 1981 through December of 1982.

24. Respondent solicited testimony from former and present DOT employees, including racial/ethnic minorities, which established and confirmed Secretary Jackson's and Mr. Roslak's strong commitment to affirmative action and Secretary Jackson's appointment, contemporaneous with his appointment of Mr. D'Costa, of a black candidate to a higher level position as Director of the DOT Minority Business Program. Although the record indicates that, prior to hiring this black candidate, Secretary Jackson had not personally been responsible for hiring any blacks for high level managerial positions, the record does not indicate whether Secretary Jackson had an opportunity to do so or how many such positions there are.

25. Some time in May or early June of 1984, Mr. D'Costa informed Mr. Roslak of his intention to vacate the subject position due to the relocation of his wife.

26. Shortly thereafter, Mr. Roslak called Dan Wallock of DER to request the reactivation of the register that had been used to fill the previous vacancy. Mr. Wallock verbally indicated his approval and he granted formal written approval on June 11, 1984. Mr. Wallock indicated that no reinterview of candidates would be necessary.

27. Secretary Jackson instructed Mr. Roslak to contact Adrian McCullom - Secretary Jackson's original second choice for the position - to see if he was still interested in the position and if he would meet with Secretary Jackson. Secretary Jackson designated no backup candidate for Mr. McCullom in case Mr. McCullom was either not interested or his references did not check out. Secretary Jackson met with Mr. McCullom on June 8, 1984 with Mr. Roslak present. Secretary Jackson asked Mr. McCullom about his present interest in the position and his intentions to run for



political office. Apparently, Mr. McCullom was considering seeking a seat in the Wisconsin State Assembly and by law could not legally do so while employed by DOT. Mr. McCullom did not decide immediately to accept the position but was asked to let DOT know his decision quickly. Mr. McCullom later accepted the offer of employment, and Mr. Roslak made a reference check with the office of Mr. McCullom's most recent employer (Rep. Coggs) which was satisfactory.

28. Mr. McCullom was appointed to the subject position effective June 11, 1984.

29. Mr. McCullom's employment was terminated prior to the completion of his probationary period.

30. Secretary Jackson's letter of appointment of Mr. D'Costa dated November 29, 1983, states, in pertinent part:

Your selection to this most important and key position in the Department of Transportation is a credit to your past efforts and accomplishments and to your excellent presentation of yourself during your employment interviews. Each of us who interviewed you recognized and appreciated your perception and commitment to AA/EEO as a keystone of the administrative/management process. We liked the approaches you presented for establishing effective relations within and outside the department, your ideas for programs and means to establish and meet AA/EEO goals, and your stated dedication to personal principles of excellence and of human concern. We are confident that you will find your new position with our department challenging and with many opportunities for professional and personal growth and accomplishments.

Secretary Jackson's exit letter to Mr. D'Costa of June 18, 1984, stated in pertinent part:

I'm sure the employees and managers of the Department join me in wishing you well as you reach for a new career in Florida. Although your time with us has been short, it has been characterized by very positive relationships with those who have worked with you in the very challenging area of affirmative action and equal employment opportunities.

\* \* \*

Your strong suit, Joe, is quiet competence, buttressed by a very positive capacity for productive interpersonal relations. Of course, we recognized that strong potential when we hired you, based on your experiences in outreach activities in the Department of Health and Human Services. I am particularly gratified that my choice has been redeemed so well.

Secretary's Jackson's letter of appointment to Mr. McCullom dated June 8, 1984, states, in pertinent part:

This offer of employment is a credit to your past efforts and accomplishments and to your excellent presentation of yourself during your employment interviews. Those of us who had the opportunity to talk with you recognized and appreciated your perception and commitment to AA/EEO as a keystone of the administrative/management process. We liked your responses and the ideas you presented for establishing effective relationships within and outside the Department.

31. Demitri Fisher, a black male, was appointed by Secretary Jackson as Affirmative Action Officer to replace Mr. McCullom in April of 1986. Mr. Fisher completed his probation and continues in the subject position. From June 20, 1985, until Mr. Fisher assumed the Affirmative Action Officer duties, Mr. Roslak was responsible for the AA/EEO duties and responsibilities.

32. Sue Christopher, DMRS administrator, testified as an expert on recruitment and testing procedures with respect to civil service examinations and the hiring process. In Ms. Christopher's expert opinion, the examination measured the skills, knowledge and abilities necessary for the EOO 7 DOT position; those who passed the examination possessed the qualifications established by the State of Wisconsin for the position; and those five individuals interviewed by Secretary Jackson were equally qualified for appointment under civil service regulations. At the present time, examination scores are not even included on certifications and the qualified candidates are listed alphabetically to emphasize their equal status.

33. Complainant's expert witness, Dr. Diane Rausch, testified that she reviewed the job description and the written submissions presented by each candidate during the interview process. In addition, she indicated that she reviewed the testimony of Secretary Jackson at the probable cause hearing. Based upon her review of those documents and her knowledge, training and experience, Dr. Rausch was of the opinion that complainant was clearly the best qualified candidate for the position in question.

#### 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 establishing that respondent discriminated against him based on race in violation of the Fair Employment Act in failing or refusing to hire him for the subject position in December, 1983.

3. The complainant has not sustained this burden.

4. Respondent did not discriminate against the complainant based on race in violation of the Fair Employment Act (Subch. II, Ch. 111, Stats.) in failing or refusing to hire him for the position of DOT Affirmative Action/ Equal Employment Opportunity Officer (EOO 7) in December, 1983.

#### DECISION

In a case of this nature, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L Ed. 2d 668, 5 FEP 965 (1973), and its progeny, to determine the merits of the complainant's charge. In this regard, the Commission notes that, under the Wisconsin Fair Employment Act, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by

articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination. See McDonnell-Douglas Corp. v. Green, Supra and Texas Dept. of Community Affairs v. Burdine, 540 U.S. 248 (1981).

A prima facie case is established in a case such as the instant one by a showing that the complainant is a member of a protected class; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that the employer continued to seek applicants, or hired another person not in the same protected category.

The respondent argues, however, that in a civil service hiring case, a mechanistic adherence to the McDonnell-Douglas formula is not appropriate. The respondent argues that, since complainant's rejection occurred simultaneous with Mr. D'Costa's appointment, something more than simply hiring "another person not in the same protected category" is needed in order to establish the fourth prong of a prima facie case under McDonnell-Douglas. The respondent instead urges the Commission to examine the circumstances of the appointment decision and determine whether they give rise to an inference of discrimination. Respondent contends that the circumstances in this case do not give rise to such an inference.

The record in this case clearly satisfies the more traditional elements of a prima facie case. In this regard, there is no dispute that complainant is a member of a racial minority (black). He applied for a position for which respondent was seeking applicants. He was qualified for the position by reason of passing a civil service examination for a position in the same classification series as the vacant position and, despite

his qualifications, he was rejected. Respondent hired another person not in the same protected category.

The respondent, however, questions whether this fourth element in the McDonnell-Douglas framework has actually been met. In this regard, respondent maintains that "under the Personnel Commission's interpretation, only those rejected applicants who are members of the same protected class as the person hired would not be able to establish a prima facie case." Respondent also argues that this approach "ignores the fact that the mere isolated rejection of a minority applicant does not raise the presumption of unlawful discrimination." Respondent cites several cases in support of this approach.

The Commission rejects this position. In the first place, respondent was unable to cite any Wisconsin court decisions interpreting the Fair Employment Act or Seventh Circuit cases which support this method of interpreting the fourth prong of the McDonnell-Douglas test. Secondly, the Personnel Commission has consistently utilized the above approach in finding that a prima facie case has been established. Third, courts generally take the position that the burden is relatively light with respect to establishing a prima facie case, and that courts should move on to the other parts of the McDonnell-Douglas test in order to determine whether discrimination occurred. Fourth, the cases cited by respondent in support of its position are not persuasive. In International Brotherhood of Teamsters v. U.S. et al., 431 US 324, at 358 fn 44, 52 L.Ed 2d 396, 97 S.Ct. 1843 (1977), the U.S. Supreme Court did state that the mere isolated rejection of a minority applicant by itself does not raise a presumption of unlawful discrimination. However, the Supreme Court went on to say that the McDonnell-Douglas formula does not require direct proof of

discrimination but only that the complaining party demonstrate at a minimum "that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." The Supreme Court opined that elimination of these two reasons for the refusal to hire is sufficient, absent some other valid explanation, to create an inference that there was a discriminatory decision. The Supreme Court did not say that the position had to remain vacant after complainant was turned down for the job. In the instant case, it is clear that complainant established his qualifications for the position, and that it was vacant at the time he was competing for it.

In Holmes v. Bevilagua, 794 F.2d 142, 147 (4th Cir. 1986), the court held:

"The question becomes whether the McDonnell-Douglas four-prong proof scheme is applicable in a factual situation in which one of five qualified employees is promoted and the vacancy ceases after the promotion. We hold that the four-prong proof scheme is applicable, and under the fourth prong, since the complainant cannot prove that the vacancy remained open after he was rejected, he must present some other evidence that his race was a factor considered by his employer in not granting him the promotion."

The court went on to note:

In U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed. 2d 403 (1983), the Court stated that the McDonnell-Douglas proof scheme does not require direct proof of discrimination to prove a prima facie case of discrimination, but it did not find the first three prongs of the test to be sufficient."

The Court added that the complainant may establish his discrimination case through direct evidence of discrimination or through indirect evidence of the employer's motivation. In accord with the Fourth Circuit Court of Appeals is the decision of the Ninth Circuit Court of Appeals in Hagans v.

Clark, 752 F. 2d 477, at 481 (9th Cir. 1985). These cases appear to present the approach of a minority of courts to this issue. Finally, the amount of effort and paper devoted to this issue exceeds by far its real importance to the decision of this matter and represents an elevation of form over substance.

Once a prima facie case is established, the respondent may rebut it by articulating legitimate, non-discriminatory reasons for its actions. Secretary Jackson's articulated reason for selecting Mr. D'Costa was his opinion, based on comparing the content of the candidates' interviews and the manner in which the candidates presented such content at the interviews, that Mr. D'Costa's ability to interact successfully and persuasively with a wide range of individuals was superior to that of the other candidates. This reason is both legitimate, in view of the duties and responsibilities of the subject position, and non-discriminatory.

The burden then shifts to the complainant to show that the reason offered by respondent for its actions is a pretext for discrimination. In this regard, complainant contends that Secretary Jackson's allegedly conflicting testimony at the probable cause hearing and the hearing on the merits relating to the basis for the subject selection decision demonstrates pretext. However, a close review of such testimony does not indicate that such testimony was in fact inconsistent. At the probable cause hearing, Secretary Jackson testified that he judged Mr. D'Costa to be the best candidate for the position based on Mr. D'Costa's discussion at the interview of his experience dealing with a wide range of individuals, and Secretary Jackson's "extraction of how he did that and what he did." Also at the probable cause hearing, Secretary Jackson testified that he judged Mr. McCullom to be the second best candidate for the position based

on the way he presented himself at the interview, i.e., his description of his interests and background. Secretary Jackson did not testify at the probable cause hearing as to the basis for his judgment that complainant was not as good a candidate as Mr. D'Costa or Mr. McCullom.

At the hearing on the merits, Secretary Jackson testified that the primary trait he was looking for in evaluating the candidates was an ability to interact with other people at all levels, i.e., their believability, understanding, patience, and ability to help the individuals at DOT carry out the program. This emphasis on the candidates' ability to interact successfully and persuasively with a range of individuals is certainly not inconsistent with Secretary Jackson's previous testimony.

Also at the hearing on the merits, Secretary Jackson testified that he judged Mr. D'Costa and Mr. McCullom as the two best candidates for the subject position because he was looking for someone who had expressed a good deal of enthusiasm; who was not just producing a rote reproduction of what they had read or thought about affirmative action; who brought specific experience in interacting with a disparate clientele; who could persuade people to do something they might not want to do with methods other than a rule or a statement; and who fit well into Secretary Jackson's relatively close attachment to affirmative action and could carry it out in a way that would make it believable and saleable. This emphasis on the candidates' experience and ability to interact successfully and persuasively with a range of individuals again is not inconsistent with Secretary Jackson's previous testimony.

Secretary Jackson also testified at the hearing on the merits that what had impressed him about Mr. D'Costa was not only his enthusiastic and positive representation of what he had done but also that he had



successfully pursued interaction with local county officials in circumstances and in areas of the state which would not necessarily be very amenable to dealing with the handicapped and that Mr. D'Costa represented successfully to Secretary Jackson his successes in this regard in a manner that "struck a chord" with Secretary Jackson. This emphasis on Mr. D'Costa's experience interacting with a wide range of individuals, the manner in which he carried out such interaction, and the manner in which he presented this to Secretary Jackson is certainly not inconsistent with Secretary Jackson's previous testimony that he selected Mr. D'Costa based primarily on Mr. D'Costa's discussion at the interview of his experience dealing with a wide range of individuals and Secretary Jackson's "extraction of how he did that and what he did."

The conclusions reached in this decision regarding the primary selection criteria applied by Secretary Jackson are confirmed by the language of Mr. D'Costa's appointment and exit letter and Mr. McCullom's appointment letter (see Finding of Fact 30). All three of these letters stress abilities in interpersonal relationships and the manner in which these two presented themselves at their respective interviews.

Finally, at the hearing on the merits, Secretary Jackson testified that he did not judge complainant to be the best candidate for the subject position because he found his answers to be rote and to be relatively shallow renditions of affirmative action cant and because he was not favorably impressed with the ability he would have in the area of interpersonal relations. It cannot be concluded that this conflicts with Secretary Jackson's testimony at the probable cause hearing because Secretary Jackson did not testify as to his reasons for not selecting complainant at the previous hearing.

Complainant further contends that pretext is demonstrated by the fact that complainant's paper credentials in the area of affirmative action/equal employment opportunity were superior to Mr. D'Costa's. Complainant's position in this regard would be sustained if respondent's selection decision had been based primarily upon a comparison of such paper credentials and/or if the selection criteria actually applied by respondent were not reasonably related to the duties and responsibilities of the subject position. However, neither of these situations exists here. It is clear from the record that Secretary Jackson assumed that the exam and screening interview had tested for actual or transferable experience, knowledge, and skills in the affirmative action/equal employment area and that his assumption was reasonable in view of the usual procedures involved in administering a civil service exam and in view of the questions asked by the screening interview panel. Secretary Jackson, proceeding from this assumption, decided to use his interview of the candidates to screen for a more subjective characteristic, i.e., the ability to interact successfully and persuasively with a wide range of individuals, and judged this ability of the candidates on the basis of the content of their discussion with him relating to their experience in this area and on the basis of the manner in which they presented themselves to him. The criteria applied by Secretary Jackson were valid given the duties and responsibilities of the subject position. If more subjective criteria such as this could not be applied in such a situation, it would obviate the use of personal interviews which is not a logical or desirable result, particularly in connection with filling higher level jobs such as this. See Casillas v. U.S. Navy, 735 F. 2d 338, 34 FEP Cases 1493, 1497 (9th Cir. 1984):

Casillas also argues that the trial court clearly erred in not finding the Navy's reason pretextual,

because of the subjective way in which the advisory panel decided, without keeping written records of its deliberations. The trial court found no evidence which showed that whatever subjective criteria may have been used were discriminatory. Further, the trial court found that the use of subjective criteria was reasonable because it enabled the advisory panel to consider carefully each person vis-a-vis the substance of the job, apart from rigid, itemized criteria. This was not clearly erroneous. Casillas's suggestion that the use of subjective criteria somehow mandates the creation of a special legal rule misconstrues the law.

We have explicitly rejected the idea that an employer's use of subjective employment criteria has a talismanic significance: "Even assuming subjectivity was involved here, it has never been held that subjective evaluation by an employer is per se prohibited by Title VII, or alone shifts to the defendant the burden of proving absence of intentional... bias...." Ward, 651 F.2d at 1270. Title VII is the law's promise that employment decisions will be based on non-permissible discriminatory criteria, not that subjective criteria will be eliminated....

Complainant further contends that Secretary Jackson's impressions and opinions regarding the interview presentations of the candidates were not corroborated by the other persons present during such interviews. The only testimony related to this point was that of Mr. Roslak who testified that, when Secretary Jackson indicated that Mr. D'Costa was his first choice for the subject position, no one disagreed with him (Transcript - 11/11/85 - p. 86). This testimony of Secretary Jackson's and Mr. Roslak's was not rebutted.

Both parties introduced statistical evidence to buttress their respective positions. Due to the limitations of such statistics as detailed in Finding of Fact 23, above, it is not possible to draw any reliable conclusions from them. In addition, both parties introduced evidence relating to Secretary Jackson's attitude toward and practice of affirmative action/equal employment opportunity. The preponderance of such evidence clearly shows that Secretary Jackson had a firm commitment to AA/EEO but,

regardless of this preponderance, such evidence has relatively little probative value in deciding whether Secretary Jackson had a discriminatory animus when making a particular selection decision.

Complainant also contends that the manner in which the selection procedure was carried out, i.e., the lack of a formal rating system or rating forms, benchmarks, interview notes, etc., demonstrates pretext. In this regard, see Casillas v. U.S. Navy, supra, 34 FEP Cases at 1498:

Casillas also complains that the panel kept no written records. An employer's lack of record-keeping is not a prima facie Title VII violation. The employer, of course, risks not having documentation with which to convince the trial court. No evidence, however, showed that the failure to keep records was only a pretext to shield a discriminatory decision that otherwise could have been documented but for the Navy's desire to shield it.

On these bases, the Commission concludes that complainant has failed to demonstrate pretext.

The protracted and extensive litigation of this case and its voluminous and detailed record have served to divert attention from what this case really involves. In this case, a member of an ethnic/racial minority (Asian) was the successful candidate and a member of a different ethnic/racial minority (black) was ranked second and eventually hired for the position when the successful candidate left. These facts alone could lead one to conclude that race was not a factor in the hiring decision, that respondent had a commitment to making an affirmative action hire and had honored that commitment. Further, the second choice, Mr. McCullom, had inferior paper credentials to those of complainant in the affirmative action/equal employment opportunity area but was ranked ahead of complainant. Since they are both black, some other factor besides race was clearly at work here. On this basis and that stated above, the Commission

concludes that respondent did not discriminate on the basis of race in making the subject hiring decision.

ORDER

This case is dismissed.

Dated: July 8, 1988 STATE PERSONNEL COMMISSION

LRM:jmf  
JMF08/2

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

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