STATE OF WISCONSIN PERSONNEL COMMISSION

PICKENS WINTERS,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case Nos. 84-0003, 0199-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments and consulted with the examiner. The Commission adopts as its final disposition of this matter the proposed decision and order, a copy of which is attached and incorporated by reference.

In a letter to the Commission dated and filed August 19, 1986, after the promulgation of the proposed decision and order, the respondent cited a recent Commission decision in Paul v. DHSS & DMRS, Nos. 82-156-PC, 82-PC-ER-69 (6/19/86), which held that an expanded certification for minorities pursuant to §ER-Pers 12.05, Wis. Adm. Code, had been done in violation of §230.03(4m), Stats., because the employer had not properly evaluated whether there was a balanced work force by comparing the percentage of minorities in the appropriate civil service classification in the agency with the percentage of minorities in the state's qualified, available work force. The respondent argued that the complainant in the instant case was illegally certified on an expanded certification for minorities which was

similarly deficient, and therefore lacks standing because he has suffered no injury to any legally protected interest. Respondent also contends that the complainant fails to make out a prima facie case because he would not be considered qualified for the appointment if he had been illegally certified.

In the opinion of the Commission, this argument, which was raised only after the hearing, comes too late. There was no opportunity for the complainant to have made a record on this point at the hearing. Furthermore, even if respondent's contention were properly before the Commission, it would not dictate a different result. A person who in fact is considered for employment and who is deemed by the employer to be a qualified, certified candidate, has a right to have his or her application considered in a non-discriminatory manner. If it turns out, after the fact, that he or she had been improperly certified, this may well run to the question of relief, but this does not mean the complainant lacks standing or cannot state a prima facie case with respect to the actual appointment decision.

Dated: Sept 4, 1986 STATE PERSONNEL COMMISSION

AJT:jmf
ID4/2

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

Parties:

Pickens Winters
c/o Attorney Michael Fox
44 E. Mifflin St., Suite 403
Madison, WI 53703

Lowell Jackson
Secretary, DOT
P. O. Box 7910
Madison, WI 53707

STATE OF WISCONSIN PERSONNEL COMMISSION

* * * * * * * * * * * * * * * * *

PICKENS WINTERS,

Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,

Respondent.

Case Nos. 84-0003, 0199-PC-ER

* * * * * * * * * * * * * * * * *

PROPOSED
DECISION
AND ORDER
ON PROBABLE CAUSE

NATURE OF THE CASE

This matter is before the Commission following a consolidated hearing on an appeal of an investigator's initial determination of "no probable cause" as to both cases. §PC 4.03(3), Wis. Adm. Code. The stipulated issues are as follows:

84-0003-PC-ER

> Whether there is probable cause to believe that respondent discriminated against the complainant based on race as set forth in his complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

84-0199-PC-ER

> Whether there is probable cause to believe that respondent discriminated against the complainant based on race and/or retaliation as set forth in his complaint of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

FINDINGS OF FACT

1. These cases involve the staffing of a classified civil service position in the office of the Secretary of the Department of Transportation (DOT), classified as 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 activities of the position are set forth on 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, employes, 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 recruiting 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 develop 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 periodocially [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 is [sic] 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. This position had been filled on a part-time basis prior to 1976 by a white female. In 1976, it became a full-time position and was filled by a Hispanic male. In 1980, it was filled by a white female. These appointments were made by John Roslak, then DOT personnel manager.

5. In 1983, the position was vacated. DOT requested and received approval from the Department of Employment Relations (DER) to use a related register[1] that had been established with respect to the EEO 8 - Supervisor classification. DOT also requested and received permission to view the entire register prior to certification.[2] DOT further requested expanded certification of minorities and handicapped,[3] and pursuant to this request, DER certified 3 applicants under the handicapped expanded certification, and 3 applicants under the minority expanded certification, in addition to certifying 6 of the top 7 applicants on the register by exam score, and 2 applicants who qualified by the addition of veterans' points.[4]

---

[1] §ER-Pers 12.04, Wis. Adm. Code.

[2] §§230.25, Stats.; ER-Pers 12.02, Wis. Adm. Code.

[3] §ER-Pers 12.05, Wis. Adm. Code.

[4] §230.16(7), Stats.

6. The seventh and last person certified as a result of the normal competitive process had a score of 87.70. The complainant, a black male, had passed the exam with a score of 86.50 and was certified as part of the minority expanded certification. Adrian O. McCullom, also a black male, had passed the exam with a score of 84.10, and was certified as a result of the addition of 5 veteran's points. As a result of the withdrawal of certain candidates after certification, DOT requested and received the certification of additional applicants, including Joseph D'Costa, an Asian male who had passed the exam with a score of 80.80 on the exam and who was considered as part of the minority expanded certification. There were ultimately 14 certified candidates remaining.

7. The 14 candidates were interviewed on November 14 and 15, 1983, by a panel consisting of DOT employes John Roslak, David Bohlman, and Cynthia Morehouse. They asked each candidate the same questions. The panel selected the 6 candidates they considered the best qualified for further consideration by the Secretary. The candidates were not given scores or numerical rankings. Of these 6 candidates, there were 2 white females, one handicapped white male, 2 black males (complainant and McCullom), and one Asian male (D'Costa). One of the females withdrew from competition prior to consideration by the Secretary.

8. On November 21, 1983, the secretary interviewed the remaining 5 candidates. Also in attendance were DOT employes John Roslak, David Bohlman, and Sue Gallagher, but the Secretary conducted the interviews and made the final appointment decision.

9. Each of the candidates was asked the same 5 questions.

10. The Secretary followed his normal procedure of designating 2 top candidates -- the first (D'Costa) who received the job offer following a

satisfactory reference check, and the second (McCullom) who would have been offered the job if D'Costa had declined.

11. D'Costa commenced employment on December 26, 1983.

12. The Secretary's only stated rationale at the hearing for selecting D'Costa as the top candidate was that the Secretary perceived DOT as a highly decentralized organization in which the decentralized elements were vested with substantial autonomy, and he felt that D'Costa was well qualified to work in this setting because of his experience in Vocational Rehabilitation working with a widely disparate clientele, particularly local officials.

13. At the time he was hired for the position in question, D'Costa had been employed 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 since 1978. 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. D'Costa had no education, training or experience in the areas of personnel or affirmative action/equal employment opportunity beyond what was associated with his supervisory position with DVR, which included the preparation of an affirmative action plan for the unit he supervised.

14. 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 discrimination and possible violations of Title VI. He also had had substantial direct experience in personnel work in the public and private sectors, and administrative experience at UW-Milwaukee. During his tenure with DHSS, complainant has had extensive involvement in working with local units of government, advisory boards, community organizations, other state units of government, and federal agencies. Complainant related this information both to the initial three-member panel and to the Secretary.

15. The complainant's experience in working with a widely disparate clientele, including local officials, is at least as extensive as D'Costa's.

16. The complainant's overall qualifications for the position were superior to D'Costa's qualifications.

17. Shortly after filling the position in question with D'Costa, the Secretary appointed a black person to a higher level, Career Executive[5] position of Director of the DOT Minority Business Program.

18. On January 4, 1984, complainant filed with this Commission a complaint (No. 84-0003-PC-ER) alleging racial discrimination in the filling of this position. The Commission shortly thereafter forwarded a copy of said complaint to the respondent.

19. Roslak was aware of said complaint no later than on or about January 25, 1984.

---

[5] §230.24, Stats.

20. The respondent's customary practice as to the internal dissemination of complaints of discrimination would have made it likely that the secretary, who was personally involved in the transaction complained of, received a copy of the complaint. The Secretary was aware of said complaint no later than approximately March 1, 1984.

21. Sometime in May or early June of 1984, D'Costa informed Roslak that he would soon be leaving the position because of the impending relocation of his spouse.

22. Shortly thereafter, Roslak called Dan Wallock of DER to request the reactivation[6] of the register that had been used to fill the previous vacancy. Wallock verbally indicated his approval and he granted formal written approval on June 11, 1984.

23. After verbal approval for reactivation of the register had been given, and on June 8, 1984, the Secretary interviewed McCullom, who previously had been ranked second and therefore was the "backup" candidate in accordance with the Secretary's customary procedure, in order to inquire if he was still interested in the job. Subsequently, McCullom advised that he was.

24. The Secretary instructed Roslak to check with McCullom's most recent employer (Rep. Coggs) as to whether he had left employment there under favorable or unfavorable circumstances.

25. Roslak called Rep. Coggs' office and was referred to someone in the office who indicated that McCullom had been a satisfactory employe.

---

[6] §ER-Pers 11.03(2), Wis. Adm. Code.

26. Rep. Coggs was not consulted personally. Had she been, she would have given McCullom a less than satisfactory reference.

27. This reference check was less extensive than the reference check Roslak had performed, on D'Costa. However, in the latter's case, a good deal of the information was volunteered by one of the persons consulted.

28. McCullom was appointed to the position in question effective June 11, 1984.

29. McCullom's resume (Complainant's Exhibit 15), which had been submitted as part of the original staffing process in late 1983, showed that he had been employed in Rep. Coggs' office from "1983 - present," in the City of Madison's Affirmative Action Office as a Personnel Analyst and Employe Relations Specialist from 1976 - 1981, in the Department of Industry, Labor and Human Relations (DILHR), Equal Rights Division, as an Equal Rights Officer, in 1975, and various employment before that.

30. The Secretary was not satisfied with McCullom's performance and, after being unable to extend his one-year probationary period, terminated his probationary employment effective June 20, 1985.

31. Comparative employment statistics for DHSS and DOT as of July 1, 1983, are as follows:

	DOT (3,561 total employes)			DHSS (9,756 total employes)		
Officials/ Administrators	2 racial/ethnic minorities	/	2.2% of workforce	18 racial/ethnic minorities	/	5.7% of workforce
Professionals	19 "	/	1.4% "	173 "	/	5.4% "
Technicians	20 "	/	3.7% "	8 "	/	2.2% "
Protective Service	43 "	/	5.1% "	104 "	/	6.6% "
Para Profes-sionals	1 "	/	1.4% "	101 "	/	4.9% "

Office/ Clerical	12	"	/	2.0%	"	35	"	/	2.9%	"
Skilled Craft	none					none				
Service/ Maintenance	4	"	/	6.1%	"	30	"	/	3.6%	"
	101	"	/	2.8%	"	469	"	/	4.8%	"

32. The percentage of racial/ethnic minorities involved in "in transactions" for DOT were 6.5%, 1979-80; 10.5%, 1980-81; 11.4%, 1981-82; 10.3%, 1982-83.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §230.45(1(b), Stats.

2. The complainant has the burden of establishing probable cause as defined in §PC 4.03(2), Wis. Adm. Code.

3. The complainant has sustained his burden as to Case No. 84-0003-PC-ER.

4. There is probable cause to believe that respondent discriminated 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 in December, 1983.

5. The complainant has not sustained his burden as to Case No. 84-0199-PC-ER.

6. There is no probable cause to believe that respondent discriminated against complainant based on race or retaliation in violation of the Fair Employment Act in failing or refusing to hire him for the position of DOT Affirmative Action Equal Employment Opportunity Officer, following the incumbent's resignation, in June, 1984.

OPINION

MEANING OF "PROBABLE CAUSE"

These cases are before the Commission on the question of whether probable cause exists to believe discrimination has occurred. The parties' submissions include arguments on the meaning of the probable cause standard which the Commission is to apply.

The term "burden of proof" in its strict sense "denotes the duty of establishing the truth of a given proposition or issue by such quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal." 29 AM Jur 2d Evidence §123. With respect to the quantum of evidence of degree of proof, "It is well established, as a general rule, issues of fact in civil cases are to be determined in accordance with the preponderance of the evidence." 30 Am Jur 2d Evidence §1163. The rule has been more specifically stated in Wisconsin, as in Reinke v. Personnel Board, as follows:

> If there is no statutory counter-part, the required burden of proof is that of other civil cases, that the facts be established to a reasonable certainty, by the greater weight or clear preponderance of the evidence...
>
> The Personnel Board is required by law to find ultimate facts, and there is no authority for the board to determine if there is substantial evidence to support the action of the appointing authority. The function of the board is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence. 53 Wis. 2d at 137-138.

As Reinke makes clear, this is the degree of proof required for findings in an administrative proceeding, in the absence of some alternative quantum, provided for by rule or statute, Accord, 2 Am Jur Administrative Law §392, and this is the standard the Commission uses in hearings on the merits of cases before it.

However, the legislature has provided in the Fair Employment Act (FEA) (Subchapter II, Chapter 111, Stats.), that complaints can only proceed to hearing on the merits if there is first a finding of "probable cause to believe that any discrimination has been or is being committed...." §111.39(4)(b), Stats. While the legislature has not defined "probable cause", the Commission has provided a definition at §PC 4.03(2), Wis. Adm. Code:

> Probable cause exists when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination probably has been or is being committed.

The parties differ in their views as to how this standard is to be interpreted.

The complainant's argument may be summarized by this excerpt from his brief:

> Extrapolating back from the standard for judicial review to the probable cause standard, it would seem that the evidentiary threshold necessary for a complainant to obtain a finding of probable cause would be quite minimal in that any and all facts which give rise to competing inferences should be resolved in the complainant's favor. It stands to reason that where the evidence in a case would withstand judicial review it would certainly be sufficient to warrant a probable cause finding.

The respondent takes a different approach, and, citing Reinke, supra, argues in effect that the Commission should apply a preponderance of the evidence standard, even on the preliminary issue of probable cause.

The Commission concludes that the proper interpretation is somewhere between those propounded by the parties: that the probable cause language requires a degree of proof that is less demanding than the preponderance standard applicable on the merits, as set forth in Reinke: "... that the facts be established to a reasonable certainty by the greater weight of clear preponderance of the evidence." 53 Wis, 2d at 137. On the other

hand, the probable cause standard is more demanding than the standard urged by the complainant, which is essentially the substantial evidence test.

In McLester v. Personnel Commission, No. 84-1715 (3/12/85), the Court of Appeals (District III) discussed the application of §PC 4.03(2), Wis. Adm. Code, as follows:

> The commission properly weighed the evidence, including the credibility of witnesses, in deciding whether McLester established probable cause to believe that discrimination occurred. The rule set out in Wilson v. State, 59 Wis.2d 269, 294, 208 N.W.2d 134, 148 (1973), that a magistrate is merely to determine the plausibility of the proponent's story and not decide the trustworthiness of witnesses, applies only to preliminary examinations in a criminal case. The commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause. Probable cause exists when there is reasonable grounds for belief supported by facts or circumstances strong enough in themselves to warrant a prudent person to believe that discrimination occurred. Wis. Admin. Code, § PC 4.03(2) (1980). The commission is not limited at the probable cause hearing to merely examining whether the petitioner has presented evidence which, if believed, would be sufficient to support his claim. Rather, the test is whether the commission believes, upon its examination of the evidence and its view of the credibility of the witnesses, that discrimination has probably occurred.

There also are substantial policy difficulties with the parties' respective contentions. It seems apparent that the legislature imposed the probable cause requirement at least in part to provide a screening device to sort out cases lacking a certain threshold degree of substance. If the commission were to apply a standard that would result in a determination of probable cause if there is any credible evidence to support it, and resolving in the complainant's favor all factual matters which give rise to competing inferences, it seems to the commission there would be very few cases that would not result in probable cause determinations, and the probable cause stage of the proceeding would serve a minimal purpose.

On the other hand, to utilize a preponderance test at the probable cause stage of the process seems unduly rigorous in the opposite direction. Instead of screening out too few cases, this approach would screen out too many, by in effect utilizing a standard that should only be applied at the full hearing on the merits, at a point at which many complainants will not yet have acquired the evidence necessary or helpful in proving their claims.

The only reported case of which the commission is aware which specifically addresses the difference between the "probable cause" and "preponderance of the evidence" concepts in a civil context contains the following statement: "Probable cause is not synonymous with 'preponderance,' being somewhere between 'preponderance' and 'suspicion.'" Young Oil Co. of La., Inc. v. Durbin, 412 So. 2d 620, 626 (La. App. 1982). The Commission agrees with this kind of characterization of the matter, as it is supported both by the language of §PC 4.03(2), Wis. Adm. Code, and the policy underlying the probable cause requirement.[7]

INITIAL HIRING DECISION

In a case of this nature, the Commission normally uses the method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP 965 (1973), and its progeny, obviously in the context of a probable cause determination as opposed to a decision on the merits.

---

[7] In any event, the Commission believes it would reach the same results in these cases even if it utilized the approach to probable cause suggested by the respondent.

A prima facie case results from 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 the employer continued to seek applicants, or hired another person not in the same protected category.

The respondent argues that in a civil service hiring case, there should be a more rigorous approach to a prima facie case, and urges the Commission "... to examine the circumstances of this appointment decision to determine if an inference of unlawful discrimination against the complainant arises."

In the Commission's view, there is a prima facie case regardless of whether one relies on the more traditional, McDonnell-Douglas type elements set forth above, or whether one looks for a more substantial inference of discrimination.

The record in this case clearly satisfies the more traditional elements of a prima facie case. In addition, it can be said that the complainant not only was qualified, but also he was at least in terms of apparent credentials, better qualified than the person actually appointed. The complainant had a higher score on the civil service exam, and his relevant training and experience appeared to be much more extensive than D'Costa's. The complainant had an extensive background in affirmative action and equal employment opportunities (AA/EEO), and, personnel, including several years of experience as the Affirmative Action/Civil Rights Compliance Officer in the Division of Community Services within DHSS.

On the other hand, when the Commission examined D'Costa's resume (Complainant's Exhibit 17), it was struck by the lack of training or experience in the areas of AA/EEO or personnel. There is no training or

experience in these specific areas beyond what can be assumed would be associated with his Field Office Supervisor position within DVR, and with his background in working with the handicapped. The difference in credentials certainly creates an inference of discrimination notwithstanding the factors cited by respondent as inconsistent with discrimination, which will be discussed below under the heading of pretext.

Having determined that there is a prima facie case, the next stage involves the articulation by the respondent of a legitimate, non-discriminatory rationale for its hiring decision. The respondent has done that by stating that D'Costa was hired because it was felt his back ground in dealing with a disparate clientele, particularly local officials, would be particularly helpful given the decentralized structure of DOT. This rationale was set forth by the Secretary on the hearing tape as follows:

> 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. D'Costa's experience in dealing, out of the office if you will, with a wide, disparate 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.

The next stage of the inquiry involves the question of whether respondent's articulated rationale is pretextual. The complainant attempted to demonstrate pretext primarily through a statistical showing and a showing that his background in working with disparate clients, including local units of government, was equal to or greater than D'Costa's background in this area, and that he brought out the latter point in his interviews both with the initial three-member panel and with the Secretary.

As to the statistical aspect of this matter, the complainant adduced comparative employment statistics for DOT and DHSS as of July 1, 1983, as

set forth in finding #31, above. These show that in the higher level job categories, DOT's employment of "racial/ethnic minorities" is considerably below the overall percentage of "racial/ethnic minorities" in the state population as a whole, and generally below their employment in DHSS. The respondent, while disputing the probative value of these figures, points to the "in transactions" summarized in the DOT affirmative action plan, which show that between 1979-1980 and 1982-1983, racial/ethnic minorities were hired in a greater percentage than both their representation in DOT as of July 1, 1983, and their representation in the state population.

While all these figures do have some probative value, it is very limited. It is very difficult to make meaningful comparisons between the work force statistics for DOT and the representation of racial/ethnic minority in the state population as a whole, particularly for higher-level jobs, because there is no way on this record to determine the degree of correlation between the state population figures and the qualified, available labor force. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 298, 308, 53 L. Ed. 2d 768, 777, 97 S.Ct. 2736 (1977), note 13: "where special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value...." Obviously, the qualified and available work force will to a large extent vary depending on the location of particular positions and their required training and experience. Likewise, it is difficult to compare DOT and DHSS without information as to the nature and geographic disposition of the jobs in each category ("professionals," "officials/administrators," etc.).

Another complicating factor is that the position in question is one appointed directly by the head of the agency. There is little basis on this record to think that the hiring decision was subject to influence by any kind of systemic, organizationally ingrained forces that might be reflected in overall departmental employment statistics that presumably are the result of years of personnel practices and decisions. There is no indication on this record of Secretary Jackson's tenure within DOT. Therefore, it is difficult to determine the relationship between a department-wide work force analysis as of July 1, 1983, and a hiring decision made by the Secretary himself in November, 1983. Similarly, it is difficult to determine the relationship between the hiring statistics for the period of 1979-1980 through 1982-1983, and the hiring decision in question.

The parties cited a number of other evidentiary factors with respect to the issue of pretext. The respondent points to the facts that a black person was appointed to the position of Director of the DOT Minority Business Program, and that a black person (McCullom) was ranked in the second, or back-up slot, for the position in question. These facts are of some significance, but they are essentially statistical in nature, and, like the data discussed above, suffer from the absence of a statistically significant context.

The respondent also points to the facts that the department requested expanded certification, and that there was a high percentage of protected-category applicants in the final pool that was selected for consideration by the secretary by the three-person panel. The Commission agrees that these facts are probative of an absence of pretext, but their weight is diminished somewhat by the facts that the Secretary was not personally

involved in the staffing prior to the final interviews, and that the use of expanded certification in this instance was pursuant to the DOT Affirmative Action Program (Complainant's Exhibit 11), and there is no indication as to when this was adopted and under whose administration.

The respondent also notes that the appointee for this position was Asian, which is included in the "racial/ethnic minority" category. This arguably is also a factor weighing against pretext, but it certainly is not ipso facto inconsistent with discrimination against a black applicant.

In the final analysis in this case, the key factor in evaluating pretext is the comparative qualifications of complainant and D'Costa. As discussed above, D'Costa's lack of any specific training or experience in AA/EEO or personnel is striking, particularly when contrasted with complainant's extensive background in this area, and the advanced, relatively technical level of this job, as illustrated by the position description set forth at finding #3. The difference in training and experience is of course not determinative, as the respondent certainly could have had some other legitimate reason for choosing D'Costa.

However, the only reason enunciated by the respondent was D'Costa's "... experience in dealing ... with a wide, disparate clientele, particularly local officials...." (testimony of Secretary Jackson). The complainant, however, provided uncontradicted testimony both that his background in this area while he was with DHSS was quite extensive, and that he conveyed this in the course of both of the pre-appointment interviews. The respondent produced nothing that would suggest that the complainant was not at least as well qualified as D'Costa in terms of working with a widely disparate clientele, particularly local officials, and the Commission is

compelled to the conclusion that their qualifications were at least equal in this area.[8]

This must be weighed against the other evidence material to the question of pretext. The statistical data is too diffuse to be of much significance even in a probable cause context. Other factors are more significant -- the Secretary's appointment of a black person to another higher level job, his selection of a non-white person for the position in question, and a black person for the second or back-up slot, and the department's request for expanded certification and inclusion of a number of protected group applicants in the final pool.

However, when this is weighed against the factors that the complainant's overall qualifications for the position, at least on paper, appear to the Commission to be far better than that of the ultimate appointee, and that the respondent's only enunciated reason for the appointment, D'Costa's background in connection with a particular aspect of the job, is completely undercut by complainant's strong showing of at least a comparable background in that area, it must be concluded that probable cause is present.

The complainant also contends this case should be analyzed under a "disparate impact" theory:

> A disparate impact analysis requires the plaintiff to show the examiner statistics which suggest a systematic exclusion of the complainant's race with regard to hiring decisions at the DOT. Once these statistics have been introduced by the plaintiff indicating that the respondent does not employ the proportion of the complainant's protected class that exists in the available labor market, the respondent is required to come forward and either refute the statistical base or demonstrate that the statistical disparity between the number of protected class members employed by the respondent and the available labor pool has resulted from a business necessity. Griggs v. Duke Power Co., 401 US 424 (1971).

---

[8] It certainly could be argued that the complainant's background in this area was superior, since it was largely in the AA/EEO context.

In the Commission's opinion, the instant record is not susceptible of analysis on a disparate impact theory. Griggs v. Duke Power Co., 401 US 424, 430, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158, 3 FEP 175 (1971), focused on "practices, procedures, or tests...." The Court held:

> "The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

In this case the complainant has not shown that a practice, procedure or test has a disparate impact on blacks. Rather, he contends that since the respondent's work force contains underrepresentation, it must demonstrate that this is due to some kind of business necessity. This is simply not the kind of situation which the disparate impact test addresses. Furthermore, as has been discussed above, there has been no showing that the respondent's work force is underrepresented with respect to the qualified, available labor force.

SECOND HIRING DECISION

After D'Costa was hired, the complainant filed a race discrimination complaint with respect to this transaction. Not long after that, in June 1984, D'Costa left and was replaced by McCullom. Complainant then filed a complaint as to this second appointment, alleging discrimination on the basis of race, and in retaliation for having filed his earlier complaint.

There is no prima facie case with respect to race discrimination. Although the complainant was not appointed when the position was vacated, another black (McCullom) was. Complainant argues that McCullom "...was hired in order to stand as a symbolic defense against the race discrimination charge that the plaintiff had filed against the respondent prior to the hiring of McCullom." However, this argument is dispelled by the fact

that, before the complaint had been filed, the respondent already had designated McCullom as the number two, or backup candidate, and it was logical to appoint him after D'Costa resigned.[9]

With respect to retaliation, in order to establish a prima facie case, the complainant must show that he has engaged in protected activity under the FEA, that he has suffered an adverse employment action, and that there was a causal connection between the adverse employment action and the protected activity. Grant v. Bethlehem Steel Corp., 622 F.2d 43, 22 FEP 1596 (2d Cir. 1980).

The complainant has demonstrated protected activity in filing his first complaint. Respondent argues that there was no adverse employment action because McCullom had effectively been appointed at the time of the first hiring decision by having been ranked second at that time. However, McCullom's appointment (to the exclusion of the complainant) certainly was a separate transaction from D'Costa's appointment, and the Secretary had to make independent decisions to reactivate the register and to appoint McCullom. As to the third element, there was some question as to whether the Secretary even knew of the complaint before he appointed McCullom. However, there was sufficient evidence of the normal practice within DOT concerning the dissemination of complaints to infer that he did see the complaint.

Closeness in time between the protected activity and the adverse employment action can be sufficiently indicative of causal connection to

---

[9] Even if it were assumed there were a prima facie case, the Commission would find there was no pretext as to this element of the complaint.

establish a prima facie case. Hochstadt v. Worcester Foundation, 425 F. Supp. 318, 324, 11 FEP 1426, 1431 (D. Mass.), affirmed, 545 F.2d 222, 13 FEP 804 (1st Cir. 1976). The time sequence element is somewhat dubious in a case like this, where the adverse employment action was triggered by a third party's action -- i.e., D'Costa's resignation -- but particularly given that this is a probable cause matter, the Commission will proceed on the theory that probable cause has been established.

The respondent has articulated a legitimate non-discriminatory rationale for its decision. McCullom was ranked second in the first selection process, (prior to the filing of the discrimination complaint and any possible motive to retaliate), and the Secretary's customary practice was to appoint the second candidate if the first candidate withdrew. While D'Costa did not withdraw before appointment, he decided to resign after only a few months on the job, and it was deemed more efficacious to request reactivation of the register and to offer the job to the back-up candidate rather than to go through the delay involved in setting up a new selection process.

Part of complainant's attempt to demonstrate pretext was to attempt to show that respondent did not obtain a reference check on McCullom from Rep. Coggs' office, but rather that Roslak apparently falsely reported that he had received a favorable reference in order to ensure that McCullom would be hired in lieu of the complainant.

The complainant called Rep. Coggs, who testified that she was the only person in her office who had supervised McCullom, that she was the only person in her office who was authorized to evaluate his performance, that she had not authorized anyone else in her office to discuss McCullom's performance with someone seeking a reference check, that no one in her

office ever called such a reference check to her attention, that if someone had called to check on McCullom, it would have been the practice or standard procedure of her office to have that reference check referred to her. She further testified that if she had been contacted at the time in question and asked if McCullom had left employment in her office under adverse or favorable conditions, and how his performance had been, she would have said that he had left under adverse conditions, and that his performance had been poor.

Roslak testified that he called Rep. Coggs' office to conduct a reference check on McCullom, and was referred to someone who told him that McCullom had left the office under favorable conditions.

There is no evidence on this record that Roslak had any idea what McCullom's work performance record was with Rep. Coggs before the alleged phone call. The scenario required by complainant's theory of the case is that Roslak either knew, suspected, or feared that if he contacted Rep. Coggs' office concerning McCullom, he would get an unsatisfactory reference, and than the respondent possibly or probably would have had to appoint the complainant to the position in question.[10] Therefore, he came up with a completely fabricated story about having contacted Rep. Coggs' office and having received a favorable reference.

It seems to the Commission that if Roslak wanted to deny the complainant the appointment in retaliation for having filed the first complaint, it would have made far more sense simply to have declined to request the

---

[10] Complainant contends that because of the lack of qualifications of the remaining people on the list, he was the only really qualified remaining candidate. However, the respondent, having gone through the first and backup candidates at that point, presumably could have decided to rerecruit.

reactivation of the expired register containing the complainant's name, rather than to run the risk involved in fabricating a reference check, particularly when it is remembered that on this record there is nothing to suggest that Roslak had any idea a reference check would be negative. Based on this record, it seems more probable that someone in Rep. Coggs' office gave Roslak some kind of substantive response to his inquiry on McCullom, and that the normal office procedure simply was not followed on that occasion.

The other indications of pretext advanced by the complainant do not strike the Commission as particularly compelling. While respondent extended an offer to McCullom prior to formal approval of the register extension by DER, the testimony of the DER employe involved (Wallock) was not inconsistent with the respondent's contention that verbal approval was granted prior to the making of the offer. The complainant also argues that the respondent deviated from DER policy by not reinterviewing all the candidates remaining on the reactivated register. The Commission agrees with the respondent that under the circumstances, all that was involved was a determination of McCullom's current interest in and availability for the position, and not a full-scale employment interview of the kind encompassed by the DER policy. Finally, the complainant suggests that Secretary Jackson gave Roslak instructions to conduct a less thorough reference check than normal. The Commission agrees that Roslak's account of what the Secretary said in connection with the McCullom reference check is consistent with an implication that the Secretary wanted a less thorough than usual reference check performed, and that this would be probative of pretext. However, there is also a possibility that Roslak, a personnel professional, attached more significance to the Secretary's exact words

than did the Secretary himself, and that the Secretary did not intend to ask for a non-standard reference check. Again, there is nothing to suggest the secretary knew or suspected that McCullom's record with Rep. Coggs was poor.

When all the circumstances are considered, the Commission believes the most significant and overriding point is that McCullom was evaluated and ranked as the second or back-up candidate prior to the time that the first complaint had even been filed and before there was any possible motive for retaliation. When D'Costa indicated he would be leaving after only a few months on the job, the respondent had a strong reason to attempt to reactivate the register and to offer the job to the backup candidate, rather than to have gone through another staffing process that would have resulted in the position having been vacant for several more months. Even given the lesser standard involved, the Commission cannot conclude that there is probable cause to believe that the respondent discriminated against complainant on the basis of retaliation when it failed to appoint him to the position in question after D'Costa resigned in June 1984.

ORDER

Case No. 84-0199-PC-ER is dismissed, based upon this determination of no probable cause, and the initial determination is affirmed. Case No. 84-0003-PC-ER is to be scheduled for a hearing on the merits, based upon this determination of probable cause, and the initial determination in that case is reversed.

Dated: _____,1986 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

AJT:jmf
JMF01/2

_____
DONALD R. MURPHY, Commissioner

Parties:

Pickens Winters
c/o Attorney Michael Fox
44 E. Mifflin St, Suite 403
Madison, WI 53703

Lowell Jackson
Secretary, DOT
4802 Sheboygan Ave., 120B
Madison, WI 53707