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 *
 DAVID HOLMES,
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 Complainant,
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 v.
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 Secretary, DEPARTMENT OF
 INDUSTRY, LABOR AND HUMAN
 RELATIONS,
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 Respondent.
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 Case No. 85-0049-PC-ER
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DECISION
 AND
 ORDER

Complainant alleges discrimination based on race with respect to a promotion. The following issues were established for hearing:

Whether the respondent discriminated against complainant on the basis of race in violation of the Fair Employment Act (Subch. II, Chapter 111, Stats.) in filling the position of Assistant Chief, Elevator Section.

Subissues:

1. Whether the respondent's affirmative action plan is in conformance with Chapter 230, Stats.
2. Whether respondent acted in conformance with its affirmative action plan in filling the position.

Prior to the commencement of the hearing, the parties stipulated to numerous facts, which are set out below in findings 1 through 16. In addition the respondent stipulated to the conclusion that the respondents Affirmative Action plan, as it was utilized in this case, did not comply with the statutory definition of "balanced work force" found in s. 230.03 (4m), Stats.

FINDINGS OF FACT

1. Following the promotion of the prior Assistant Chief, Elevator Section, Bureau of Technical Services, Safety and Buildings Division,

Department of Industry, Labor and Human Relations (DILHR), civil service classification Elevator Safety Inspector 3, the respondent decided to fill the position on a competitive promotional basis, and it was announced with an application deadline of January 17, 1985. DILHR Personnel was responsible on a delegated basis, pursuant to §230.05(2)(a), Stats., for the staffing of this position.

2. The announcement contained the following statements of "JOB DESCRIPTION" and "KNOWLEDGE REQUIRED":

JOB DESCRIPTION: As Assistant to the Chief of Elevator Section, monitor the state's elevator inspection program; review and approval of plans for new installations and remodeling, inspections, testing; provide consultation services for new and existing elevators, power dumbwaiters, escalators, moving walks, stage and orchestra lifts, material lifts and dumbwaiters with automatic transfer devices, special purpose personnel elevators and lifts for the physically disabled in compliance with the Wis. Adm. Code Chapter Ind 4, Elevators, the ANSI a17.1 National Standard Safety Code for Elevators and Escalators, Wisconsin State Electrical Code--Volume 2, National Electrical Code and Wis. Adm. Code Chapter Ind 50-64, Building, Heating, Ventilation and Air Conditioning Code; consult with owners, architects, elevator installers and manufacturers, fire departments, etc., regarding elevators and related lift equipment to assist them in proper installation or design so as to be in compliance with codes, statutes, current interpretations and other building safety requirements; develop and conduct written examinations required for certification as an elevator inspector.

KNOWLEDGE REQUIRED: Elevator installation, operation and inspection methods and procedures; monitoring methods and techniques; safety codes related to elevator safety; plan review process; civil service rules and procedures; oral communication skills.

3. As part of the pre-certification process, DILHR personnel elicited "position analysis questionnaires" from two "job experts," the prior incumbent and now section chief, Mr. Phillips, and the bureau director, Mr. Helmeid. These questionnaires involved an evaluation of the importance of the job content and required knowledges, based on a position description (PD) which had been prepared by Mr. Phillips on November 21, 1984.

4. Five persons applied for the position. DILHR personnel made or had made the decision to certify all applicants who met the criterion of having had elevator safety inspection experience, and on that basis certified all five applicants.

5. The division administrator, and appointing authority, Mr. McClain, had delegated the authority to interview and screen the certified applicants and to make a recommendation to him as to whom to appoint to the position, to Mr. Helmeid and Mr. Phillips.

6. Of the five certified candidates, one dropped out of contention, apparently because he became uninterested in the position. The four remaining candidates consisted of [Mr. Zalewski, Mr. Endrizzi and the complainant], who are white, and Mr. Lundy, who is black. All were employed in the elevator section as Elevator Safety Inspectors 2.

7. Mr. Helmeid and Mr. Phillips interviewed each of the remaining four candidates. They asked each of the candidates the same questions. The questions were based on the work plan and the PD, and included questions about each candidate's prior work experience before coming to the state.

8. As a result of this interview process, Mr. Helmeid and Mr. Phillips ranked the candidates in order of merit as follows:

1. Zalewski
2. Holmes
3. Lundy
4. Endrizzi

9. Mr. Helmeid forwarded a "HIRING CHECK LIST" to Mr. McClain that listed the candidates in "Suggested Offering Order" as follows:

<u>NAME</u>	<u>COMMENTS</u>
1. Bernard Zalewski	Most code knowledge - most time in grade
2. David E. Holmes	Good public relations - good worker

NAME

COMMENTS

3. Rondie L. Lundy
4. Gerald D. Endrizzi

10. Mr. McClain then sent Mr. Helmeid a memo dated February 12, 1985, as follows:

You have an AA [affirmative action] candidate for this position. If you do not wish to hire that person you must justify that decision, in writing, before I review your hiring order.

11. Mr. Helmeid responded by memo dated February 14, 1984 [sic -- should have been 1985], as follows:

JUSTIFICATION FOR OUR RECOMMENDATION TO HIRE BERNIE ZALEWSKI AS THE ASSISTANT TO THE CHIEF OF THE ELEVATOR SAFETY INSPECTION SECTION.

We recommend Bernie Zalewski be chosen over Rondie Lundy for the position of Assistant to the Chief of the Elevator Inspection Section for the following reasons.

1. Basic elevator background before beginning as a State Elevator Inspector.

Bernie Zalewski began in the elevator construction industry as an elevator construction helper and worked at the helper level for four years before being moved to full elevator mechanic status. Mr. Zalewski continued working at the elevator mechanic level an additional ten years working with new construction, maintenance, and repair tasks.

Rondie Lundy worked as an Elevator construction helper for a total of six years on only new construction.

It is our opinion that Bernie Zalewski has a superior elevator background gained from working as a elevator mechanic in charge of construction projects.

2. Experience with the State as an Elevator Inspector.

Bernie Zalewski has worked from 1970 to present as an Elevator Safety Inspector. A total of approximately 14 years.

Rondie Lundy has worked from 1979 to present as an Elevator Safety Inspector. A total of approximately six years.

It is our opinion that Bernie Zalewski possesses superior knowledge and background in the area of elevator safety rules gained from his work as an Elevator Inspector.

3. Ability to communicate both in writing and orally.

We feel it is very important to communicate effectively with elevator owners, elevator installers, designers, and the general public who is contacting this office regarding elevator problems.

It is our opinion that Bernie Zalewski can communicate much better both in writing and verbally than Rondie Lundy.

12. Mr. McClain directed that the job be offered to Mr. Lundy, who subsequently accepted and was appointed effective March 4, 1985.

13. The departmental and division affirmative action plans provided in part as follows:

DEPARTMENTAL:

If a non-protected class person is selected for recommendation to be hired, promoted, or permissively transferred to fill a vacant position and a protected class person is certified as eligible, a written statement of justification for the recommendation is to be sent to the division administrator or designee. The administrator or designee, division AA representative and departmental affirmative action officer (for Job Service, the EEO supervisor) will review any recommendations to hire a non-protected class person before any commitment to hire, etc., is made. The justification must include the relative qualifications of the candidates.

This action will be required until the Plan of Service goals for the division and area percentages of protected classes in the work force are met. This action is required only if the unit's plan of service or affirmative action goals have not been attained.

DIVISIONAL:

3. Any decision, by a program manager, to not make an affirmative action hire when the opportunity is available must be justified to the administrator.

14. The division affirmative action plan for the period July 1, 1983 - June 30, 1985, shows that as of July 1, 1983, there were 225 employes, of

whom 5, or 2.2%, were members of "racial/ethnic groups," as compared to 6.4% of the total state population. The goal as of June 30, 1985, was 20 racial/ethnic group employes, or 8.1% of the work force. There were 33 professional employes, none of whom were in racial or ethnic groups, as compared again to 6.4% of the total state population. The goal as of June 30, 1985, was six racial/ethnic group employes, or 12.5% of the work force. There were 114 protective service employes, of whom three, or 2.6% were members of racial/ethnic groups, again as compared to 6.4% of the total population. The goal as of June 30, 1985, was eight racial/ethnic group employes, or 6.0%. AS to all three categories -- total employes, professional, and protective service -- the affirmative action plan indicated there was an "underutilization" as to "RACIAL/ETHNIC GROUPS" based on a percentage less than that found in the state population.

15. In the February 1985 "Alphabetical Listing of Classifications" issued by the Department of Employment Relations (DER), the classifications of Elevator Safety Inspector 1, 2 and 3 are set forth in the "protective services" category for affirmative action purposes.

16. Complaints of discrimination were filed March 22, 1985 (Zalewski), April 2, 1985 (Holmes), and July 9, 1985 (Endrizzì).

17. Had respondent offered the Assistant Chief position to Mr. Zalewski rather than to Mr. Lundy, Mr. Zalewski would have accepted the offer.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of the Fair Employment Act, Subch. II, Ch. 111, Stats.

2. The complainant has the burden of proving by a preponderance of the evidence that respondent discriminated against him on the basis of race in filling the position of Assistant Chief, Elevator Section.

3. The respondent's Affirmative Action plan, as it was utilized, did not comply with the statutory definition of "balanced work force" found in §230.03(4m), Stats.

4. Respondent discriminated against the complainant based on his race.

5. Complainant is not entitled to any monetary relief.

OPINION

The only contested issue in this matter is the relief that should be provided the complainant. As noted above, the respondent stipulated to the conclusion that its Affirmative Action plan, as utilized, did not comply with the statutory definition of "balanced work force" found in §230.03(4m), Stats. The Commission has reached a similar conclusion in Kesterson v. DILHR, 85-0081-PC & 85-0105-PC-ER (12/29/86). The evidence indicates that the respondent acted on conformance with the plan in filling the position of Assistant Chief. However, because the plan violated statutory requirements, the Commission concludes that respondent discriminated against the complainant by placing him third rather than second on the final hiring list which resulted when Mr. Lundy was moved from third to first on the list.¹

¹ In his brief, respondent argues that complainant failed to establish a prima facie of race discrimination because no adverse action occurred due to the application of the affirmative action plan. Respondent equates a lack of adverse impact with the fact that respondent had decided not to hire complainant before the affirmative action plan was applied and the same decision continued after the affirmative action plan was applied. However, the adverse effect on the complainant was changing his ranking from second to third, whether or not the change in ranking caused a change in the person hired for the vacant position.

In terms of relief, the complainant contends that because Mr. Lundy was hired for the position of Assistant Chief, complainant's prospects for advancing beyond his current classification of Elevator Safety Inspector 2 are remote. There are only two positions in the Elevator Section that are at classification levels higher than ESI 2: Assistant Chief and Chief.

Complainant views himself and Mr. Zalewski as the two most qualified people to move into these two positions as they become vacant. With Mr. Lundy now in the Assistant Chief position, and with every indication that he is likely to stay there (if not to move up to the Chief position when it becomes available), only one promotional opportunity is likely. If Mr. Zalewski is interested in the vacancy and if he is again found to be better qualified than the complainant, then complainant will not be able to move beyond his current classification in the near future.

The scenario painted by the complainant may occur but it is far too speculative to serve as the basis for awarding complainant a higher pay range and back pay as he requests in this case. As provided in §111.39(4)(c), Stats:

If, after hearing, the examiner finds that the respondent has engaged in discrimination or unfair honesty testing, the examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay.

The Wisconsin Supreme Court has held that one of the purposes of the Fair Employment Act is to make the prevailing complainant "whole." In Anderson v. Labor & Industry Review Comm., 111 Wis. 2d 245, 330, N.W.2d 594 (1983), the court held that prejudgment interest on back pay awards had to be included in such awards in order to make the prevailing complainant "whole", even though the Fair Employment Act does not expressly provide for the payment of prejudgment interest. In Watkins v. Labor & Industry Review

Comm., 117 Wis. 2d 753, 345 N.W.2d 482 (1984), the court held that in order to make a prevailing complainant "whole", she must be able to recover reasonable attorney's fees and the court interpreted the Act to provide such authority.

In the present case, the only direct harm suffered by the complainant as a result of the discrimination was that he was ranked third rather than second for filling a vacant position. Mr. Zalewski testified that had he been offered the Assistant Chief position, he would have accepted the offer. Therefore, it is clear that absent respondent's discrimination, complainant would not have been offered the position in question. Complainant was not represented by counsel and there was no indication that he incurred any attorney's fees or costs associated with pursuing his claim. It would be speculative for the Commission to reach any conclusions as to potential harm suffered by the complainant in terms of fewer promotional opportunities in the future. If the Commission were to adopt the complainant's theory and if Mr. Lundy had been moved from 6th to first rather than from 3rd to 1st, the respondent would be liable for back and front pay for all five of those candidates bypassed by Mr. Lundy even though the case arose from a single vacancy. Such an award would go well beyond the concept of making a prevailing complainant "whole." Therefore, the Commission enters the following

ORDER

Respondent shall cease and desist from discriminating against the complainant on the basis of race with respect to the use of expanded certification in promotion.²

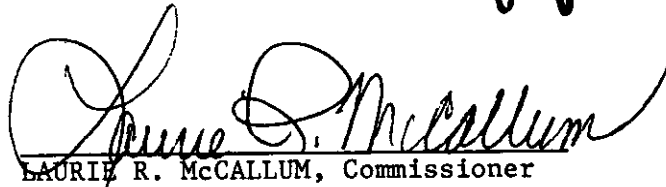
² The Commission has added a reference in the Order to expanded certification so as to be more consistent with the action that is the subject of the complaint.

Dated: April 15, 1987 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

JGF002/2
KMS:baj/jmf


DONALD R. MURPHY, Commissioner


LAURIE R. MCCALLUM, Commissioner

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