

X

STATE OF WISCONSIN

PERSONNEL COMMISSION

JANET BLOEDOW,

Petitioner,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 87-0014,72-PC-ER,  
87-0086-PC

DECISION  
AND  
ORDER

These matters are before the Commission following a consolidated hearing on appeals from an investigator's initial determination of "no probable cause" as to two complaints of discrimination and on an appeal of a non-selection decision. The stipulated issues for hearing read as follows:

87-0014-PC-ER: Whether there is probable cause to believe that respondent discriminated against complainant on the basis of sex in violation of the Fair Employment Act (FEA) with respect to denial of promotion to the vacancies of Assessment and Evaluation (A&E) Asst. Director (July 1986), A&E Director (October 1986) or A&E Asst. Director (October 1986).

87-0072-PC-ER: Whether there is probable cause to believe that respondent discriminated against complainant on the basis of retaliation in violation of the FEA with respect to denial of promotion to the vacant Columbia Correctional Institution (CCI) Program Review Coordinator position in June 1987.

87-0086-PC: Whether respondent's failure to promote appellant to the vacant CCI Program Review Coordinator position in June 1987, was illegal or an abuse of discretion.

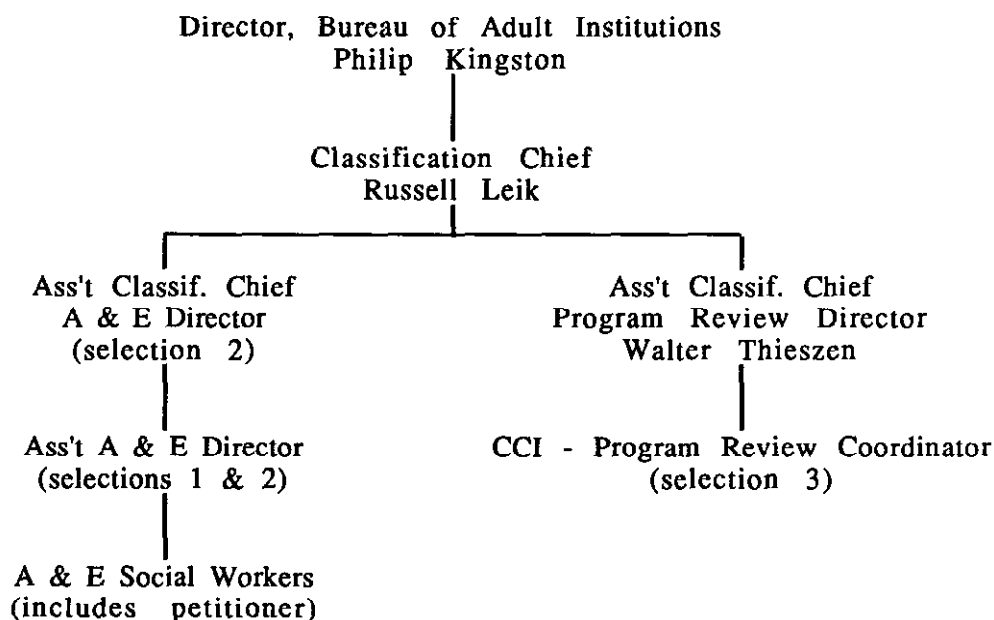
FINDINGS OF FACT

1. These cases involve the staffing of four classified civil service positions in the Bureau of Adult Institutions, Division of Corrections (DOC) within the Department of Health and Social Services (respondent). At all times relevant to this proceeding, Philip Kingston served as the Director of the Bureau

of Adult Institutions. Mr. Kingston supervised Russell Leik, chief of the classification section. As Classification Chief, Mr. Leik was responsible for both 1) the Assessment and Evaluation unit (A & E) which performs the initial assessment of all new inmates admitted to the state prison system in terms of the level of security or custody (maximum, medium, minimum) and institution in which they will be incarcerated as well as the educational and vocational programs to be offered them and 2) the Program Review unit which carries on an ongoing review of the inmate's programs and security status and the progress or lack of progress made by the inmate relative to the initial assessment. The classification section operates out of DOC's central office in Madison but has employees at various facilities in the prison system.

2. Since 1985, the petitioner has been employed by the respondent as a Social Worker 3 at Dodge Correctional Institution (DCI) in A & E. During that period, petitioner's duties included performing inmate release planning, contacting parole agents, corresponding with inmate families, performing A & E evaluations, recommending treatment programs, and assisting in the development of educational programs and vocational training programs for inmates. Between 1977 and 1985, petitioner worked as a Social Worker within the DOC but did not have any responsibilities within the A & E area.

3. The following organizational chart reflects the interrelationship of the various positions which are the subject of these proceedings:



4. The respondent maintains two A & E units state-wide. The unit at DCI serves male inmates and there is a much smaller A & E unit at Taycheedah Correctional Institution (TCI) serving female inmates.

5. In April of 1986, Daniel Buchler was promoted from his position of Assistant Director of A & E at DCI to A & E Director. Mr Buchler had performed the A & E Director duties in an acting capacity for the previous five months. Mr. Buchler replaced Mr. McCaury who was promoted to another position within the Division of Corrections. While Mr. Buchler was serving as acting A & E Director, the petitioner served as an acting Program Review Coordinator.

6. In June of 1986, Mr. Buchler convened an interview panel for the purpose of recommending, to the appointing authority, a candidate to fill the position of Assistant Director of A & E (referred to as selection 1).

7. The duties, responsibilities and reporting relationship of the Assistant A & E Director are in summary as follows:

Under the supervision of the A&E Director, the employee has responsibility for: supervision and administration of the A&E program at TCI [Taycheedah Correctional Institution]; supervision of Central A&E social workers or career counselors; responsibility to be acting A&E Director; performance of administrative duties for Central A&E; and responsibility for the DCI [Dodge Correctional Institution] Program Review process including supervision of the Program Review Program Assistant. This position works closely with DCI, TCI, and other DOC staff.

The social work positions referred to in this summary include the Social Worker 3 position filled by the petitioner.

8. Petitioner took the examination and was among those persons certified for the vacant Assistant Director of A & E position.

9. Mr. Buchler prepared the interview questions for use by the panel in rating the candidates. Mr. Buchler prepared the questions based on his own experience in the position and sought to ascertain each candidate's training and experience relating to the vacancy as well as the candidate's response to a factual situation which might be experienced in the position. The questions read as follows:

1. The Assistant Director chairs the staffing committee, making final determinations regarding the inmate's program assignment

and recommendations regarding security classification and institution placement. All of the committee members recommend a placement, and you are the only one in disagreement. How would you handle this situation?

2. The social worker recommends a particular medium security placement and program for an inmate. The career counselor recommends a completely different medium placement and program for the same inmate. How do you come to a final recommendation or decision?

3. This position involves the supervision and administration of the A&E Program at Taycheedah. A Taycheedah social worker, who is not under your supervision, calls you regarding an A&E social worker report. The social worker indicates that his/her supervisor has provided very negative feedback about this report written by the social worker. What would you do?

4. You have reason to believe that an employee under your supervision has violated a work rule. You have also observed that the same employee's overall work performance is deteriorating. What do you do?

5. Based upon your training and work experiences, why do you believe that you are qualified for the position of Assistant Director of Assessment and Evaluation?

Each question was worth 10 points. For each question, Mr. Buchler listed either four or five benchmarks or indicators which he felt were appropriate responses to the question. By using these indicators, Mr. Buchler did not intend to generate an inclusive list of appropriate responses. No score was assigned to any of the indicators. DOC's customary practice was not to assign points for each indicator or benchmark. None of the indicators used for the June of 1986 interview process refer to the candidate's sex or are sex-related.

10. Other than Mr. Buchler, the panelists were Colleen James and Arlene Wood. Ms. James had not worked in the classification field but had served as a training officer in the Division of Corrections and, as a consequence, had an overall knowledge of the functioning of the Division but no specific knowledge of classification. Ms. Wood was employed by the Division of Corrections as a psychologist. Ms. Wood was not cognizant of the actual duties of the Assistant Director of A & E at the time she sat on the interview panel.

11. As a consequence of having worked in the A & E unit, Mr. Buchler knew many of the certified candidates on a professional basis, in some cases as the candidate's supervisor. In addition, Mr. Buchler knew several of the can-

didates through a variety of social interactions. Mr. Buchler had played noon-time basketball or volleyball with four of the candidates, including Judy Smith who was selected for the position. He had also socialized after work with groups of co-workers including Ms. Smith, the petitioner and several of the other candidates. He had gone out for drinks with both Ms. Smith and another candidate. In 1985, Mr. Buchler and another male stayed in one room of a two room suite at the Wisconsin Correctional Association convention in Green Bay while Ms. Smith and another female stayed in the other room of the suite. In 1986, Mr. Buchler and several other males stayed in one room of a two room suite at the Wisconsin Correctional Association convention in Delavan while Ms. Smith and several other females stayed in the other room of the suite. Mr. Buchler and Ms. Smith did not have a romantic relationship.

12. All of the candidates were asked the same questions. All of the candidates were provided the same opportunity to answer the questions.

13. The panelists assumed the candidates were telling the truth when they stated their training and experience. No effort was made to confirm the accuracy of the information provided by the candidates.

14. The panelists relied solely on the information provided during the course of the interviews and did not consider outside information, such as resumes, received from the candidates and did not consider the panelists' prior knowledge of the candidates.

15. After each panelist had assigned scores for each of the various candidates, the panelists conferred and developed an overall ranking which was based on the scoring and, at least in part, on the candidates' overall presentation. The table below summarizes the scoring and ranking.

Selection 1 - Assistant Director, A & E

Date: June, 1986

<u>Candidates (Sex)</u>	<u>Panelists</u>			<u>Point Total</u>	<u>Final Ranking</u>
	<u>Dan Buchler</u>	<u>Colleen James</u>	<u>Arlene Wood</u>		
Judy Smith (F)	38 (1)	35 (1)	37.5 (3)	110.5 (1)	1
Dan Benik (M)	32 (6)	35 (1)	32 (5)	99 (3)	2
Dick Verhagen (M)	35 (3)	21 (9)	42 (1)	98 (4)	3
Judy Lyon (F)	35.5 (2)	33 (3)	28 (8)	96.5 (5)	4

John Bett (M)	34.5 (4)	32 (5)	28 (8)	94.5 (7)	5
Jan Bloedow (F)	30.5 (7)	31 (6)	34 (4)	95.5 (6)	6
Chris Ellerd (M)	32.5 (5)	33 (3)	39-40 (2)	104.5-105.5 (2)	7
George Kaemmerer (M)	25.5 (8)	25 (7)	29 (7)	79.5 (8)	8
Dennis Kavanaugh (M)	22 (10)	24 (8)	28(8)	74 (10)	9
Vincent Wagner (M)	25.5 (8)	21 (9)	31 (6)	77.5 (9)	10

16. Ms. Smith had been employed as a Vocational Rehabilitation Counselor in the A & E unit from March of 1980. During the period Mr. McCaury was the Director of A & E, he assigned Ms. Smith to a project involving career assessment for inmates at TCI. Prior to working with the Division of Corrections, Ms. Smith had gained supervisory experience.

17. The panel ranked Ms. Smith as the top candidate. Mr. Buchler conveyed the panel's recommendation to Russell Leik, classification chief and the hiring authority for the vacant position. Mr. Leik chose not to contact any references for the candidates because he already knew all of the top-ranked candidates professionally.

18. Mr. Leik offered the position to Ms. Smith who accepted the offer and commenced working in that capacity in July of 1986.

19. In August of 1986, Dan Buchler was hired as Unit Manager, Administrative Officer-Supervisor at the Oshkosh Correctional Institution.

20. Ms. Smith served as the Assistant Director of A & E until October of 1986 when she accepted a promotion to the position of Administrative Officer 1 at Oshkosh Correctional Institution.

21. In October of 1986, the respondent carried out a combined selection process (referred to as selection 2) for the Director and the Assistant Director vacancies. Russell Leik, supervisor of the Director position, prepared an initial draft of the interview questions and selected the interview panel.

22. The duties and responsibilities of the Assistant A & E Director position as of the time of the October, 1986 vacancy are identical to those duties and responsibilities set out in finding 7. The duties, responsibilities and reporting relationship of the Director of A & E position are summarized as follows:

Under the direction of the Classification Chief, this position is responsible for supervising the Assessment and Evaluation program, and the A&E staff, at all adult correctional reception facili-

ties; functions as Classification Chief in the absence of or at the direction of the Classification Chief; and performs administrative duties as assigned by the Classification Chief.

23. In addition to Mr. Leik, the other members of the interview panel were Kathy Nagle and Bev Davis. At that time, Ms. Nagle was the Security Director for DCI and Ms. Davis was employed at one of DOC's correctional centers for women. Ms. Nagle and Ms. Davis reviewed the interview questions before they were finalized. Mr. Leik was the hiring authority for the Assistant Director position while Mr. Kingston was the hiring authority for the Director position.

24. The questions read as follows:

1. Describe any training or experience that you feel qualifies you for the A & E Directors position.
2. You have been contacted by the Treatment Director of an adult male institution expressing concern about A & E recommendations. What would you do.
3. You have been called by a agent of the Bureau of Community Corrections expressing concern regarding how a vocational program was recommended for an inmate. What would you do?
4. In your opinion, what challenges are facing the A & E Unit in the next five years?
5. You have a new employee who is still on original probation, but after five months of acceptable work, suddenly has a noticeable drop in work. What would you do.
6. Interrelation with DCI and A & E. If you were to become director of A & E, what steps would you take to facilitate relationship of A & E with DCI staff.

Each of the questions had benchmarks listed and a specific number of points assigned to each benchmark. Question 4 listed 6 appropriate responses and provided room for an additional 4 responses.

25. Question 6 listed 5 benchmarks, each worth 4 points, including the following: "Participate in extra-curricular activities (noon hour sports, etc.)." Question 6 and each of the benchmarks listed were reasonably related to the purpose of maintaining cooperation between the A & E staff and DCI and they

were not posed for the benefit of any individual or group of candidates for the vacant positions.

26. Dan Benik was one of the candidates for the two vacancies. Mr. Benik was employed as a Program Review Coordinator at Waupun Correctional Institution and then Columbia Correctional Institution starting in 1983. From 1979 until 1983, he was a vocational guidance counselor at WCI.

27. John Bett also was a candidate for the vacancies. Mr. Bett worked as a Social Worker 3 in the A & E unit beginning in 1981.

28. Mr. Benik and Mr. Bett submitted resumes during the course of their interviews, even though no resume was requested. Mr. Leik considered the information found in the resumes when he assigned scores to the individual candidates. Ms. Nagle did not give any candidates any points due to information found in the resumes.

29. Mr. Leik knew all of the candidates professionally but did not socialize with any of the candidates. Ms. Nagle knew the petitioner, did not know Mr. Benik and only had spoken a couple times with Mr. Bett.

30. All of the candidates were asked the same questions. All of the candidates were provided the same opportunity to answer the questions.

31. Ms. Nagle was surprised that petitioner gave a poor interview given the length of the petitioner's experience in the A & E unit. Ms. Nagle expected the petitioner to have a greater knowledge of the function of the unit and a better ability to express that knowledge.

32. Each panelist completed his/her scoring for a candidate before the next candidate's interview began. After all of the interviews were completed, the three panelists totalled their scores and ranked the candidates according to each candidates' cumulative score. The table below summarizes the scoring and ranking.

Selection 2 - Director and Assistant Director, A & E

Date: October, 1986

<u>Candidates (Sex)</u>	<u>Panelists</u>			<u>Total</u>	<u>Final Ranking</u>
	<u>Russ Leik</u>	<u>Kathy Nagle</u>	<u>Bev Davis</u>		
Dan Benik (M)	77 (1)	70 (2)	65 (1)	212 (1)	1
John Bett (M)	65 (3)	70 (2)	63 (2)	198 (2)	2



Dick Verhagen (M)	62 (4)	72 (1)	63 (2)	197 (3)	3
Chris Ellerd (M)	66 (2)	48 (5)	58 (5)	172 (4)	4
Jan Bloedow (F)	57 (5)	54 (4)	59 (4)	170 (5)	5
Judy Lyon (F)	51 (6)	46 (7)	48 (6)	145 (6)	6
Traut (M)	45 (7)	46 (7)	37 (8)	128 (8)	7
George Kaemmerer (M)	42 (8)	47 (6)	45 (7)	134 (7)	-

33. Mr. Kaemmerer's name was not included in the final ranking. Mr. Traut and Ms. Lyon specified that they only wished to be considered for the Director position.

34. Mr. Leik did not contact any of the candidates' references because he was already familiar with their work.

35. Based on the results of the interviews, Mr. Leik recommended to Mr. Kingston that Mr. Benik be hired for the vacant Director position. Mr. Benik accepted Mr. Kingston's offer and Mr. Leik then hired Mr. Bett for the Assistant Director position.

36. On February 3, 1987, the complainant filed a complaint of discrimination with the Commission alleging that she had been discriminated against by Russell Leik and others based on sex with respect to the July, 1986 and October, 1986 selection decisions. Among the various statements made in her complaint, the complainant mentioned that Colleen James was one of the three panelists for the July, 1986 decision and that Walt Thieszen and Kris Krenke had served on the interview panel for a PRC position in May of 1985 which complainant pointed to as being indicative of a pattern of sex discrimination. Complainant also accused six other panelists of sex discrimination and alleged that a "Good Ol' Boy Syndrome" was operating in the A & E unit. Complainant went on to identify the A & E staff who she felt had benefitted from the "Syndrome."

37. When Dan Benik accepted the position of Assistant Director of A & E in October of 1986, he vacated his position of CCI Program Review Coordinator. The first line supervisor of that position is Walt Thieszen, Assistant Classification Chief and director of PRC in the Bureau of Adult Institutions.

38. The duties, responsibilities and reporting relationship of the Columbia Correctional Institution Program Review Coordinator position are in summary as follows:

Under the supervision of the Assistant Classification Chief-Program Review Director, this employee has responsibility for: serving as chairperson of the Program Review Committee; coordination of the Program Review Recall System; coordinating inter-institution transfers; maintenance of communication with institution staff; maintenance of up-to-date policy and program information; and performance of special tasks.

The position description for the position also listed the following position goals:

- A. Provide direction to the Program Review Committee, as chairperson, in making recommendations regarding work, school, and treatment program assignments, inter and intra institution transfers, security ratings, work/study releases, and administrative confinement cases. [55%]
- B. Coordinate the Program Review recall system to insure the ongoing review of each resident's program, security status, and the delivery of services system. [10%]
- C. Coordinate the arrangement of security reduction procedures and transfers between institutions. [10%]
- D. Maintain regular and ongoing communications (verbal, written) with staff to gather and disseminate information. [10%]
- E. Maintenance of up-to-date information of correctional programs and resources, policies, procedures, and intervention and assessment techniques. [10%]
- F. Performance of special tasks, as assigned by the Classification Office. [5%]

The position description also listed the following "knowledges:"

Knowledge of Division of Corrections and community resource facilities and programs.

Knowledge of institution rules and procedures.

Knowledge of Division of Corrections' policies and procedures.

Knowledge of Classification procedures and criteria.

Knowledge of evaluation techniques.

Knowledge of interviewing techniques.

Knowledge of the Criminal Justice System.

Knowledge of legal procedures.

Knowledge of the dynamics of human relations and behavior.

Knowledge of the English language.

39. Mr. Thieszen prepared a draft of questions to be used in interviewing candidates for the PRC vacancy (referred to as selection 3). Mr. Thieszen also sat on the interview panel and recommended two other individuals, Colleen James and Kris Krenke, as panelists. Mr. Leik was the hiring authority for the PRC position. He approved the interview questions and approved the selection of panelists. The interview questions read as follows:

1. Describe your educational background and job experience. In what way do you believe this qualifies you for the Program Review Coordinator position?
2. As Program Review Coordinator, what steps would you take to facilitate good working relationships with CCI staff?
3. You have received numerous Program Review referrals from social workers that are incomplete and contain unrealistic recommendations. You have already discussed the problem individually with the social workers. What would you do?
4. The Program Review Committee is reviewing a social worker's recommendation that differs from the A & E plan. How do you come to a final recommendation or decision?
5. You are chairing the Program Review Committee. The inmate before the Committee is hostile and demands a transfer. What would you do?

Following each question, there were at least five benchmark responses, each of which was allocated a certain number of points. In addition to the above questions, the panelists evaluated the oral communication skills of each candidate by completing an evaluation guide. The guide included a rating scale

from 1 point to 9 points and a summary of the characteristics to be considered when completing the guide.

40. Since December of 1986, Ms. James had served as a unit manager at CCI. In that capacity, Ms. James was required to periodically serve on the institution's Program Review Committee.

41. At the time of the PRC interviews, Ms. Krenke was serving as the Treatment Director at TCI. She had been a member of the PRC committee in that institution and had worked closely with the Program Review Coordinator.

42. At the time the PRC interviews were conducted, Mr. Leik knew that the petitioner had filed a complaint of discrimination naming him. Mr. Thieszen also knew that petitioner had filed a complaint but he did not know the subject matter of the complaint or that it named him or either of the other two panelists. Neither Ms. Krenke nor Ms. James was aware that the petitioner had filed a complaint.

43. All of the candidates were asked the same questions. All of the candidates were provided the same opportunity to answer the questions.

44. In addition to the petitioner, other candidates for the PRC vacancy included Mark Heise and Susan Wallintin. Mr. Heise worked as a psychologist at the Wisconsin Resource Center, another DOC institution. He had gained experience managing units in a unit management facility. Ms. Wallintin was employed in the A & E unit at DCI performing predominantly clerical responsibilities such as filing, typing and, as directed by the PRC coordinator, preparing lists of inmates to be seen by program review staff.

45. During the course of the interviews the panelists circled benchmarks and made notations. After the conclusion of all the interviews, each panelist added the scores to produce a total for each candidate. Sometime after each panelist handed in their own scores, Mr. Thieszen totalled the scores from the panelists and developed a final ranking. The table below summarizes the scoring and ranking.

Selection 3 - Program Review Coordinator at Columbia Correctional Institution

Date: May, 1987

Note: Certain errors were made by some panelists when they added a candidate's scores for the interview questions. The correct addition is

found in brackets in the following chart, immediately below the original incorrect total.

<u>Candidates</u>	<u>Panelists</u>			<u>Total</u>	<u>Final Ranking</u>
	<u>Walt Thieszen</u>	<u>Colleen James</u>	<u>Kris Krenke</u>		
Mark Heise	75 (1)	68 (1)	68 (1) [72] (1)	211 (1) [215] (1)	1
Frances Paul	64 (2)	66 (2)	61 (2) [56] (2)	191 (2) [186] (2)	2
Robert Clifford	52 (3) [55] (3)	50 (3)	47 (4)	149 (4) [152] (4)	3
Jennifer Gavin	45 (5)	43 (5)	39 (5) [41] (5)	127 (5) [129] (5)	4
Melissa Lynch	42 (6)	42 (7)	37 (7)	121 (6)	5
Kathryn Dayton	41 (7)	41 (8)	39 (6)	121 (7) (6)	6
Janet Bloedow	40 (8)	43 (5)	36 (8)	119 (8)	7
Susan Wallintin	48 (4) [52] (4)	50 (3)	55 (3)	153 (3) [157] (3)	DSQ

46. At some point after the ranking was completed and before references were checked, Ms. Wallintin was removed from consideration based on the conclusion that she lacked sufficient non-clerical experience in the program review process.

47. Mr. Thieszen submitted the ranking to Mr. Leik who then contacted the references of Mr. Heise, Ms. Paul and Mr. Clifford. Mr. Heise was hired for the vacant position due to ranking first on the interviews and a satisfactory reference.

48. Petitioner was advised by letter dated June 22, 1987 that she was not selected for the vacant PRC position.

#### CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§230.44(1)(d) and .45(1)(b), Stats.

2. The petitioner has the burden of establishing probable cause, as defined in §PC 1.02(16), Wis. Adm. Code.

3. The petitioner has failed to sustain her burden of establishing probable cause to believe that the respondent discriminated against her based on sex in violation of the Fair Employment Act in failing or refusing to hire her for the positions of Assistant Director of A & E in June of 1986 and the positions of Director and Assistant Director of A & E in October of 1986.

4. The petitioner has failed to sustain her burden of establishing probable cause to believe that the respondent retaliated against her in failing or refusing to hire her for the position of CCI Program Review Coordinator in May of 1987.

5. The petitioner has the burden of establishing that the respondent acted illegally or abused its discretion in failing to promote her to the position of CCI Program Review Coordinator in May of 1987.

6. The petitioner has failed to sustain her burden of proof as to the civil service appeal.

### DISCUSSION

#### Selection 1: Assistant Director A & E

The petitioner alleges that she was discriminated against because of her sex in regard to the decision not to hire her for the position of Assistant Director of A & E.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the petitioner to show a prima facie case of discrimination. If petitioner meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the petitioner may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981). Here, this method of analysis is in the context of a probable cause determination as opposed to a decision on the merits. The Commission has defined "probable cause" in §1.02(16), Wis. Adm. Code:

"Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that discrimination, retaliation

or unfair honesty testing probably has been or is being committed.

In Winters v. DOT, 84-0003, 0199-PC-ER, 9/4/86, the Commission held that the probable cause standard requires a degree of proof that is less demanding than the preponderance standard applicable on the merits but more demanding than the substantial evidence test.

In the context of a hiring decision, the elements of a prima facie case of disparate treatment were established in McDonnell Douglas as follows:

- (1) he belongs to a group protected by Title VII;
- (2) he applied and was qualified for a job for which the employer was seeking applicants;
- (3) he was rejected; and
- (4) the position remained open and the employer continued to seek similarly qualified applicants. 45A Am Jur 2d, Job Discrimination §318.

The petitioner has established a prima facie case. She is a member of a protected group (female). She applied for and was qualified for the available position of Assistant Director of A & E. This element is demonstrated by the facts that she took the examination and was among those certified. Petitioner was not selected for the position. There is some support for the view that the fourth element of an individual prima facie hiring case cannot be established if the successful candidate is in the same protected category as the complainant.<sup>1</sup> However, the decision in Diaz v. A T & T, 752 F. 2d 1356, 36 FEP Cases 1742 (9th Cir., 1985), suggests otherwise. The appellant in that case, a Mexican-American, was eliminated early in the selection process. He filed his charge of discrimination several weeks before the employer decided to select another Mexican-American to fill the vacancy. The 9th Circuit held that the fact that the person selected was a member of the same protected class did not preclude the plaintiff from establishing a prima facie case. In reaching this conclusion, the court emphasized that Title VII is designed to protect individuals as well as groups from discrimination and that the law should not be read

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<sup>1</sup>"The fourth element. . . may be established by showing that within a reasonable time after the complainant's application the vacancy was filled by a nonprotected group individual who had no better qualifications than those of the claimant." 45A Am Jur 2d, Job Discrimination §322 (emphasis added). Also, see Winters v. DOT, 84-0003, 0199-PC-ER, 9/4/86.

to permit an employer to discriminate against some employees on the basis of their race or sex even though the same employer may favorably treat other members of the same group.

Even though the appointment of Ms. Smith to the Assistant Director position does not preclude the petitioner from establishing a prima facie case, petitioner has failed to establish probable cause to believe that discrimination occurred. The respondent contends that the petitioner was not as qualified as other candidates based on the structured interviews conducted of all of the candidates. This reason for not selecting the petitioner has not been shown to have been pretextual.

The most persuasive evidence relating to the first selection decision is that two of the three panelists were female and that the successful applicant was also female.

Petitioner suggests that the process for selecting the Assistant Director was dominated by a male, Dan Buchler. Mr. Buchler drafted the questions used in the interview and selected the other members of the panel. Of the three members on the panel, Mr. Buchler was most familiar with the duties of the vacant position. While Mr. Buchler did take the leadership role in organizing the interview process, that role was a logical one given his capacity as the supervisor for the vacancy. The respondent had to assign to someone the responsibility of drafting the questions and selecting the panel. The petitioner may be dissatisfied that Mr. Buchler performed those functions but the petitioner has failed to identify anyone else who was more appropriately positioned to carry out those responsibilities.

Petitioner also notes that the benchmarks for scoring the interview questions were not assigned points, thereby leaving to each panelist the decision as to how to score each question. Petitioner contends that this situation resulted in uneven scoring between the panelists. Mr. Ezelareb noted that a lack of a scoring system for listed benchmarks is the common practice.

The petitioner suggested that Mr. Buchler's objectivity was tainted "due to his relationship with Judy Smith," the successful candidate. The sole evidence of any romantic relationship between Mr. Buchler and Ms. Smith was that they were both part of a group of state correctional employees who shared suites during two Wisconsin Correctional Association conventions held in 1985 and 1986. Both Mr. Buchler and Ms. Smith denied any romantic in-



volvement and testified that the employees chose to share accommodations as a means of saving money and that the male and the female employees slept in different rooms. No other witnesses testified to the existence of any romantic relationship between the two, nor was there even any testimony as to the existence of rumors of such a relationship. Petitioner also argues that there was a wide variance between the scores of the various panelists. Petitioner failed to provide any statistical evidence relating to the variation in the scores and the Commission is unwilling to infer discrimination based on the variations without such evidence.

Petitioner argues that there was no mathematical relationship between the panelists' scores and the final ranking and no testimony as to how the respondent reached from one to the other. The total point scores and the final ranking are reflected in finding 15. One of the panelists, Colleen James, testified that the final ranking was based on both the numerical scores and on the candidates' overall presentation. Another panelist, Dan Buchler testified that after tabulating their scores, the panelists discussed the candidates and came up with the final ranking. There is very little evidence as to how the panelists determined each candidates' "presentation" or what went into the discussions described by Mr. Buchler. However, the only significant variation between a ranking based solely on the point totals and the final ranking submitted to the appointing authority was that Chris Ellerd, a male, was moved from the #2 spot all of the way to the #7 ranking, one below the petitioner. The Commission cannot conclude that the panelist's consideration of the candidates' "presentation" is indicative of sex discrimination against the petitioner in light of the results of that consideration.

Other arguments raised by the petitioner regarding the first selection decision are also unpersuasive, in part because they arise from practices which were applied to all of the candidates, regardless of their sex. For example, the petitioner contends that the panelists should have verified the information given by the various candidates during their interviews. Petitioner failed to present any evidence that the failure to verify constituted a departure from the respondent's normal hiring procedures or any evidence as to how the failure to verify information would discriminate against the petitioner. Petitioner noted that Mr. Buchler had written comments on several of the interview sheets to the effect that the candidate had not understood question num-

ber 3, yet he awarded points to the candidate anyway. Mr. Buchler voiced concerns about the wording of question 3 because several of the candidates did not appear to understand the question. Even though he had these concerns, Mr. Buchler did assign points for the answers to the question and those points were included in the totals for each candidate. Mr. Buchler awarded a total of 57 points among the 10 candidates for their answers to question 3. The three female candidates averaged 6.8 points for this question. The seven male candidates averaged 5.2 points. Even though some candidates may have answered the question in such a way that Mr. Buchler thought they did not understand the question, these candidates still gave responses which were consistent with some of the indicators listed for the question.

Petitioner also complains about the failure to perform reference checks of the candidates. Mr. Leik, the appointing authority for the position, knew all of the top-ranked candidates through professional contacts with them in their previous positions. He saw no reason to conduct reference checks because of that familiarity. The Commission agrees that Mr. Leik's familiarity with the candidates' performance in their existing positions made it unnecessary to perform reference checks before offering the position to Ms. Smith.

Many of the petitioner's arguments suggest that she expects the respondent to apply a rigidly mechanical selection process to hire someone to fill the vacancy. Various fair employment decisions have pointed out that subjective hiring criteria are entitled to little weight in certain hiring decisions. For example, in Zalkins Peerless Wiping Co. v. Neb. EOC, 39 FEP Cases 47 (Neb. Sup. Ct., 1984), the court held that the employer could not have its hiring decisions shielded from scrutiny by contending that it hired employees based on "gut reaction." In Zalkins, there were no standards or qualifications used by the employer and hiring was often done "on the spot" after someone stopped by and asked for a job. But the courts also recognize that subjectivity is not always inappropriate. In Shidaker v. Bolger, 37 FEP Cases 769, 777 (N.D. Ill., 1984), the district court held:

The validity of subjective devices increases in direct proportion to the level of employment sought. In cases where the skills sought are minimal or can be objectively quantified, or the position is entry level, courts reject as illegitimate purely subjective valuations of potential or fitness.

In contrast, while, objective factors may play a threshold role in professional or entry level management positions, decisions as to promotions at these levels likely turn on an evaluation of more intangible subjective qualities, such as leadership skill and ability to take decisive action when necessary. However, even subjective tests for upper level employees and professionals will not withstand scrutiny unless the underlying goals are clear and job-related. (Citations omitted)

In the present case, there was some subjectivity available to the panelists in scoring the various candidates and additional subjectivity was applied in determining the final ranking, but the panelists' assessment of the candidates was based on a series of questions which were tied closely to the responsibilities of the vacant position. As noted above, the key difference between the scores and the final ranking adversely affected a male candidate, rather than a female candidate.

In the case of Nagel v. Avon Board of Education, 39 FEP Cases 602 (D.C. Conn., 1983), the court recognized that deficiencies in the selection process affected all of the candidates equally:

None of the deficiencies pertained solely nor more particularly to the plaintiff nor were they likely to produce any different evaluation of the plaintiff than of any other candidate. Thus, the selection process, though faulty, did not operate any differently in relation to the plaintiff than to the other candidates. She was not precluded from putting forth her full qualifications as there was no restriction on either her oral or written presentation. While the plaintiff might have been obliged to extend herself to make a better case, she was not restricted from doing so and was in no different posture before the screening committee than other candidate[s].

The same can be said for the June, 1986 decision.

The respondent has articulated a legitimate, non-discriminatory reason for its decision by stating that the petitioner was ranked well below the successful candidate after the selection process. This reason, coupled with the facts that the successful candidate was a woman and that two of three panelists were women along with the absence of evidence of pretext, results in a conclusion of no probable cause to believe that discrimination occurred.

Selection 2: Director and Assistant Director A & E

The petitioner alleges that she was discriminated against based on her sex in regard to the hiring decisions for the positions of Director and Assistant Director of A & E in October of 1986.

Again, the petitioner has established a prima facie case. She was among those certified for the two vacancies and the respondent eventually filled the positions with two other candidates, both males. The respondent articulated a legitimate, non-discriminatory rationale for its hiring decision by pointing to the point totals received by each candidate in the interview process. The next stage of inquiry is whether the respondent's articulated rationale is pretextual.

The petitioner attempted to demonstrate pretext through a variety of different allegations, some of which are similar to arguments made with respect to the first selection decision. As in the first decision, the majority of the interview panel for the October, 1986 selection decisions were women. It is difficult for the petitioner to establish pretext in light of the composition of the panel.

One of the panelists, Bev Davis, did not testify at hearing. The absence of Ms. Davis does not tend to establish pretext.

Petitioner argues that Mr. Leik's use of "implied benchmarks" in scoring the candidates' responses caused the process to be something other than fair, objective and neutral. Mr. Leik testified that he gave at least some credit for those responses in which the candidate "implied" the correct answer even though the candidate may not have used the exact wording set forth in the listed benchmark response. Given that the candidates were ranked on the basis of their responses during an interview rather than on their answers to a multiple choice examination, the panelists have to exercise some discretion in determining whether to award points to a given response.

Petitioner also suggests the reference in a benchmark to "noon hour sports" is indicative of pretext. This phrase was found in a benchmark for the question: "If you were to become director of A & E, what steps would you take to facilitate relationship of A & E with DCI staff." Five benchmarks were listed for that question, including the following: "Participate in extra-curricular activities (noon hour sports, etc.)." Petitioner suggests that the reference to

sports favors men in general and a particular group of people who worked together. Petitioner's argument fails to recognize that the benchmark is for extracurricular activities, and that sports are listed as only one example of activities which would promote interaction and cooperation between A & E and DCI staffs. At least some women participated in noon time sports in the institution, even though the testimony suggested that the locker facilities for women were inadequate. The petitioner did not play sports at the institution. She considered it to be "unprofessional" for staff to return to work dripping wet and sweating after a lunch hour game. However, the petitioner did help with the Employees Assistance Program and served on the board of directors of the Corrections Employees Charity Organization which conducts annual charity events involving all DOC employees. Both of these activities of the petitioner are the type of extracurricular activities which could encourage cooperation between A & E and DCI. The evidence indicates that had the petitioner listed this information in her response to question 6, she would have been given credit for the extracurricular activities benchmark. However, there is no credible evidence to the effect that the petitioner identified these activities in her interview as being appropriate for facilitating the relationship of the two staffs.

Petitioner points to Ms. Nagle's scoring of question 1 as an indication that the decision was other than neutral. The panelists' interview sheets indicated that each benchmark for question 1 was worth 4 points. However, Ms. Nagle credited some of the candidates with 5 points for each benchmark for that question. She used 5 points for one of the two female candidates (Ms. Lyon) and for four of the six male candidates (Mr. Bett, Mr. Ellerd, Mr. Kaemerer and Mr. Traut). It is clear that Ms. Nagle erred in her scoring of the question, but her errors did not single out the complainant or all females. Her error had a larger adverse effect on the two candidates she ranked highest (Mr. Benik and Mr. Verhagen) than on the petitioner. The error is not indicative of pretext.

Petitioner complains that all three of the panelists knew her before the selection decision. Such prior knowledge does not tend to establish pretext in a sex discrimination claim. It simply reflects the fact that the candidates for these vacancies were already employed in the Division of Corrections and that the panelists were also DOC employees. Ms. Nagle knew the petitioner. She was

surprised that the petitioner gave a poor interview in light of her long employment with A & E. Ms. Nagle and the other panelists all gave the petitioner a similar score. The fact that Ms. Nagle was surprised with petitioner's interview does not indicate that she held the petitioner to a higher standard than the other candidates.

Mr. Leik was the immediate supervisor for the Director position. It was logical for him to be involved in the selection process and to sit on the panel. While the petitioner asserts that Mr. Leik "dominated" the selection process, the evidence only indicates that Mr. Leik performed the normal responsibilities of a supervisor of a vacancy. Petitioner failed to identify anyone who was in a more appropriate position to sit on the panel, select the rest of the panel and prepare the initial draft of the interview questions. Again, it was not necessary for Mr. Leik to perform reference checks on the candidates because he was already familiar with the work of the top candidates.

Petitioner contended that if the panelists knew the candidates well enough to eliminate the need for reference checks, then the panelists should have credited the petitioner for certain experience that is typically part of being a Social Worker 3, even if the petitioner's response during the interview was simply that she had been a Social Worker 3. In order to be credited for knowledge, an applicant has to express that knowledge or information during the interview itself. The petitioner may have had knowledge not made known during the interview, but she was not entitled to credit for that knowledge as long as it was not expressed. As a general matter, the various notations of the panelists on their interview sheets indicated that they took similar notes of the candidates' comments. If the panelists notes and circled benchmarks do not reflect a certain response, then the Commission cannot conclude that that response was in fact expressed.

Despite petitioner's contention, there is no evidence that she was better qualified than Mr. Benik and Mr. Bett. Even if the Commission were to conclude that the petitioner was actually better qualified than the successful candidates, the interview notes show that during the interviews, the petitioner did not express qualifications comparable to those expressed by Mr. Benik and Mr. Bett.

As to both the June, 1986 and October, 1986 decisions, the petitioner contends that there is a pattern established by the fact that with the exception of a

half-time position, there are no females employed at or above the pay grade 14 level in the classification section. However, the petitioner has failed to offer evidence as to the number of such positions which exist as well as the number of females who may have applied for the positions when the positions have become vacant.

Based on the above analysis the Commission cannot conclude that the petitioner has established pretext to the extent necessary for a finding of probable cause.

### Selection 3: Program Review Coordinator at Columbia Correctional Institution

The petitioner raises two claims as to the May of 1987 PRC selection decision. In case 87-0072-PC-ER, she claims that the decision constituted retaliation for having filed a prior discrimination complaint. In case 87-0086-PC, she alleges that the decision was otherwise illegal or an abuse of discretion. Each allegation is treated separately below.

In a retaliation context, a claimant may establish a prima facie case by showing she has engaged in protected activity under the Fair Employment Act, that she has suffered an adverse employment action, and that there is a causal connection between the adverse employment action and the protected activity. Grant v. Bethlehem Steel Corp., 622 F. 2d 43, 22 FEP Cases 1596 (2d Cir., 1980). Here, the petitioner's complaint of discrimination filed on February 3, 1987 was a protected activity. The subsequent decision to appoint Mr. Heise rather than the petitioner to the vacant PRC position was an adverse employment action. Petitioner established a causal connection by pointing to the interview scoring of Ms. Wallintin, a Program Assistant in the A & E unit. Ms. Wallintin, with no professional experience in classification, received many more points in the interview than the petitioner, who had such professional experience but had also engaged in protected activities.

The respondent has articulated a legitimate non-discriminatory rationale for its decision. Respondent contends that panelists who heard the interviews scored the candidates based on what they said rather than on outside information.

Petitioner's attempt to demonstrate pretext must fall short because two of the three panelists were unaware at the time of the scoring that the peti-

tioner had filed a complaint of discrimination. The third panelist, Mr. Thieszen, was aware of the complaint but was unaware that the complaint had specifically named him. All three of the panelists were very consistent in their scoring of the petitioner. Ms. Krenke gave petitioner 36 points, Mr. Thieszen gave her 40 points and Ms. James gave her 43 points. None of the panelists ranked petitioner higher than tied for 5th among the eight candidates who were interviewed. In contrast, the three panelists gave the successful candidate 72, 75 and 68 points, respectively.

Mr. Leik, the appointing authority for the PRC position, was aware at the time of the hiring decision that some of the petitioner's allegations of sex discrimination were directed against him. However, in making the selection decision, Mr. Leik simply relied on the rankings presented him by the interviewing panel. He did nothing to modify those rankings in such a way as to avoid hiring the complainant.

As in the previous hiring actions, the petitioner argues that there were numerous deficiencies in the way in which the interviews were conducted and scored from which retaliation can be inferred. Those deficiencies are discussed more specifically below in the context of the petitioner's civil service appeal. Because the deficiencies in the process affected all of the candidates and were not specifically directed at the petitioner, they cannot be viewed as being supportive of the petitioner's allegation of retaliation.

In regard to petitioner's appeal under §230.44(1)(d), Stats., the standard to be applied is whether respondent's decision not to promote the petitioner to the vacant PRC position was "illegal or an abuse of discretion." The only illegality alleged was that the decision violated the Fair Employment Act and the Commission has already concluded that the petitioner has failed to establish probable cause as to that claim.

The term "abuse of discretion" has been defined as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, 79-208-PC, 6/3/81. The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather it is a question of whether, on the basis of the facts and evidence presented,



the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, 81-74-PC, 4/2/82.

The issue in the instant appeal relates to the decision not to promote the petitioner. This issue requires the Commission to determine whether the selection criteria were valid and, if so, to compare the relative qualifications of the petitioner and Mr. Heise, the successful candidate. While it is enticing to focus on the relative scoring of the petitioner and Ms. Wallintin and to jump from those results to the conclusion that the use of any questions and benchmarks which could result in that comparative scoring must constitute an abuse of discretion, the Commission must look at the questions and benchmarks themselves to determine whether they are reasonably related to the duties and responsibilities of the vacant PRC position. It is not the Commission's role to determine which of an unlimited number of possible criteria it would have been best for the respondent to utilize. Rather, the Commission must determine whether the criteria used were reasonably related to the duties and responsibilities of the vacant position and were uniformly applied. Royston v. DVA, 86-0222-PC, 3/10/88. The appointing authority is not required to apply every reasonable criterion in making a hiring decision. Romaker v. DHSS, 86-0015-PC, 9/17/86.

The questions posed by the panelists to all of the candidates are set forth in finding 39. In addition, the duties of the PRC position and the "knowledges" required for the position are described in finding 38. All of the five questions are reasonably related to the duties of the position. The first question asks for the candidates to describe their relevant educational background and job experience. The benchmark responses show that candidates were given credit for knowledge of or experience in the classification process, interviewing and evaluation, DOC and BAI policies and procedures, a "unit management" institution, and adult male institution, writing and documentation and for having worked independently. Most of these benchmark responses are specifically listed as "knowledges" required in the position. The reference to experience in a "unit management" institution reflects the fact that CCI is operated using such a system. The reference to working independently is consistent with the general level of supervision provided to the PRC position by the Program Review Director. The petitioner stipulated that the first question was job relevant and valid as an exam question. The second question asked the candidates

to identify steps to facilitate a good working relationship with CCI staff. The benchmark responses show the candidates were given credit for identifying communication links via management team meetings and with unit managers, heads of security, social workers, work supervisors, education staff and security staff as well as the position's immediate supervisor and the institution superintendent and deputy superintendent. Communication with CCI staff is specifically identified as goal D in the relevant position description and is implicit in the other goals for the position. The next three questions required the candidates to respond to hypothetical situations which are apt to be encountered by the Program Review Coordinator. The final portion of the scoring of the candidates was the oral communication skills evaluation. The evaluation guide identifies factors for rating the candidates communication skills such as organization and ease of understanding. As noted above, the position description shows that communication skills are an important aspect of the duties of the PRC position. Necessarily, the evaluation of those skills is a relatively subjective determination. Therefore, the Commission concludes that all of the questions used to rank the applicants were reasonably related to the vacant position. The Commission recognizes that respondent found it necessary to disqualify Ms. Wallintin after the interviews, even though she had received the third highest total score, because her experience in the classification was in a predominantly clerical rather than professional capacity. This result indicates that additional questions or revised benchmarks more sensitive to the quality of the candidate's familiarity with classification would have been preferable. However, the respondent's decision to use those questions and benchmarks found in Respondent's Exhibit 63 cannot be said to be clearly against reason and evidence.

The Commission's comparison of the applicants is properly focused on their relative performance in light of the criteria utilized by the respondent. However, it can also be helpful to compare the candidates solely on their work experiences. The record is quite limited with respect to the experience and qualifications of Mr. Heise. Mr. Heise had worked several years as a psychologist at the Wisconsin Resource Center, another Division of Corrections institution. He had been a committee member in the PRC process, and was responsible for programming, assessment, testing and evaluation. He had gained experience managing units in a unit management facility. CCI was also a unit

management facility. The petitioner's experience included two years in the field of classification as a social worker. During this period, petitioner's duties included performing inmate release planning, contacting parole agents, corresponding with inmate families, performing evaluations, recommending treatment programs and assisting in the development of educational programs and vocational training programs for inmates. Also, early in 1986 during the period in which Mr. Buchler was acting A & E Director, the petitioner served as an acting Program Review coordinator. While the petitioner was indisputably qualified for the PRC vacancy, her qualifications were not clearly superior to those of Mr. Heise. As noted above, the key analysis is of how the two candidates performed in the interview setting based on the criteria used by the panelists.

One of the three interviewers characterized the petitioner as being "hostile" during her interview. Ms. Krenke testified that the petitioner's obvious hostility may have caused the petitioner to cut off her responses rather than fully responding to all of the questions. For example, the petitioner may have indicated in the interview that she was a social worker, but she failed to indicate what specific duties or experience she gained while a social worker which would qualify her for the vacant PRC position. Ms. Krenke recalled that the panelists discussed the various candidates even though the discussion did not affect the scores assigned by the panelists. Because Ms. Krenke testified that the panelists scored the candidates independently, the Commission concludes that the discussion between the panelists occurred after the panelists' scoring of the applicant was completed. Ms. Krenke recalled that the panelists were also surprised at how poorly Jennifer Gavin responded during her interview, given Ms. Gavin's experience in the area of program review. Ms. Krenke testified that Mr. Heise did very well in the interview.

The petitioner conducted her own analysis of the interview documents completed by the three panelists and prepared a listing of what the petitioner considered to be errors in the interview scoring. Petitioner's observations comprise Appellant's Exhibit 10, which is 27 pages in length. Many, if not most, of the petitioner's observations state that the benchmarks circled by the panelist are not reflected in the handwritten notes made by the panelist during the course of the interview. Those notes are found below the benchmarks listed for each question. Petitioner's argument is premised on the theory that

the panelists should have kept verbatim notes of everything said during the response to each question and should have then circled the appropriate benchmarks before going on to the next question. Petitioner's expectations of the process are unrealistic. It is true that the respondent could have chosen to tape record the candidate's responses but did not do so. However, there is no statutory or other requirement that selection interviews be recorded. The panelists did keep good notes of the candidate's comments. Those notes are reasonably consistent between the three panelists. The notes do not reflect all of the circled benchmarks because the panelists would not always circle a benchmark and make notes for every comment made by the candidate.

Many of the petitioner's remaining observations are based on the theory that she should have received credit for knowledge or experience that was implicit in her work history. For example, on page 1 of Appellant's Exhibit 10, petitioner writes: "Bloedow should have been awarded [points] for [evaluation and interviewing] skills by virtue of current class." This observation is inconsistent with the uniform procedure used in scoring the interviews. All of the candidates were scored based on their responses, and not based on information the panelists may have already known about the candidate. For example, Ms. Krenke testified that Mr. Heise did not get credit for the benchmark for writing and documentation skills even though she knew that because he worked as a psychologist, he had to have those skills.

In those few instances where the petitioner testified that her answer to an interview question included information called for in a benchmark yet was not reflected in the interview notes of any of the panelists, the Commission must reject the petitioner's testimony. In light of the relative consistency of the notes taken by the three panelists, the Commission concludes that those notes provide a more accurate record of what was said than the recollection of the petitioner.

Petitioner has also pointed out that some of the panelists incorrectly added up the scores of the various questions. Respondent conceded that such errors were made. For the most part, the math errors were made by Ms. Krenke who admitted that her accuracy when adding was quite limited. She testified that she had expected her addition to be verified before it was relied upon. The original scores and the corrected scores are both reflected in finding of fact 45. That finding shows that the errors did not result in a change in

ranking of the candidates by either the individual panelists or by the panel as a whole.

The petitioner contends that certain of the interview notes from at least one, if not two, of the position interviews have been altered by the respondent between the time copies of the documents were first presented to petitioner pursuant to a discovery request and the time the original documents were filed with the Commission on the fourth day of hearing. While the petitioner's contentions extend to numerous exhibits, the only specific comparisons between documents was made with Exhibit 71, the interview notes taken by Ms Krenke of Ms. Wallintin for the PRC position in May of 1987. The petitioner contends that benchmark (a) for question 5 on the document initially filed with the Commission (Exhibit 71) is not circled. The original document (Exhibit 71'), which was executed by Ms. Krenke in pencil, clearly has a circle around benchmark (a). Exhibit 71' was offered as an exhibit after it became apparent that the parties and the examiner were having difficulties in deciphering the information on the set of exhibits which were initially filed with the Commission. The parties filed several other versions of Exhibit 71. The respondent filed as Exhibit 71'' the version that respondent's counsel had used at the hearing before the original, Exhibit 71', was produced. Also, as part of its case in rebuttal, the petitioner filed Exhibits 13, 14 and 15 which are a series of photocopies made, in effect, from Exhibit 71'', which is a copy made directly from Exhibit 71' once the original was filed with the Commission. The petitioner's three exhibits reflect experiments carried out by the petitioner, on the copy machine in the office of the petitioner's counsel, to see if she could create from Exhibit 71'' a copy which looked like Exhibit 71 in terms of any markings around benchmark (a).

The Commission has made a careful examination of the various forms of Exhibit 71 which have been filed by the parties. That examination leads directly to the conclusion that there was no alteration of Ms. Krenke's marking of benchmark (a) in question 5 for Ms. Wallintin's interview in May of 1987, after such time as Exhibit 71 was produced. This conclusion is based on the following:

1. There clearly is a mark on Exhibit 71 in the northeast quadrant of the area around the "(a)" on page 5. When Exhibit 71 is superimposed on Exhibit

71' (the original), these marks are exactly in the location of the darkest portion of the circle on Exhibit 71'.

2. There is also clearly a mark on Exhibit 71"" in the northeast quadrant of the area around the "(a)" on page 5. This mark is at the same location as the mark on Exhibit 71 but is slightly longer and more distinct. Everything on Exhibit 71"" indicates that it served as the document from which Exhibit 71 was copied. When Exhibit 71"" is superimposed on Exhibit 71' (the original), these marks are exactly in the location of the darkest portion of the circle on Exhibit 71'.

3. The pencilled circle surrounding the "(a)" on page 5 of Exhibit 71' has been compared to the various handwritten notations elsewhere on that page to find those marks which were the most similar in terms of darkness and width. Both Exhibits 71 and 71"" have been examined to see how those copies showed those marks. The degree of clarity of these marks on Exhibits 71 and 71"" is very similar to the degree of clarity of the circle around "(a)".

4. Exhibits 13, 14 and 15 were reviewed to find the copy which most closely reflected the quality of the copying of the handwritten comments found on Exhibit 71. The closest comparison was page 3 (designated A-3) of Exhibit 13. Even this photocopy, which was the least clear of the nine copies comprising Exhibits 13, 14 and 15, is more distinct, with respect to the handwritten comments, than Exhibit 71. Nevertheless, the markings on A-3 of the circle around "(a)" are very similar to the marking in the identical location on Exhibit 71"", and are also similar, in terms of location, to the marking on Exhibit 71.

For all of the above reasons, the Commission concludes that the circle around benchmark (a) on the original of Ms. Krenke's interview notes (Exhibit 71') was not added after the creation of Exhibit 71.

The petitioner argues that other documents were changed after the conclusion of the interviews and points to Ms. Krenke's testimony that there were notations on her interview sheets that were not in her handwriting. Ms. Krenke testified that she did not know if she had written the 66 at the top of her interview sheet for Ms. Paul. That number is an incorrect total for the points awarded by Ms. Krenke to Ms. Paul. The correct total is 56, although Mr. Thieszen listed the total as 61 when he was calculating the scores of the panel as a whole. (Respondent's Exhibit 88). Ms. Krenke also testified she didn't


think the number 40 found on the last page of Respondent's Exhibit 77 was in her handwriting. Exhibit 77 is Ms. Krenke's interview sheet for Ms. Gavin. On the top of the first page of the exhibit, the total score is listed as 39. Mr. Thieszen also listed the total as 39 when he calculated scores on Respondent's Exhibit 88. The correct total is 41 points. There was no explanation offered by the respondent as to how the numbers might have been written on the interview sheets by someone other than Ms. Krenke. It is at least possible that Mr. Thieszen added the numbers sometime after the completion of the interviews even though he denied making any changes to the interview sheets themselves. Even if Ms. Krenke did not change Ms. Paul's score to 66 and did not add the number 40 at the end of Ms. Gavin's interview sheet, the Commission is unpersuaded that these notations should generate a conclusion that the CCI-PRC selection decision was illegal or an abuse of discretion. The changed numbers were not used by Mr. Thieszen when he calculated the panel's group ranking of the candidates. The notations, if relied upon, would also have no effect on Ms. Krenke's ranking of the various candidates. The most that the Commission can conclude is that the petitioner has identified two notations, both inconsequential, which Ms. Krenke was unwilling to testify, 18 months after the interviews were conducted, were her own.

Based on the above analysis, the petitioner has failed to meet her burden with respect to the third selection.

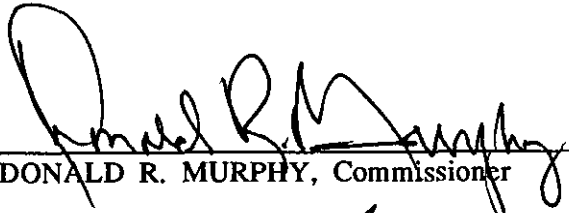
ORDER

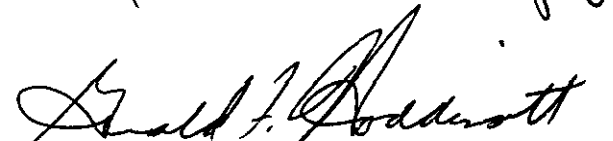
The respondent's May, 1987 selection decision for the CCI - PRC position is affirmed, the initial determination of no probable cause is affirmed and these matters are dismissed.

Dated: August 24, 1989 STATE PERSONNEL COMMISSION

  
LAURIE R. MCCALLUM, Chairperson

KMS:kms

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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