

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NANCY COZZENS-ELLIS,

Complainant,

v.

Chancellor, UNIVERSITY OF  
WISCONSIN - Madison,

Respondent.

Case No. 87-0070-PC-ER

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ORDER

After reviewing the proposed decision and order and the objections filed by the parties in writing and at the oral argument conducted on February 6, 1991, and after consulting with the hearing examiner, the Commission hereby adopts the proposed decision and order as its final decision and order with the addition of the language in the following paragraphs. It should be noted that the arguments presented by the parties in their written objections to the proposed decision and order and in their oral arguments presented the first opportunity for the hearing examiner and the Commission to be apprised of the parties' arguments on the merits of the instant case since the complainant failed to file a post-hearing brief despite the hearing examiner's request for briefs from the parties and complainant's agreement with the briefing schedule established by the hearing examiner.

Complainant argues that several alleged irregularities in the recruitment and selection process for the subject promotion demonstrate that probable cause exists for a finding of discrimination and retaliation. The first of these involves an allegation by complainant that the failure of respondent to create and/or maintain written records regarding the recruitment and selection process constitutes such an irregularity. The record indicates, however, that certain written records were created. For example, Respondent's Exhibit 2 is an instructional memo created by Mr. Kaszubski and shared by him with the two other members of the first interview panel which set forth the procedure to be followed by the panel, the questions to be asked of the candidates by the

panel members, and the benchmarks to be used in evaluating the candidates' answers to the interview questions. Ms. Foley, a member of the second interview panel, testified that she took notes during her interview of the candidates but later destroyed these notes herself. There is no evidence in the record from which to conclude that anyone else instructed Ms. Foley to destroy her notes. However, the absence of additional written records of the recruitment and selection process would bolster complainant's position in this regard if the record showed that such records were required to be or were with limited exception created and maintained in such hires or if the record contained some evidence from which it could be concluded that the recommendation forwarded by the panels to Chief Hanson did not represent the consensus of the panel members or did not reflect the actual information available to the panel members or their actual opinions relating to the qualifications of the candidates. The record does not show this. The evidence in the record, although not extensive on this point, suggests that written interview notes, candidate rankings, and/or recommendations are often created and maintained but they are not required to be and it is not particularly unusual for them not to be. In addition, the testimony of the interviewers who were called as witnesses at the hearing is entirely consistent, i.e., they each testified that Ms. DePagter and Mr. Simmons were ranked as the top two candidates by each panel; and does not reflect that they were misinformed about the actual qualifications of the candidates or that the rankings of the candidates did not reflect their actual opinions.

The second alleged irregularity involves the rationale for removing Mr. Bauer from the recruitment and selection process. In her written objections, complainant states: ". . . the complainant proved that Captain Bauer was removed from the hiring process because of the prior litigation of the complainant." However, the testimony of Mr. Bauer, Mr. Hanson, and Ms. Foley reflects that Mr. Bauer removed himself from the process because he was Ms. DePagter's uncle. Only Mr. Hartwig's testimony that he thought that Mr. Bauer had not participated because of the litigation involving complainant is inconsistent with this. In addition, even if Mr. Bauer had not participated because of the litigation involving complainant, complainant has failed to show that this is evidence of a discriminatory or retaliatory motive on

the part of respondent, i.e., has failed to show how this presented a disadvantage for complainant in the recruitment or selection process.

The third alleged irregularity involves the decision by respondent not to have the interview panel members review the personnel files of the candidates. However, here again, complainant has failed to show that this is a process that is required to be followed or followed with limited exception and has failed to show how this evidences a discriminatory or retaliatory motive on the part of respondent. It is clear from the record that at least some of the interview panel members were very familiar with the relevant backgrounds of the candidates and with their performance at the Department and that, since the rankings of the panel members were unanimous, that this familiarity did not appear to affect the outcome of the recruitment and selection process.

The final alleged irregularity involves inconsistencies in the testimony regarding the membership of the interview panels. Mr. Simmons testified that he recalled that Mr. Bauer interviewed him. Ms. DePagter testified that Gary Johnson interviewed her. Despite this, the clear preponderance of the evidence is to the contrary on both counts. Ms. Foley, Mr. Hartwig, and Mr. Hanson each testified that they were the only three members of the second interview panel and Mr. Hanson testified that he did not receive input relating to the subject selection from Mr. Bauer or Mr. Johnson. Mr. Kaszubski, who set up the first interview panel and who monitored the participation of the first panel in the selection process, testified that he, Mr. Flores, and Ms. Brookbank were the only three members of the first interview panel. In addition, both Mr. Simmons and Ms. DePagter testified that they had applied for and been interviewed for numerous promotional opportunities within the Department and had trouble recalling many of the details of these.

Complainant also argues that Chief Hanson's reliance on the recommendations of the interview panels demonstrates discrimination and/or retaliation since Mr. Hanson admitted that he had not always followed interview panels' recommendations in the past. The record shows that Mr. Hanson had not followed an interview panel's recommendation only once: when he promoted complainant to an SO 3 position in March of 1986. The only thing this demonstrates is that Mr. Hanson had the authority to select a candidate other than the candidate recommended by an interview panel and had done this to promote complainant. However, it does not demonstrate that

Mr. Hanson's failure to take exception to the recommendation of an interview panel evidences a discriminatory or retaliatory motive on his part. In fact, it would be much more sensible to sustain an argument to the contrary, i.e., that an appointing authority's failure to follow the recommendation of an interview panel is exceptional and could lend credence to an argument that discrimination or retaliation affected the selection.

Complainant argues next that the record shows that she was more qualified than Mr. Simmons or Ms. DePagter since she had more experience and more supervisory experience than they. However, the record shows that, although complainant had a longer tenure as a Security Officer with the Department than either Mr. Simmons or Ms. DePagter, she had less lead work/supervisory experience as a Security Officer with the Department than Ms. DePagter and less supervisory experience overall than Mr. Simmons. In addition, this experience component was not the only selection criterion relied upon by respondent and the record demonstrates that, overall, on the basis of the relevant selection criterion, complainant did not show that she was more qualified for the subject promotions than the successful candidates. This is discussed in detail at pages 12 through 14 of the proposed decision and order which has been adopted by the Commission in its entirety. One of these other criteria was the performance of the candidates during their tenure with the Department. The record shows that complainant had been disciplined in February of 1984 for tardiness and for making inappropriate remarks to co-workers and had grieved this discipline. (See Finding of Fact 2, page 2 of proposed decision and order). During the course of his oral argument, counsel for complainant stated that "Complainant sued respondent over it (discipline) and was paid money," thereby implying that reliance by the panel on the fact of the imposition of discipline was improper. However, the record does not show what the outcome of the grievance was and does not show that complainant received any type of remuneration in the nature of a remedy as a settlement or other disposition of the grievance.

Complainant argues further that she proved in the record that Mr. Hanson made the statement to her in January of 1985, in reaction to the grievance she had filed after being disciplined in February of 1984, that "We cannot promote people who behave like this and, if you behave yourself, we may promote you in 10 years." In addition to the discussion regarding this

point set forth at pages 10 and 11 of the proposed decision and order, the Commission feels that the following chronology of relevant events further bolsters its conclusion in this regard:

9/1/74	complainant hired as SO 2
2/84	complainant disciplined
1/85	alleged statement made by Mr. Hanson
10/22/85	complainant filed original PC complaint re: respondent's failure to promote her in 1/85
3/16/86	complainant promoted to SO 3
11/23/86	PC complaint settled
12/86	complainant applied for subject promotion
5/9/87	settlement signed

This chronology shows that Mr. Hanson promoted complainant to an SO 3 position after he allegedly made the statement that he didn't intend to promote her for at least 10 years. Mr. Hanson's action in promoting complainant less than 15 months after he allegedly made the statement is further evidence that Mr. Hanson didn't make the statement and that complainant has not shown that Mr. Hanson had demonstrated a predisposition not to promote complainant based on discriminatory or retaliatory motives. In addition, the evidence offered by complainant to show that the statement was made by Mr. Hanson consists of complainant's testimony to this effect. It should be noted that complainant's credibility was placed into question when she testified that she saw an original certification list which did not list Ms. DePagter's name and that she was aware that Ms. DePagter's name was added to the certification list as a result of expanded certification after the original certification list had been provided to respondent. However, the record clearly shows that only one certification list was generated, that Ms. DePagter's name was on this list and not as a result of expanded certification, and that expanded certification may be requested only prior to the generation of a certification list.

The analysis applied here and in the proposed decision and order in relation to the alleged statement by Mr. Hanson applies both to the allegation of sex and race discrimination and to the allegation of retaliation. By failing to prove that Mr. Hanson made the alleged statement, complainant has failed to demonstrate both discrimination and retaliation in this regard.

Finally, complainant takes issue with the standard of proof applied by the hearing examiner in the proposed decision. In his oral argument, counsel for complainant stated that probable cause is an "easy standard" and all that is required to show probable cause is a prima facie case; and that it is not proper to resolve credibility disputes at the probable cause stage of these proceedings. Complainant clearly misstates the law in this regard. On page 9 of the proposed decision and order, there is a discussion of the current state of the law in regard to both the probable cause standard and how such standard is to be applied in the context of a disparate treatment case such as the one under consideration here. This discussion clearly indicates that, although the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination or retaliation, it involves more than simply setting forth a prima facie case of discrimination. In addition, in McLester v. UGLRC, Case No. 79-PC-ER-38 (10/13/82); aff'd by Outagamie County Circuit Court, McLester v. Pers. Comm., 82-CV-1315 (7/30/84); aff'd by Court of Appeals Dist. III, 84-1715 (3/12/85), the Court of Appeals decided that the Commission is entitled to review the credibility of witnesses and the weight of the evidence in determining probable cause; that 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; and that, 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. It should also be noted that complainant has cited no authority for her position in this regard.

In her objections to the proposed decision and order, complainant also "objects to the Commission's usage and reliance upon Chairperson Laurie McCallum to decide this case: on the ground that she is married to the Lieutenant Governor, and that "since this lawsuit is against the State of Wisconsin, the complainant contends that there exists a conflict of interest."<sup>1</sup>

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<sup>1</sup> This objection, raised for the first time after Chairperson McCallum heard the case and issued a proposed decision unfavorable to complainant, may well be considered untimely, §PC 5.01(4), Wis. Adm. Code, but the Commission will nonetheless address it on the merits.

The general rule governing disqualification of a quasi-judicial administrative official under the circumstances presented by complainant's objection is set forth in Am Jur 2d Administrative Law §64 as follows:

An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to sit in a proceeding . . . in which he has a personal or pecuniary interest, [or] where he is related to an interested person within the degree prohibited by statute . . . an interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical. (footnotes omitted)<sup>2</sup>

Chairperson McCallum does not have a personal or pecuniary interest in this matter. The question, then, is whether her husband would be considered an "interested person," inasmuch as he is the Lieutenant Governor and this case involves a complaint of discrimination against another unit of government, the UW-Madison. Presumably, there are two possible interests that might arise from an award in favor of complainant under these circumstances. The first is that a possible award of back pay and costs would have a negative impact on the state treasury. The second is that the award against a state agency would have a negative political effect on the administration generally, including the Lieutenant Governor.

In Spoooner Dist. v. N.W. Educators, 136 Wis. 2d 263, 269-270, 401 N.W. 2d 578 (1987), the Supreme Court discussed the standards for deciding whether an arbitrator's award should be vacated for "evident partiality" of the arbitrator under §788.10(1)(b), stats., as follows:

The test for evident partiality was laid out by this court in *Richco Structures v. Parkside Village, Inc.*, 82 Wis. 2d 547, 263 N.W.2d 204(1978). An arbitrator's award must be vacated on the ground of evident partiality if "the reasonable person, as a party to the arbitration proceeding, upon being advised of the undisclosed matters, would have such doubts regarding the prospective arbitrator's impartiality that he or she would investigate further, would demand that the arbitration be conducted on terms which would provide checks on the arbitrator's exercise of discretion, or would take other protective measures to assure an impartial arbitration and award." 82 Wis. 2d at 562.

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<sup>2</sup> This section of American Jurisprudence was cited in LeBow v. Optometry Examining Board, 52 Wis. 2d 569, 574, 191 N.W. 2d 47 (1971).

The *Richco Structures* court discussed the types of disclosures required to be made by an arbitrator. Rejecting the notion that the concept of "evident partiality" was restricted to cases where there is proof that "an arbitrator has an interest in the outcome of the proceeding" or where "a relationship exists between the arbitrator and a party or a party's representatives which is so substantial that the arbitrator's interest in the outcome may be inferred," *Richco Structures* construes "evident partiality" as a much broader concept. 82 Wis. 2d at 557-59. According to *Richco Structures*, an arbitrator must disclose:

1. Relationships or transactions with the parties or their representatives.
2. Facts which might indicate to a reasonable person that the arbitrator may have an interest in the outcome of the arbitration.
3. Facts which may reasonably support an inference, or the appearance of the existence of bias, prejudice, partiality, or the absence of impartiality. See, 82 Wis. 2d at 558.

It is somewhat questionable whether these principles applicable to arbitrators, whose decisions are subject to very limited review, can be applied directly to an issue of alleged impartiality of a quasi-judicial administrative official in a Chapter 227 proceeding which involves a final panel decision and the right to judicial review. However, this test is somewhat similar to the "appearance of fairness" test used with respect to more similar proceedings:

In discussing the appearance of fairness, we have enunciated the following test as a prerequisite to the application of the doctrine: whether a disinterested person being apprised of the totality of a board member's personal interest in a matter being acted upon would be reasonably justified in thinking partiality may exist. Hill v. Department of Labor and Industries, 90 Wash. 2d 276, 580 P. 2d 636, 639-640 (1978).

In any event, the Commission concludes that under either of the foregoing standards complainant's objection is not well taken.

With respect to the potential impact of a decision favorable to complainant on the state treasury, such an impact would have to be considered by any reasonable, disinterested person to be infinitesimal in the context of the overall state budget.


As to the possible political impact of a decision against respondent, it also seems highly unlikely that this would be of sufficient impact to give rise



to a conclusion of an absence of impartiality. Looking at this matter from a broader perspective, it can be said that inherent in the very legislative structure of the Commission, §15.06(1)(d), Stats., is a connection between the chief executive and the Commission, via the gubernatorial appointment of the commissioners, but the same legislation also provides safeguards against undue influence. For example, the commissioners' terms (five years) are longer than the Governor's (four years), no more than two commissioners may be adherents of the same political party, and they are subject to State Senate confirmation. In this regard, it is noteworthy that the Senate unanimously confirmed Ms. McCallum's current appointment notwithstanding that at the time her husband was Lieutenant Governor. Obviously, the Senate, whose members would be as attuned as anyone to conflict of interest problems, perceived none in Ms. McCallum sitting on this Commission and hearing cases involving the state as employer while married to the Lieutenant Governor. This provides additional support for the conclusion that there is no absence of fairness or the appearance of fairness in having Ms. McCallum participate in this matter.

Finally, complainant "objects to the Commission as a whole. Its record in finding for complainants is inadequate . . . ." Complainant cites no authority for the proposition that this perceived "inadequate record" of decisions for complainants is of any legal significance with respect to this proceeding, and the Commission will not attempt to address this "objection" to the proposed decision any further.

Dated: February 26, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/AJT/lrm/gdt/3

  
GERALD F. HODDINOTT, Commissioner

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Donna Shalala  
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NANCY COZZENS-ELLIS,  
 Complainant,  
 v.  
 Chancellor, UNIVERSITY OF  
 WISCONSIN SYSTEM - MADISON,  
 Respondent.  
 Case No. 87-0070-PC-ER

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PROPOSED  
 DECISION  
 AND  
 ORDER

Nature of the Case

This complaint was filed on June 11, 1987, and alleged discrimination in hiring based on sex and/or race and based on retaliation for engaging in activities protected by the Fair Employment Act. An Initial Determination was issued on February 13, 1990, finding No Probable Cause to believe that such discrimination or retaliation had occurred as alleged. A hearing on the issue of Probable Cause was held on October 1 and 4, 1990, before Laurie R. McCallum, Chairperson, and a briefing schedule established. Due to the fact that the complainant, the party with the burden of proof as to all substantive issues, failed to file her initial brief, the respondent was not required to file a brief and the Proposed Decision and Order was prepared without final argument by the parties.

Findings of Fact

1. Complainant was hired by respondent's Department of Police and Security (hereinafter "Department") as a Security Officer 2 (SO 2) effective September 1, 1974. Effective March 16, 1986, complainant was promoted to a Security Officer 3 (SO 3) position. As a Security Officer, complainant had been

assigned to each of the three work shifts and had worked in each of the three work areas, i.e., the UW-Hospital and Clinics, the campus, and the Elvehjem Museum. As an SO 3, complainant had served as an Officer in Charge, i.e., had filled in for a supervisor in the supervisor's absence, approximately 20-30 times. Prior to December of 1986, complainant had completed at least one supervisory course at the Madison Area Technical College, and had graduated in 1980 from a two-month course at a police academy, a course for which the Department paid and for which the Department gave complainant paid leave time to attend.

2. During her employment as a Security Officer for the Department, complainant had been tardy on numerous occasions and her original probation had been extended because of this tardiness problem. In February of 1984, complainant had received a written reprimand for tardiness and for making inappropriate remarks to co-workers. Complainant grieved this reprimand pursuant to the applicable collective bargaining agreement.

3. Complainant applied for but was not selected for eight promotional opportunities between September of 1974 and December of 1986. In January of 1985, in relation to one of these, complainant asked Ralph Hanson, the Director of the Department, why he had not selected her. Complainant alleges that Mr. Hanson made reference to her 1984 grievance and told her that, "We cannot promote people who behave like this and, if you behave yourself, we may promote you in 10 years." The record does not sustain complainant's allegation that Mr. Hanson made this statement. Mr. Hanson has been Director of the Department since at least September of 1974.

4. On October 22, 1985, complainant filed a complaint with the Commission alleging that she had been discriminated against on the basis of sex in regard to the respondent's failure to hire her for the January, 1985,

promotional opportunity referenced in Finding of Fact 3, above. Complainant filed a parallel action in federal district court in February, 1986. These actions were settled on November 23, 1986, and the settlement agreement was signed by the parties on May 9, 1987.

5. In December of 1986, complainant applied for a promotion to one of two Security Supervisor 1 position vacancies within the Department. Both of these position vacancies were at UW-Hospital and Clinics. After administration of a written exam, a list of certified candidates was generated and forwarded to Mr. Hanson. This certification list indicated as follows, in pertinent part:

Roth, Richard T.	Grade 82.58
Walsh, Susan	Grade 78.58
Cozzens-Ellis, Nancy	Grade 77.442
Simmons, Wesley	Grade 77.441
Trimble, Thomas	Grade 76.58
DePagter, Carol	Grade 76.01

Women	
Niesen, Donna	Grade 71.43

Because two vacancies were to be filled from a single certification list, six names were certified. During this period of time, the Department had requested expanded certification for women and minorities for all hires. Ms. Niesen's name had been added to the subject certification list as a result of expanded certification for women. Ms. DePagter's name had not been added to the subject certification list as a result of expanded certification. A request for expanded certification was required to be made prior to the generation of the list of certified candidates, i.e., it was not possible for an appointing authority to review the list of certified candidates prior to making a request for expanded certification.

6. After the Department received the subject certification list, the certified candidates were interviewed by a panel consisting of James Kaszubski, a Security Supervisor 2 with the Department; Roberto Flores, an employee of the

Higher Education Corporation who had formerly been employed by the Department; and Karen Brookbank, an employee of I.R.I. Security. Each of the candidates was asked the same 10 questions by the panel. Eight of these questions asked the candidates to indicate how they would handle a specific hypothetical situation if they were a supervisor. The other two questions were as follows:

1. What special qualities and qualifications do you feel you bring to this job?
2. Why do you want this promotion?

Mr. Kaszubski was aware of the scores of the candidates on the written exam but the other two interviewers were not. The interviewers independently rated the candidates before discussing their ratings with the other interviewers. The interviewers used the following three-point rating scale to rate the candidates: highly qualified, qualified, not qualified. Each of the interviewers rated Mr. Simmons and Ms. DePagter as the top two candidates and rated complainant as the fourth ranked candidate with a rating of "qualified." The panel forwarded their recommendation in writing to Mr. Hanson. At the time of these interviews, Ms. Kaszubski was aware that complainant had filed a discrimination action against respondent and Mr. Flores may have been aware of this as the result of his former employment with the Department but there is no evidence in the record from which to conclude that Ms. Brookbank was aware or should have been aware of this action.

7. The candidates were then scheduled for one-on-one interviews with Robert Hartwig, a police captain with the Department; Linda Foley, communications supervisor for the Department; and Mr. Hanson. These three interviewers met after the interviews were completed and agreed that Mr. Simmons and Ms. DePagter should be ranked as the top two candidates and complainant

as the third. Their rankings were based on Ms. DePagter's educational background in criminal justice and on her experience in the Department as a lead worker, and on Mr. Simmons' supervisory experience in previous employment and on the leadership he had shown in his work as an SO 2 for the Department, as well as the way both candidates had presented themselves in their interviews. All three interviewers were aware that complainant had filed a discrimination action against respondent.

8. In the previous promotional opportunities for which complainant had applied, she had not been recommended for hire by the first interview panel. When complainant was promoted to the SO 3 position, Mr. Hanson went against the recommendation of the first interview panel in promoting her.

9. In her interview with the first panel, complainant, a white female, described her educational background and her graduation from a two-month course at a police academy in 1980. This educational background included undergraduate courses at the UW-Madison although it is not clear from the record what subject matter was covered by these courses, and at least one supervisory course at Madison Area Technical College. Complainant also described this supervisory course to Ms. Foley during their one-on-one interview. Although complainant had experience, prior to joining the Department, supervising and training research laboratory technicians, the record does not show that she shared this experience with any of the interviewers.

Complainant advised the first panel of interviewers that she felt she was a good employee and a good leader although the record does not show that she communicated any examples or specifics to the interviewers in this regard.

10. Mr. Simmons is a black male and had been hired by the Department in October of 1983 as an SO 1 and had been promoted to an SO 2 position prior to 1986. Mr. Simmons had served as a sergeant in the U.S. Marine Corps for three

years prior to 1956; had been employed as a manager of retail grocery stores for the Kroger Company from 1956 to 1971; and had been employed as a production worker for the Oscar Mayer Company from 1971 to 1983. While employed by Kroger, Mr. Simmons was responsible for supervising and scheduling 50 employees, for developing and implementing sales programs, and for supervising the accounting operation and all other operations of a retail store. As an SO 2, Mr. Simmons was assigned to the UW-Hospital and Clinics. In his interviews, Mr. Simmons emphasized the leadership skills he believed he had exhibited as an SO with the Department, citing specific instances of the work he had done and the decisions he had made without a supervisor present, citing situations which had occurred in the hospital emergency room which he believed he had handled independently and well, citing his willingness to take the initiative and make recommendations for change, and citing the positive relationship he believed he had developed with his co-workers who were the employees the successful candidate for the subject positions would be supervising; and citing his supervisory experience with the Kroger Company. Mr. Simmons had applied for previous promotional opportunities with the Department but had not been selected.

11. Ms. DePagter is a white female and had been hired as an SO by the Department in September of 1977. Effective October 20, 1985, Ms. DePagter was promoted to an SO 3/lead officer position. Ms. DePagter has completed nearly all of the course work for a B.S. degree in police administration from UW-Platteville. During her interviews for the subject positions, Ms. DePagter described her college-level work in police administration; her experience as an SO 3/ lead officer with the Department; and the leadership initiative she had taken while employed as an SO with the Department, such as volunteering to take on lead officer duties when the lead officer position was vacant and



volunteering to take on certain scheduling and routine paperwork functions to assist her supervisor. Ms. DePagter's uncle is Ronald Bauer, a police captain with the Department. Mr. Bauer did not participate in the subject hiring decisions.

12. In a performance review signed by Ms. DePagter during 1985, her supervisor stated the following objectives, expected results, and actual results:

Objectives

1. Strive to work more harmoniously with fellow officers.
2. Seek education about the preservation and protection of art.
3. Cultivate the relationships of the Elvehjem staff members.
4. Continue to use the knowledge of the Security Division policies and procedures as well as those of the Elvehjem to promote the safety of the works of art.

Expected Results

1. Working more harmoniously with fellow officers will produce the effects of better staff morale and a greater ability to fulfill the security mission.
2. Education about the protection of art will produce a greater ability to discuss and suggest new methods of protection for the Elvehjem.
3. With better relationships with Elvehjem staff, comes a greater acceptance of thoughts and ideas promoting art and people safety.
4. This knowledge will serve to make the job of approaching the public to correct or inform them of problems they may be creating.

Actual Results

1. A better cooperative effort between officers is being seen. This officer is doing her part to actively promote that harmony.
2. & 3. This officer, through her knowledge is discussing and promoting ideas of security for the art with Elvehjem staff and her fellow officers.
4. DePagter actively promotes security with the public.

13. In a performance evaluation signed by Ms. DePagter on March 25, 1986, Ms. DePagter's supervisor rated her performance as excellent in quality of work and initiative; good in judgment, quantity of work, dependability, rate of learning, and work habits; average in ability to get along with others in

work environment; and did not rate her performance as poor or unsatisfactory in any regard. The accompanying narrative stated as follows:

DePagter consistently develops and maintains goals on her own initiative. She has a large work load and deals with it well. When a task is assigned, you can be assured that it will be well done and timely. Extra tasks are done without complaint and in fact enthusiastically. She seeks out opportunities to advance herself with education.

Employee has shown consistent good qualities. She has actively involved herself with Elvehjem administrative staff to resolve security problems. She is capable of making supervisory decisions and associated planning and directing. DePagter, nevertheless, keeps me informed and seeks counsel and advice before initiating changes.

14. Complainant was notified in a letter dated May 5, 1987, that she had not been selected for the subject promotional opportunities.

#### Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §§230.45(1)(b) and 111.33(2), Stats.
2. The complainant has the burden to prove that probable cause exists to believe that respondent discriminated against her on the basis of her race and/or sex and/or to believe the respondent retaliated against her based on actions she took which are protected by the Fair Employment Act in its decision not to hire her for the subject promotional opportunities.
3. Complainant has failed to sustain these burdens.
4. There is no probable cause to believe that respondent discriminated or retaliated against complainant as alleged.

### Decision

The issue under consideration is one of probable cause. Probable cause is defined in §PC 1.02(16), Wis. Adm. Code, as a reasonable ground for belief, supported by facts and circumstances, strong enough in themselves to warrant a prudent person to believe that discrimination has been or is being committed. Although the Commission recognizes that the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination, it is useful in the context of a probable cause proceeding such as the instant one to utilize the analytical frameworks and guidance provided by decisions on the merits in discrimination cases to assist the Commission in reaching a decision on probable cause. The Commission will follow this course in reaching a decision here on probable cause.

In analyzing a claim of disparate treatment such as the one under consideration here, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

In the context of a hiring decision, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the Fair Employment Act (FEA), (2) applied for and was qualified for an available position, and (3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Under the facts of the instant case, complainant is protected by the FEA as a result of her race and her sex; and applied for and, as a result of her certification for the positions, was considered qualified for the subject positions. In regard to the position for which Mr. Simmons was the successful candidate, an inference of discrimination on the basis of sex and race arises in view of the fact that Mr. Simmons is a black male. Such an inference does not arise in regard to the position for which Ms. DePagter was the successful candidate since she, like complainant, is a white female. As a result, complainant has made out a prima facie case in regard to the Simmons hire but not in regard to the DePagter hire. However, the Commission will proceed with the analysis as if complainant had made out a prima facie case in regard to both hires.

Respondent offers as the reasons for its hiring decisions the opinion of the interviewers that Mr. Simmons and Ms. DePagter were better qualified for the subject positions. On its face, these reasons are both legitimate and non-discriminatory.

Complainant offers both direct and indirect evidence in her effort to show pretext. Her direct evidence consists of complainant's testimony that, in January of 1985, in regard to a grievance that complainant had filed in 1984, Mr. Hanson told her that, "We cannot promote people who behave like this and, if you behave yourself, we may promote you in 10 years." (See Finding of Fact 3, above). Although, if complainant had been able to prove that Mr. Hanson actually made this statement to her, it could be used to show that Mr. Hanson was predisposed not to promote complainant, the record does not link this alleged predisposition to either complainant's sex or race. In fact, it is clear from the record, through evidence presented by complainant, that the statement was allegedly triggered by the filing of a grievance by complainant in response to a written reprimand. There was no showing in the record that

such reprimand or respondent's handling of the resulting grievance were related in any way to complainant's race and/or sex. Even if complainant had shown that the alleged statement by Mr. Hanson was linked to her race and/or her sex, complainant has failed to show that Mr. Hanson actually made the statement. The Commission bases this finding on the fact that Mr. Hanson was an experienced administrator and supervisor and well aware of the liability such a statement could create for his employer; and on the fact that such a statement was inconsistent with Mr. Hanson's subsequent action in promoting complainant. Complainant could argue in this regard that respondent promoted complainant in order to improve its position in the litigation of the discrimination cases filed by complainant, including its position in relation to the alleged statement. However, even if this were the case, it is still incongruous to conclude that Mr. Hanson, an administrator with many years of experience and an awareness of what actions on his part would expose his employer to liability, would make such a statement to an employee who had shown she was not hesitant to formally challenge management's decisions in relation to her employment.

Complainant further argues that pretext is shown by respondent's "violation of the expanded certification process" in regard to the subject hires. Complainant has failed to show that any such violation occurred. Complainant stated in the opening argument at the hearing that, prior to requesting expanded certification for females, respondent was aware that there were already two females on the certification list and the only reason, therefore, for requesting expanded certification for females was to certify Ms. DePagter whom respondent had pre-selected for the position. The record not only shows that Ms. DePagter's name was not certified as the result of expanded certification for females but also that respondent, during the relevant period of time,

had requested expanded certification for women and minorities for all hires and that it was not possible for an appointing authority to review the list of certified candidates prior to making a request for expanded certification.

Complainant has failed to show pretext in this regard.

Complainant next argues that pretext is demonstrated by the fact that complainant was better qualified for the subject positions than Ms. DePagter or Mr. Simmons and yet was rated lower than either of these candidates by the members of the interview panels. Complainant first offers as evidence of her position in this regard the fact that she received a higher score on the written exam than the successful candidates. However, the Commission has consistently held that this alone does not support a decision that a candidate is better qualified than lower scoring candidates. If it did, it would render the interview phase of the selection process meaningless.

It is apparent from the record that the primary selection criteria applied by the first panel related to supervisory skills and experience, leadership skills and experience, and interview presentation and secondarily to relevant qualities and qualifications; and the primary selection criteria applied by the second panel related to relevant education and training, supervisory skills and experience, leadership skills and experience, and interview presentation. In view of the nature of the positions to be filled, these criteria are appropriate. The record indicates that, although complainant had been with the Department a total of 12 years as opposed to Ms. DePagter's 9 years, Ms. DePagter had more extensive experience as a lead officer in the Department than complainant, had more extensive training and education in law enforcement, and had a better performance history with the Department. Although complainant tried to characterize Ms. DePagter's work performance during 1985 as unsatisfactory by introducing part of a

performance evaluation, a review of the entire evaluation, particularly the "Actual Results" section, does not support this conclusion. In addition, an evaluation completed in early 1986 confirms that Ms. DePagter's performance was rated as average or above in all areas. In contrast, complainant's work history with the Department indicates a problem with tardiness and a written reprimand for tardiness and for making inappropriate remarks to co-workers. The record also indicates that Ms. DePagter described to the interviewers specific examples illustrating the leadership skills and initiative she had shown while employed as an SO with the Department and that the interviewers rated her interview presentation as superior to complainant's. Complainant has failed to show that she offered any examples or specifics to the interviewers relating to leadership skills or initiative that she had shown or that her interview performance was superior to Ms. DePagter's. It is also important to note in this regard that the members of the interview panels unanimously ranked Ms. DePagter higher than complainant and that these rankings were reached independently. Complainant has failed to show that she was better qualified for the subject positions than Ms. DePagter based on the hiring criteria applied by respondent and has thus failed to show pretext in this regard.

In comparing complainant's relevant qualifications with those of Mr. Simmons, the record indicates the following: complainant had more years of experience as an SO with the Department; the highest SO level at which Mr. Simmons had been employed was SO 2 whereas complainant had been employed as an SO 3; complainant had served as a lead officer with the Department but Mr. Simmons had not; complainant had more extensive training and education in law enforcement than Mr. Simmons; Mr. Simmons had more extensive supervisory and management experience than complainant;

complainant's work history with the Department included problems with tardiness and a written reprimand but the record does not indicate that Mr. Simmons' work history with the Department included any performance problems; Mr. Simmons discussed in detail during his interviews examples of leadership skills and initiative he had shown while employed as an SO with the Department but the record does not indicate that complainant provided any such specifics or examples to the interviewers. Although it is not apparent from the record that Mr. Simmons' qualifications for the subject position were clearly superior to complainant's or vice versa, the Commission concludes that, in view of the primary selection criteria, i.e., leadership skills and experience and supervisory skills and experience, it was not unreasonable for the members of the interview panel to rank Mr. Simmons higher than complainant. Mr. Simmons had more extensive supervisory and management experience than complainant and the record indicates that he provided more information to the interview panels relating to his leadership skills and initiative than did complainant. The members of the interview panel also concluded that Mr. Simmons' interview performance was superior to complainant's and complainant has failed to show that her performance was actually superior to Mr. Simmons'. It is again interesting to note in this regard that the members of the interview panels ranked the candidates independently and yet were unanimous in their ranking of Mr. Simmons higher than complainant. Complainant has failed to show that she was better qualified for the subject position than Mr. Simmons based on the selection criteria applied by respondent and has failed to show pretext in this regard.

Complainant finally offers as evidence of pretext her representation that Mr. Hanson made the hiring decisions before consulting with the other panel members. The record does not sustain such a conclusion. Mr. Hanson



testified that he consulted with the members of the second interview panel before making his decision and there is no evidence that he formulated or communicated a final decision prior to that time. Complainant has failed to show pretext in this regard.

Complainant has also alleged that respondent retaliated against her for filing a discrimination action with the Personnel Commission and in federal court in relation to the subject hires. Basically, the evidence she offers in support of this position relates to the fact that the members of the interview panels were aware of her filing of these actions and did not recommend her hire as a result. The record does confirm that Mr. Kaszubski, Mr. Hartwig, Ms. Foley, and Mr. Hanson were aware prior to their interview of complainant of the fact that complainant had filed these actions. The record also indicates that Mr. Flores could have been aware of this fact as a result of his prior employment by the Department. However, the record does not show that Ms. Brookbank was aware or should have been aware of this fact and yet her ranking of the candidates was the same as that of the interviewers who did have such knowledge. In addition, as the above discussion shows, the result reached by the interview panel members does not indicate that discriminatory or retaliatory factors were at work, i.e., the record indicates that the hiring criteria were appropriate in view of the duties and responsibilities of the subject positions, that these criteria were uniformly applied by the interview panel members, and that the rankings reflected this uniform application of the criteria to the information provided to the panels by the candidates. Complainant has failed to show that she was retaliated against as alleged.

Finally, some of the evidence introduced by complainant appears to have been offered for the purpose of demonstrating that the hire of Ms. DePagter was motivated by nepotism, i.e., Ms. DePagter is the niece of

Ronald Bauer, a captain with the Department. The Commission finds this curious due to the fact that, in a letter dated June 30, 1987, the Commission advised the parties that "so much of the charge of discrimination that relates to allegations of nepotism" was being processed as an appeal under §230.44(1)(d), Stats. This appeal was assigned Case No. 87-0085-PC and was dismissed with prejudice by the Commission prior to the hearing in the instant matter. The June 30 letter was an acknowledgement that a charge of nepotism is not cognizable per se under the Fair Employment Act. In view of this, the Commission will not address the matter of nepotism here.

In the report of the prehearing conference held on May 21, 1990, the section entitled Jurisdiction states as follows:

Respondent reserves any right it may have to raise an objection to the complainant's retaliation claim, arguing that the complainant's action in federal court was not a "proceeding under this subchapter as required in §111.322(3), Stats. Complainant contends that any such objection is untimely. The parties agreed that in the interest of expediency this dispute may be resolved based on evidence offered at the hearing on probable cause and on legal argument related thereto.

In view of the fact that complainant's charge of retaliation was also based upon an action filed with the Commission and that the analysis of the charge of retaliation would not change regardless of whether the federal action was present or absent, the Commission need not decide whether the federal action was a "proceeding under this subchapter" as required in §111.322(3), Stats. In addition, since the complainant has provided no basis for her assertion that respondent's objection in this regard is untimely and since the Commission has deemed it unnecessary to decide the point raised by respondent in regard to the federal action, the Commission will also not decide whether respondent's objection was untimely.

Order

This complaint is dismissed.

Dated: \_\_\_\_\_, 1990      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
GERALD F. HODDINOTT, Commissioner

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