

STATE OF WISCONSIN

PERSONNEL COMMISSION

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PASTORI M. BALELE,  
 Complainant,  
 v.  
 Secretary, DEPARTMENT OF  
 ADMINISTRATION, and  
 Administrator, DIVISION OF MERIT  
 RECRUITMENT AND SELECTION,  
 Respondents.  
 Case No. 88-0190-PC-ER

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ORDER

The Commission would first like to note that it carefully considered all the arguments of the parties and all the objections and responses to the Proposed Decision and Order. The Commission would also like to note that some of the representations made and arguments offered by the complainant related to facts not of record in this proceeding. After consulting with the hearing examiner, reviewing the Proposed Decision and Order, and considering the objections and arguments of the parties, the Commission adopts the Proposed Decision and Order as written.

Dated: January 24, 1992

STATE PERSONNEL COMMISSION

  
 LAURIE R. McCALLUM, Chairperson

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 DONALD R. MURPHY, Commissioner

  
 GERALD F. HODDINOTT, Commissioner

Parties:

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 Secretary DOA  
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PROPOSED  
DECISION  
AND  
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of race and/or national origin. A hearing on the issue of probable cause was held on May 2 and 3, 1991, before Laurie R. McCallum, Chairperson. The parties filed post-hearing briefs and the briefing schedule was completed on October 1, 1991.<sup>1</sup>

Findings of Fact

1. In June of 1988, respondents published a recruitment announcement for the newly created position of Deputy Administrator, Division of State Agency Services, Department of Administration. This position was classified at the Administrative Officer 5 level in pay range 20 in the Career Executive Program and would be managing approximately 200 employees. The announcement stated as follows, in pertinent part:

This position is responsible for planning, directing, controlling and evaluating the administration of all the Division's programs and functions including statewide purchasing, and general services functions such as records management, central mail and printing operations, fleet management, and air services. These include, but are not limited to, coordination and evaluation of overall division operations, plans, budgets, policies and

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<sup>1</sup> Neither the hearing examiner nor the Commission considered the briefs filed by the parties subsequent to the close of the briefing schedule to which the parties had agreed at the close of the hearing.

objectives. Conducting studies, investigations, assessments or other staff functions under general direction by the Administrator.

KNOWLEDGE REQUIRED: Program planning and evaluation of complex issues; policy development, analysis and implementation; fiscal and budgetary planning, development and monitoring; effective personnel management concepts and techniques; and oral and written communication skills.

2. Respondents decided to do an open recruitment for this position. The decision to do an open recruitment for a Career Executive position results in the creation of four categories of candidates:

Option One candidates: Career Executives employed within the department in which the position is offered;

Option Two candidates: Career Executives employed in state service but outside the department in which the position is offered;

Option Three candidates: Non-Career Executive state employees; and

Option Four candidates: Non-state employees.

Option One and Option Two candidates are automatically certified for vacant Career Executive positions for which they apply. Option Three and Option Four candidates may be certified only after completing and receiving a high enough score on a competitive examination.

3. The competitive examination for the subject position consisted of an Achievement History Questionnaire (AHQ) scored by a three-member panel consisting of Jean Rogers, Administrator of DOA's Division of Administrative Services; James Meier; and John Potter. DOA's Division of Administrative Services supervises DOA's personnel function. The members of this panel and the members of the interview panel were selected by Ralph Hollman who was employed as the Administrator of DOA's Division of State Agency Services in June of 1988. Mr. Hollman is a black male.

4. Complainant received a score of 75.85 on the AHQ. The successful candidate for the subject position, Leo Talsky, received a score of 97.30 on the AHQ. A passing score was 70.00. Complainant received the fourth highest score of the six Option 3 candidates taking the AHQ exam. Mr. Talsky received the highest score of those candidates taking the AHQ exam.

5. The following candidates were certified for the subject position:

- Option One: Larry Eisenberg (white male)  
Robin Gates (white male)  
Stan Vinge (white male)
- Option Two: Gregory Robbins (white male)
- Option Three: Pastori Balele (black male)  
Patricia Kramer (white female)  
David Seligman (white male)  
Robert Smith (white male)  
Gary Wentz (white male)  
Steven Willadsen (white male)
- Option Four: Susan Crowley (white female)  
Ronald Gabrielson (white male)  
Suzanne Hock (white female)  
Lawrence Jankowski (white male)  
Dennis Leisten (white male)  
William Pratt (white male)  
Mary Strobe (white female)  
Jonathan Sutter (white male)  
Leo Talsky (white male)  
Gerald Turbeville (white male)  
Robert Woodward (white male)

6. Respondent DMRS had advised respondent DOA at or around the date that the list of certified candidates was developed that the job group which included the subject position was underutilized for females and the handicapped. Of 320 Career Executive positions in state service at that time, 14 were held by minorities. After the hearing record in this matter was closed, complainant filed a document with the Commission entitled "Standards for State Agency Affirmative Action Plans--January 1, 1988 - June 30, 1989" which included a page entitled "Job Groups with Underutilization." This page indicates that the Administrators-Senior Executives job group had an availability percentage for racial/ethnic minorities of 7.26%. This page also indicated that this job group was underutilized for females but not for racial/ethnic minorities.

7. After compiling this list of certified candidates, respondent DOA decided to reduce the number of candidates to be interviewed by applying a screening criterion. DMRS does not require that every certified candidate for a position be offered an interview. The pre-interview screening of certified candidates is not an uncommon practice in state service. The screening criterion selected by DOA was whether the candidate had experience directly

managing 20 or more professional level employees. This criterion was applied by employees of DOA's personnel unit to the information contained in the candidates' AHQs and resumes. As a result of the application of this criterion, the following candidates were screened out: Pastori Balele, Patricia Kramer, David Seligman, Gary Wentz, Steven Willadsen, Susan Crowley, Suzanne Hock, and Dennis Leisten. This group consisted of one black male, three white females, and four white males.

8. When he became aware, on July 13, 1988, that he was not one of the candidates on the list to be interviewed, complainant requested an explanation from Don Bach, who had recently been appointed to replace Mr. Hollman as Administrator of the Division of State Agency Services. Mr. Bach referred complainant to DOA's personnel unit. Patricia Thyse, who had been assigned to coordinate the subject recruitment and selection for DOA, and Peter Olson of such unit advised complainant that, if he would like to provide supplemental information in writing relating to his supervisory experience, they would consider it. Complainant provided such supplemental information in memo form to Ms. Thyse and Mr. Olson and his name was added by them on July 13, 1988, to the list of candidates to be interviewed. This procedure was also followed by Patricia Kramer whose name was also added to the list of candidates to be interviewed.

9. Although it was apparent from complainant's AHQ that he had held a high-level administrative position with Maswa County in Africa <sup>2</sup>in the early 1970's and a supervising accountant position for Shirecu Association in the early 1970's, it was not apparent how many employees he had managed in these positions. In a document complainant submitted to respondent DOA in lieu of a resume, complainant does not indicate the number of positions he managed at Maswa County but does indicate that he supervised 10 employees while employed at the Shirecu Association.

10. Mr. Talsky's AHQ indicated that he had developed a 20-person legislative audit division; had organized a Neighborhood Security Aide program composed of 125 uniformed personnel; and had run a variety of programs over a four-year period that "totalled over 200 employees." The letter to respondent DOA accompanying Mr. Talsky's resume indicated that he had most recently

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<sup>2</sup> The record does not reflect the country in which Maswa County is located.

been responsible for the administration of a program which, along with several sub-contract agencies, employed approximately 100+ employees.

11. On July 20, 1988, complainant filed a complaint with the Commission (Case No. 88-0121-PC-ER) alleging that respondent DOA had discriminated against him on the basis of his race and national origin in initially screening him out of the interview process for the subject position and requiring him to provide supplemental information in order to qualify for interview. Complainant personally delivered a copy of this complaint to the office of the Secretary of DOA on July 20, 1988.

12. On July 22, 1988, complainant was invited to meet with Gerald Whitburn, Deputy Secretary of DOA. The purpose of the meeting was to discuss the complaint filed by complainant with the Commission. Mr. Whitburn also asked Mr. Bach and Richard Lorang, the Executive Assistant to the Secretary of DOA, to attend the meeting. Mr. Whitburn indicated to complainant during this meeting that he was disappointed complainant was not certified for the interview for the subject position and that people new to state service often had to work their way up to the level they hoped to reach. Complainant told Mr. Whitburn that he had been in state service for almost seven years. Mr. Whitburn asked complainant what he wanted to be eventually and complainant replied that he would like to head a bureau. Mr. Whitburn said that he and his staff were hopeful they could work with complainant to develop a career path for him and asked Mr. Bach to work with complainant to design such a path. In response to such offer of assistance, complainant agreed to withdraw his complaint.

13. Complainant was interviewed for the subject position later on July 22, 1988. The interview panel consisted of Ms. Rogers and Mr. Bach. It was not unusual for the same person to serve on both an AHQ panel and an interview panel. The Department of Employment Relations has a policy which recommends that exam and interview panels contain affirmative action group members. Both Ms. Rogers and Mr. Bach were aware that the names of complainant and Ms. Kramer had been added to the list of candidates to be interviewed after the original list had been created. Neither Mr. Bach nor Ms. Rogers considered this to be unusual. Neither of the interviewers was aware of the final AHQ scores of the candidates. At the time of the interviews, Ms. Rogers was not aware of the complaint filed by complainant on July 20,

1988, or of the July 22, 1988, meeting with Mr. Whitburn. Each of the candidates was asked the same questions by the interviewers. The candidates' responses to the interview questions were not scored. Mr. Bach made notes paraphrasing parts of the candidates' responses to the interview questions. In Mr. Bach's notes relating to complainant's interview, below question 7 which gave the candidate an opportunity to add anything he/she wanted to the interview, are four references to "very good background" which are enclosed in quotation marks. These references are to statements made by complainant, not to Mr. Bach's judgment regarding complainant's background. After the interviews were completed, Mr. Bach's notes were maintained in the recruitment file for the subject position but Ms. Rogers' notes were not. Ms. Rogers' notes could not be located by respondent DOA after the subject complaint was filed. Neither respondent DOA nor respondent DMRS has a policy requiring the scoring of responses to interview questions nor one requiring the retention of interview notes. Eighty percent of the time, interview notes are not placed in a recruitment file.

14. After the interviews were completed, Ms. Rogers and Mr. Bach agreed that Mr. Talsky was by far the best-qualified candidate for the subject position. Neither of them ranked complainant as one of the top five candidates.

15. The materials Mr. Talsky had provided to respondents prior to the interview indicated that, from 1976 until 1988, Mr. Talsky had served as Executive Chief of Staff to the Milwaukee County Executive where he was responsible for staffing and managing the General Office of County Executive and its seven divisions, i.e., Office for Economic Resource Development, Office on Aging, Elderly Nutrition Program, Office on Handicapped, Veterans Service, Emergency Government, and Intergovernmental Relations. In addition, he was responsible for developing policy recommendations on every aspect of county government; for developing 19 county budgets; for monitoring and assessment of the Department of Administration including the Budget Office, Procurement Division, Data Processing, Printing, Mail Services, and Records Retention; and for review and assessment of the Department of Public Works which included operation and development of two major airports, the Central Automotive Fleet Services, Mass Transit, and the Minority Contracting Program. These materials also indicated that, from 1972-1976, as Director of

Milwaukee County Board Services. Mr. Talsky had developed and managed a new research and administrative service office for the 25-member Milwaukee County Board and had organized the Office on Aging, Elderly Nutrition Program and neighborhood Security Aide force. These materials also indicated that, from 1969-1972, as a Fiscal Research Analyst, Mr. Talsky had provided research and analysis services to the Milwaukee County Board's Finance Committee with special emphasis on the county's total budget adoption (over \$700 million annually), the county's annual bonding program, and the development of a systematic procedure for purchasing, prioritizing and allocating county-wide data processing services. These materials also indicated that Mr. Talsky had received a Master of Science degree in 1966 in economics, specializing in public finance.

16. The materials complainant provided to respondents prior to the interview indicated that, from 1985 to 1988, complainant had been employed as an Administrative Assistant 3 in pay range 12 for DOA. This position functions as a procurement management assistant coordinating certain procurement activities for the Bureau of Procurement; reviewing agency purchasing requests to determine if they meet applicable requirements; serving as a backup to the Minority Business Director; coordinating the Sheltered Workshop Program; and providing training and technical advice to purchasing agents, program directors, and the public regarding state purchasing laws, policies, and procedures. These materials also indicated that, from 1981 to 1985, complainant was employed by DOA as a marketing coordinator for the Federal Property program, analyzing and exploring policies and procedures to improve the marketing of federal surplus property. In this position, complainant supervised two employees. These materials also indicated that, from 1973 to 1976, complainant was employed by the Shirecu Association as a supervising accountant responsible for financial reports, including statements, budgets, feasibility studies, cash flows, and other reports requested by management; advising the board on management of assets and development of policies and procedures regarding receipts, disbursements, purchasing, stores, and fleet; and supervising ten employees for which complainant was involved in hiring, training, discipline and grievance handling. These materials also indicated that, from 1971 to 1973, complainant was employed by Maswa County in Africa as an assistant county executive responsible for overseeing the



departments of highway, social services, education, and the treasury; reviewing budgets (each of these departments had a budget of \$11 to \$15 million), programs, and purchases before being forwarded to the county executive for approval; and assisting the county executive in evaluating the performance of other county employees. These materials also indicated that complainant received a Master of Science degree in Agriculture Business Management and had completed undergraduate courses in accounting, finance, statistics, computer science, economics, marketing and business law; and graduate courses in business management, marketing, research procedures, and personnel management.

17. The hiring decision for the subject position was effectively made by Mr. Bach. The position was offered to Mr. Talsky and he accepted such offer. Complainant and the other unsuccessful candidates were mailed letters advising them of their nonselection. Subsequent to his appointment to the subject position, Mr. Talsky was required to take several supervisory and technical courses offered by agencies of state government. All supervisors in state service are required to take certain supervisory courses.

18. In a chance meeting on July 27, 1988, Mr. Whitburn asked complainant if he had withdrawn his complaint as he had indicated that he intended to do in their meeting of July 22. Complainant told Mr. Whitburn that he had not. Later on July 27, 1988, complainant prepared and sent to the Commission a letter withdrawing his complaint in Case No. 88-0121-PC-ER.

19. Subsequent to his non-selection for the subject position, complainant requested a reclassification of his Administrative Assistant 3 position but this request was denied by the Department of Employment Relations (DER). In a memo to Larry Eisenberg dated September 13, 1988, Mr. Talsky recommended that Mr. Eisenberg and Jan Abrahamsen, both employees of the Division of State Agency Services, review complainant's position description with him to determine its accuracy and determine what changes could be made in complainant's position to satisfy DER's criteria for classification at a higher level and to satisfy complainant's career concerns.

20. Complainant subsequently met with Mr. Bach, Mr. Talsky, Mr. Eisenberg, and Ms. Abrahamsen to discuss his current position and his career concerns. Complainant was asked during this meeting if he would consider transferring to a position in the Purchasing Agent series in pay

range 12. The others present at the meeting told complainant that this could result in more rapid advancement than remaining in a position in the Administrative Assistant series. Complainant indicated that he was not interested in such a transfer because it was not a promotion. During this meeting, Mr. Talsky asked complainant whether he was a friend of Mr. Hollman's. When complainant told Mr. Talsky that he thought he was, Mr. Talsky suggested to complainant that he might want to consider applying for a position with the City or County of Milwaukee, where Mr. Hollman was now employed and could be of assistance and where there had been recent changes in administrations and many positions were being filled.

21. Mr. Whitburn met with complainant on November 21, 1988, to again discuss complainant's career concerns. One of the suggestions Mr. Whitburn made during this meeting was that complainant consider a transfer to another agency where greater opportunities for advancement may exist. After complainant agreed to consider this suggestion, Mr. Whitburn and other DOA staff researched existing transfer opportunities but were unable to identify one appropriate for complainant.

22. On December 9, 1988, complainant filed the instant complaint with the Commission.

#### Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that probable cause exists to believe that he was discriminated against by respondents on the basis of color, race, and/or national origin in regard to the failure or refusal to certify or interview him for the subject position or for the failure or refusal to ultimately appoint him to the subject position.
3. Complainant has failed to sustain this burden.
4. There is no probable cause to believe that complainant was discriminated against as alleged.

#### Opinion

The issues in this matter are as follows:

Whether there is probable cause to believe that respondent DOA and/or respondent DMRS discriminated against complainant on the basis of color, race or national origin with respect to a failure or refusal to initially certify or interview complainant for the subject Administrative Officer 5 (Deputy Administrator, Division of State Agency Services).

Whether there is probable cause to believe that respondent DOA discriminated against complainant on the base of color, race or national origin with respect to its failure or refusal to ultimately appoint him to the subject position.

Complainant has offered both disparate treatment and disparate impact theories in support of his position in this matter.

#### Disparate Treatment

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 his race (black) and national origin (African); he applied for, and, as a result of his certification, was deemed qualified for the subject position; and, in view of the fact that a white person of U.S. national origin was the successful candidate for the subject position, an inference of discrimination on the bases of race and national origin could be drawn. Complainant has made out a prima facie case in regard to the applicable issues.

#### Post-Certification Screening

Respondent DOA asserts that it imposed the post-certification screening criterion under consideration here to reduce the number of candidates to be interviewed. In view of the fact that 21 candidates were certified for the subject position, this assertion, on its face, presents a legitimate, non-discriminatory reason for DOA's action.

Complainant argues that the screening criterion was not applied uniformly to all candidates and that this demonstrates pretext. As evidence of this argument, complainant points to the fact that the screening criterion was applied to his candidacy but not to Robin Gates'. However, the record clearly shows that Robin Gates was a Career Executive employee and that respondents had interpreted applicable statutory and administrative rules provisions to exempt the candidacies of Career Executive employees from competitive examination and post-certification screening processes for Career Executive positions. Specifically, respondents argue that §230.24(1), Stats., in requiring that the Career Executive program "provide for the mobility of such employes among the agencies and units of state government," and §ER-Pers 30.10(1), Wis. Adm. Code, in providing that "career executive program employment grants to each employe thereunder rights and privileges of movement between positions within the program without examination and additional competition," dictate this result. The Commission agrees and concludes that, in addition, this result is consistent with the testimony of respondents' personnel experts as to the manner in which these statutory and administrative rules provisions had been interpreted and applied to other hiring transactions. The Commission concludes that respondents' action in exempting Career Executive

employees from application of the post-certification screening criterion is consistent with applicable requirements and practices and that this argument of complainant's does not tend to demonstrate pretext.

Complainant also argues that the screening criterion was not applied to Mr. Talsky's candidacy in the same manner as it was to complainant's and that this demonstrates pretext. Specifically, complainant argues that, despite the fact that the materials relating to Mr. Talsky's candidacy which were available to the individuals doing the screening, i.e., Mr. Talsky's AHQ, resume, and cover letter, did not indicate that he had ever directly managed 20 or more employees, Mr. Talsky was not screened out of the selection process. Complainant ignores, however, the fact that Mr. Talsky's AHQ indicated that he had developed a 20-person legislative audit division; had organized a Neighborhood Security Aide program composed of 125 uniformed personnel; had run a variety of programs over a four-year period that "totalled over 200 employees"; and that his cover letter indicated that he had most recently been responsible for the administration of a program which, along with several sub-contract agencies, employed approximately 100+ employees. Complainant further ignores the fact that, although it was apparent from complainant's AHQ that he had held a high-level administrative position with Maswa County in Africa in the early 1970's and a supervising accountant position for Shirecu Association in the early 1970's, it was not apparent from his AHQ or from the document complainant submitted to DOA in lieu of a resume that he had ever directly managed 20 or more employees. This argument of complainant's does not tend to demonstrate pretext.

Complainant also asserts that, by requiring complainant to submit supplemental information in writing confirming his experience directly managing 20 or more employees, complainant was treated differently than other candidates. However, the only other candidate who challenged the application of the screening criterion was Patricia Kramer. Respondent DOA also required Ms. Kramer to submit any supplemental information relating to her experience in writing. This assertion by complainant does not tend to demonstrate pretext.

Complainant further argues that respondent DOA's failure to obtain respondent DMRS's written approval for the "selective certification" it conducted by applying the post-certification screening criterion demonstrates pretext.

Section ER-Pers 12.03, Wis. Adm. Code, specifies the procedure to be followed in conducting a selective certification. This administrative rule provision clearly anticipates that this process is a pre-certification process. The screening process carried out by DOA was a post-certification process and the provisions of §ER-Pers 12.03, Wis. Adm. Code, would not apply. Complainant's argument in this regard does not tend demonstrate pretext.

It should finally be noted in this regard that, although complainant argues against the application of the selection criterion, respondent did ultimately conclude that complainant satisfied the selection criterion. As a result, the screening criterion that complainant argues against did not ultimately affect his candidacy for the position, i.e., did not deprive him of an interview. Although complainant argues that the interview panel's awareness of the fact that his name was added to the interview list some time after the interview list had originally been created placed him at a disadvantage compared to those candidates whose names appeared on the original interview list, complainant fails to state what this disadvantage could have been. The only conclusion the interviewers could have drawn from the interview list they worked from is that those candidates included on the list had satisfied the screening criterion, particularly since the record shows that it was not uncommon for names to be added to an interview list for a variety of reasons.

The Commission concludes that complainant has failed to show that respondent's actions relating to the post certification screening were a pretext for discrimination and, as a result, there is no probable cause to believe that complainant was discriminated against on the basis of his race or national origin with respect to the application of the screening criterion to his candidacy.

#### Selection Decision

Respondent offers as its reason for hiring Mr. Talsky its opinion that he was the best qualified candidate for the subject position. On its face, this reason is legitimate and non-discriminatory.

Complainant first argues that the composition of the AHQ and interview panels demonstrates pretext.

First of all, the membership of the AHQ panel is not only not relevant to the issues under consideration here but the complainant has failed to show

that he was aggrieved by any action of the AHQ panel since he passed the AHQ exam and was certified as a result. Although complainant has argued that his relatively low score on the AHQ exam placed him at a disadvantage with the members of the interview panel, he has failed to show that either of the members of the interview panel were aware of his final AHQ exam score or his relative ranking on the AHQ exam.

What complainant argues first in regard to the membership of the interview panel is that its failure to include "a member of an affirmative action group" demonstrates pretext. The reasons offered by respondent DOA for its selection of Mr. Bach and Ms. Rogers as the two members of the interview panel included the fact that Mr. Bach was the supervisor of the subject position and Ms. Rogers was the supervisor of DOA's personnel function; and the fact that Ms. Rogers, as a female, was a member of an "affirmative action group" underutilized by the job group of which the subject position was a part. Complainant argues that the fact that the job group of which the position was a part was also underutilized for racial/ethnic minorities required the inclusion of a racial/ethnic minority on the interview panel. First of all, complainant has failed to show such underutilization for racial/ethnic minorities. The record reflects that respondent DMRS advised respondent DOA that the position's job group was underutilized for females, not ethnic/racial minorities. In an attempt to rebut this showing in the record, complainant testified that the racial/ethnic minority availability figure for such job group was 7.26%; that only 14 of 320 or 4.4% of Career Executive employees in May of 1988 were racial/ethnic minorities; and that this demonstrated an underutilization of ethnic/racial minorities relevant to the subject position. Complainant attempted to corroborate the 7.26% availability figure by submitting additional information subsequent to the close of the hearing record (See Finding of Fact 6, above). However, the figures offered by complainant in the hearing record fail to show how the grouping of Career Executive positions in state service dovetails with the job grouping of positions in state service for purposes of affirmative action reporting. There is no evidence in the record from which it is possible to conclude that these two groupings are identical. In the absence of that showing, it is not possible for the Commission to conclude that there was an actual underutilization of ethnic/racial minorities in the relevant job group. Even if the Commission were to consider complainant's post-

hearing submission, the information contained in that submission also does not reveal how the two job groupings dovetail and actually indicates that the job group to which the 7.26% figure applies does not have an underutilization for ethnic/racial minorities but does for females. In addition, even if the relevant job group was underutilized for ethnic/racial minorities, there is no requirement that an ethnic/racial minority serve on the panel. It would be desirable, of course, but the absence of a racial/ethnic minority, standing alone, is not evidence of pretext in a situation such as the one under consideration here. Complainant's argument here does not tend to demonstrate pretext.

Complainant further alleges in this regard that the fact that both members of the interview panel were political appointees shows "an intent to select somebody sympathetic to the views of the present administration." Complainant is essentially arguing that Mr. Talsky was selected because of his political views. This flies in the face of complainant's basic premise in this case that Mr. Talsky was selected because of his race and national origin. Complainant's allegation does not tend to demonstrate pretext.

Complainant further argues that Ms. Rogers had a conflict serving on both the AHQ and interview panels and the existence of this conflict demonstrates pretext. The Commission is unable to ascertain the nature of the alleged conflict. In addition, the record shows that this is not an uncommon practice in state service. Since Ms. Rogers was responsible for respondent DOA's personnel function, it would not be surprising that it was considered desirable to draw on her expertise in filling this newly created, high level administrative position. Complainant also asserts in this regard that the record does not clearly indicate that Ms. Rogers had Ms. Thyse's permission or authorization to serve on the interview panel. Even if this were true, since Ms. Rogers was Ms. Thyse's superior, it must be assumed that she did not need Ms. Thyse's permission to serve on the panel.

Complainant next takes issue with the interview process itself. Complainant argues that the failure to employ written benchmarks or to score responses to interview questions demonstrates pretext. Complainant cites no requirement or practice which would dictate this result. The record clearly shows that no such requirement or practice is applicable to the subject hire. The record does show that the interviewers took notes paraphrasing the



candidates' responses to interview questions and that, after the interviews were completed, the interviewers had a clear idea of who the top candidate and the second-ranked candidate should be and that they clearly agreed on this ranking.

Complainant also argues that respondent DOA's failure to locate Ms. Rogers' interview notes after the subject complaint was filed demonstrates pretext. However, complainant fails to cite any requirement that such notes be maintained and the record clearly shows that no such requirement exists. Although complainant cites §230.16, Stats., in support of his argument in this regard, this statutory provision clearly applies to pre-certification examinations administered or delegated by respondent DMRS and not to post-certification procedures administered by an appointing authority. Complainant further argues that Ms. Rogers' interview notes would show that he was clearly the best qualified candidate for the subject position. This would be more persuasive if the testimony of Ms. Rogers indicated an inability on her part to recall complainant's and Mr. Talsky's interviews or some indecision on her part as to the relative qualifications of these two candidates but this is not the case. Ms. Rogers clearly recalled the impressions she formed as a result of her interview of these two candidates and the fact that she concluded that Mr. Talsky was clearly more qualified for the subject position than complainant. Complainant's argument in this regard would also be more persuasive if the qualifications of the candidates were similar or complainant's qualifications were superior on paper but, as will be discussed below, this is also not the case here. As is concluded below, Mr. Talsky was clearly a much better qualified candidate for the subject position than complainant. Complainant's argument does not tend to demonstrate pretext.

Complainant next takes issue with the selection decision itself. Complainant argues in this regard that the fact that his qualifications for the subject position were superior to Mr. Talsky's demonstrate pretext. The record does not support this argument. The record shows that the interviewers were aware that, for the previous 12 years, Mr. Talsky had served as the top staff person to the County Executive of the largest county in Wisconsin with oversight responsibilities in the areas of budget, procurement, data processing, printing, mail services, records retention, airports, fleet, mass transit, and minority contracting; direct management of several programs including

economic resource development, elderly nutrition, emergency government, veterans services, services for the aging, and services for the handicapped; and responsibility for policy development for every aspect of county government. In contrast, the record shows that the interviewers were aware that, for the previous seven years, complainant had been employed by DOA in staff procurement positions each with a narrow range of duties and responsibilities and each with minimal oversight and supervisory responsibilities; that complainant had not served in an administrative position for the previous 12 years; that complainant's administrative position at the county level had involved a much smaller county and a narrower range of program and administrative responsibilities than Mr. Talsky's administrative positions; and that complainant's administrative position with the Shirecu Association again involved a much smaller organization with a much narrower focus than Mr. Talsky's administrative positions. The Commission concludes, in view of the level and scope of the duties and responsibilities of the subject position (See Finding of Fact 1, above), that Mr. Talsky's qualifications were substantially superior to those of the complainant.

Complainant argues in this regard that the fact that Mr. Talsky took several supervisory and technical courses after his appointment to the subject position shows that he was not qualified for the position and demonstrates pretext. The record shows that all supervisors in state service are required to take certain supervisory courses regardless of their background. In addition, the record does not show that complainant, if he had been the successful candidate, would not have been required to take additional courses as well.

Complainant argues further in this regard that Mr. Bach's interview notes to the effect that complainant had a "good background" demonstrates that complainant was the best qualified candidate for the subject position. Complainant contends that DOA's interview guidelines suggest that interviewers "jot down notes on candidates' statements and observable behavior only" and that, as a result, Mr. Bach's notes necessarily reflect his "observations" in regard to complainant's candidacy and not what complainant told him during the interview. First of all, even if the quoted language reflected Mr. Bach's assessment of complainant's candidacy, that language says nothing about how Mr. Bach viewed complainant's candidacy in comparison to the candidacies of the other persons interviewed and it would not be possible to conclude from

this language alone that Mr. Bach was of the opinion that complainant was the best qualified candidates. Second, complainant's conclusions regarding the intent of Mr. Bach's notes is clearly inconsistent with the fact that the cited language appeared in quotes in such notes. Finally, complainant's conclusions regarding the intent of Mr. Bach's notes are inconsistent with the interview guidelines complainant cites in favor of his contention, i.e., such guidelines do not indicate that interview notes should reflect an interviewer's "observations" about a candidate, but should instead reflect "candidates' statements and observable behavior only."

Finally, in regard to the relative qualifications of complainant and Mr. Talsky, complainant argues that Mr. Talsky did not meet the basic requirements of the position since he had not started at a lower position in state service and worked his way up. Complainant bases this argument on the statement made by Mr. Whitburn during the meeting of July 22, 1988, (See Finding of Fact 12, above) that "people new to state service often had to work their way up to the level they hoped to reach" and argues that this language should be interpreted to require employees new to state service to be placed in relatively low level positions and work their way up. Mr. Whitburn's statement could hardly be said to impose such a hiring requirement. It was apparently an observation that state employees in positions in lower classifications often had to work their way up incrementally through positions in higher classification levels before being appointed to a top level position. The record does not tend to show pretext in regard to the selection decision itself.

Complainant has also argued that events occurring after the nonselection, i.e., the failure to get a reclassification of his position, the suggestion that he accept a transfer to a different series and to a different agency, and statements made by Mr. Talsky at a meeting, demonstrate a discriminatory animus on the part of respondent DOA against complainant and demonstrate pretext in regard to the nonselection decision.

It is clear from the record that DOA had recommended that complainant's position be reclassified to a higher level within the Administrative Assistant series but that the Department of Employment Relations (DER) had rejected this recommendation. The record does not show that DOA had any control over DER's decision in regard to complainant's reclassification request

or that DOA urged DER not to approve such request. The record actually shows that DOA not only recommended to DER that the request be granted but worked with complainant after the denial to restructure his position so that any future request would stand a better chance of winning DER approval.

Complainant also argues that DOA's assistance with his reclassification request was intended to appease complainant after the nonselection and to induce him not to pursue his complaint and also served as evidence that DOA realized they had discriminated against complainant in not selecting him for the subject position and wanted to make amends. However, the information available in the record indicates that DOA's actions in regard to the reclassification of complainant's position took place after complainant had withdrawn his first complaint but before he filed the instant complaint so complainant's inducement argument is unfounded. In addition, it strains credulity for complainant to argue that DOA's efforts to help him achieve a result he requested is evidence of a discriminatory animus.

Complainant asserts that DOA's suggestions regarding transfer were an obvious attempt to get rid of him and were a pretext for discrimination and were in obvious retaliation for his having filed the first discrimination complaint. First of all, this retaliation allegation is not within the scope of the applicable issues here. Second, complainant had made it clear both before and after the subject nonselection that he was dissatisfied with his position and with his failure to advance in state service. As a result, DOA presented several suggestions to him and gave him the option of pursuing those suggestions if he wished. Complainant does not allege there was any implicit or explicit coercion involved in the presentation of these suggestions. Again, complainant asked for and welcomed assistance from DOA in attempting to advance his career and, in the absence of coercion or evidence of bad faith, the Commission concludes that such assistance does not demonstrate a discriminatory animus.

Finally, statements made by Mr. Talsky at a meeting subsequent to the subject selection decision could not constitute evidence of discriminatory animus or pretext relevant to the issues under consideration here since Mr. Talsky was not one of the persons involved in making the subject selection decision and was not even a DOA employee at the time this decision was made. The record does not tend to demonstrate pretext in regard to these actions by respondent which occurred subsequent to the selection process.

Complainant also argues that a question posed by counsel for respondent at the hearing as to complainant's national origin is direct evidence of discrimination. This is not convincing since the instant complaint alleges discrimination on the basis of national origin and it is important to create a record, therefore, as to the national origin of the complainant. In addition, the record does not show that counsel for respondent was involved in the subject selection decision.

Complainant also argues that the Commission's decision that respondents failed to adequately respond to a discovery request filed by complainant in this litigation is further evidence of pretext. Formal discovery is a litigation tool and a party's response to discovery part of their broader litigation strategy. An adverse decision on a discovery motion is not evidence of liability on the underlying issues of the case. In addition, the record does not show that the individual who handled the litigation of this complainant for respondents was involved in making the decision not to select complainant for the subject position.

Finally, complainant alleges that the convening of the July 22, 1988, meeting and the content of the discussion at this meeting demonstrates pretext in regard to the subject selection decision. Complainant argues first in this regard that statements made by Mr. Whitburn clearly conveyed to him that a decision had already been made not to hire him. Complainant points specifically to the statements relating to state employees working their way up to the level they hoped to reach and relating to developing a career path for complainant. (See Finding of Fact 12, above). It appears from a comment Mr. Whitburn's made earlier during the meeting that he was under the impression that complainant was not going to be interviewed for the subject position, i.e., "he was disappointed complainant was not certified for the interview" for the subject position. That is the context in which the statement relating to state employees working their way up to the level they hoped to reach appeared. It appears more likely from the language of the statement and the context in which it appeared that Mr. Whitburn was trying to make complainant feel better about not getting an interview by sharing with him what often happens to other state employees trying to advance to a higher level. Mr. Whitburn's statement regarding assisting complainant in developing a career path does not appear to imply that Mr. Whitburn felt that

complainant was incapable of becoming a bureau director but, to the contrary, that he was willing to help complainant achieve that result. The Commission concludes that the more plausible interpretation of Mr. Whitburn's statements at the meeting indicates that Mr. Whitburn was under the impression that complainant was no longer in the running for the subject position and, to address complainant's frustrations regarding this result and to avoid litigating the complaint filed by complainant, Mr. Whitburn was willing to assist him in advancing his career in state service. Although this may show poor communication between Mr. Whitburn and others in DOA, the Commission does not find that it shows a discriminatory animus.

What about Mr. Bach's role in the meeting? First of all, the record does not show that Mr. Bach was aware that complainant's name was on the list of candidates to be interviewed for the subject position. In fact, the record shows that the last Mr. Bach had heard of this matter was a statement to him by complainant taking issue with his exclusion from the list. In addition, the only instructions Mr. Bach received from Mr. Whitburn during the meeting required Mr. Bach to assist complainant in advancing his career in state service. There is no evidence in the record from which it is logical to conclude that Mr. Bach understood, or should have understood, from the meeting that complainant was not to be selected for the subject position. Finally, the record shows that Ms. Rogers was not involved in the July 22, 1988, meeting with Mr. Whitburn and yet her conclusions regarding complainant's candidacy for the subject position parallel Mr. Bach's.

Complainant also argues that he was treated differently than the other candidates since none of them was called to meet with Mr. Whitburn before being interviewed for the subject position. However, complainant forgets that the record shows that he was the only candidate to file a discrimination complaint two days before his interview and to personally deliver a copy of his complaint to the office of the Secretary of DOA. If complainant wanted to avoid the attention the filing of such a complaint necessarily brings, he would have waited until after the selection decision was made to file it. The obvious purpose of the meeting was to short circuit the complaint filed on July 20, 1988, by informal resolution. Although it is certainly a questionable personnel practice to meet with a candidate for a position prior to the interview for the purpose of attempting to settle a complaint he has filed and, although the

communication among those involved in the selection decision and Mr. Whitburn was clearly inadequate, the Commission cannot conclude that any of these shortcomings or any of the incidents under consideration here demonstrate a discriminatory animus on the part of respondents or pretext in the context of this matter.

Even if the Commission were to conclude that evidence of discrimination on the basis of race, color, and/or national origin as to the selection process and decision was present here, such a conclusion would not change the ultimate result in this matter. Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), involved a Title VII proceeding in which the trial court found that the plaintiff had been passed over for partnership in part because of legitimate, non-pretextual concerns about her interpersonal skills, and in part because of her sex "by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." The U. S. Supreme Court held that ". . . once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving [by a preponderance of the evidence] that it would have made the same decision even if it had not allowed gender to play such a role . . . ." The Commission adopted this approach in the context of a hiring decision in Jenkins v. DHSS, Case No. 86-0056-PC-ER (6/14/89). Under the facts of the instant case, the Commission concludes that, even if we were to assume that discrimination against complainant on the basis of race, color, or national origin played a part in the subject selection decision, in view of the substantially superior qualifications of Mr. Talsky, the same hiring decision would have been made in the absence of such considerations of complainant's race and national origin. The appropriate conclusion to be reached as a result of this, consistent with Price Waterhouse and Jenkins, is that respondents would be found not to have any liability under the FEA. The Commission concludes that there is no probable to believe that complainant was discriminated against on the basis of race, color, or national origin with respect to his nonselection.

#### Disparate Impact

Complainant has also advanced a theory of disparate impact in the presentation of his arguments. First of all, complainant argues that application of

the post-certification screening criterion had a disparate impact on ethnic/racial minorities and females. The initial application of this criterion resulted in the screening out of 100% of the ethnic/racial minority candidates (1 of 1), 75% of the female candidates (3 out of 4), and 33% of the white male candidates (4 out of 12). However, this was not the end of the process. Respondent DOA explained the screening process to each of the certified candidates. As a result, at least two of these candidates questioned the results of the screening process. These two candidates were permitted to file supplemental information and were ultimately added to the list of candidates to be interviewed. Consequently, the ultimate result of the application of the screening criterion was that 0% of the ethnic/racial minority candidates (0 of 1), 50% of the female candidates (2 out of 4), and 33% of the white male candidates (4 out of 12) were screened out. Obviously, this screening process did not ultimately have a disparate impact on racial/ethnic minority candidates and complainant's argument in this regard fails.<sup>3</sup>

Even if such a disparate impact had been found, the Commission concludes that the selection criterion was job-related. Since the subject position was responsible for managing 200 employees, requiring that a candidate have managed 20 employees or have equivalent experience clearly relates to a critical aspect of the position

Complainant also argues that exempting Career Executive employees from the AHQ and the pre-interview screening has a disparate impact on racial/ethnic minorities in accordance with the holding in Caviale v. DHSS, 744 F. 2d 1289 (7th Cir. 1984). However, the Court of Appeals held in Caviale that it was evidence of sex discrimination for the Department of Health and Social Services to limit recruitment for a vacant position solely to Career Executive employees. The Court did not hold that it was inappropriate to give Career Executive employees exemptions from certain recruitment and selection procedures and, as concluded above, such exemptions are consistent with the statutory and administrative rules framework for the Career Executive program. Since complainant was certified as a result of the AHQ process and was interviewed for the subject position, he has failed to show that he was

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<sup>3</sup> The Commission also notes that the numbers involved are too small to have statistical significance.



Finally, the Commission notes that both parties have filed motions to strike the other party's initial post-hearing brief based on the alleged inclusion in such briefs of facts not of record in this proceeding. In regard to complainant's motion, all but two of the citations from respondent's brief which are alleged by complainant to represent facts not in the record are actually conclusions respondent has drawn from facts in the record and arguments based on such conclusions. Although the complainant may disagree with such conclusions and arguments, the respondent has the right to present them and, once presented, complainant has the right to attempt to refute them. The only two which merit further discussion here are those numbered by complainant in his motion as 3 ("He did not rank within the top ten of all candidates taking the exam"); and 5 ("Talsky . . . directly supervised 100 employees"). In regard to #3, the motion is granted. It appears to the Commission that the record reflects that complainant received the fourth highest score of the six Option 3 candidates taking the AHQ exam (See Finding of Fact 4, above) but does not reflect that complainant's AHQ score did not place him within the top 10 of those taking the exam. In regard to #5, the record reflects, through testimony of Mr. Talsky, that he did indeed directly supervise more than 100 employees while employed as Executive Chief of Staff to the Milwaukee County Executive. However, the record does not reflect that the interviewers were aware of this specific fact through the written materials Mr. Talsky supplied to them or through Mr. Talsky's interview. As Finding of Fact 10, above, states, these materials indicated that Mr. Talsky had, in this position, been responsible for the administration of a program which, along with several sub-contract agencies, employed approximately 100+ employees. In regard to #5 then, the motion is denied.

In regard to respondent's motion, the Commission finds that those listed as citations from pages 6, 12, 21, 32, 24, 46, and 50 of complainant's brief represent facts not in the record of this proceeding and respondent's motion is granted as to these; that those listed as citations from pages 24, 25, 27, 30, 34, 38, 41, and 49 of complainant's brief represent conclusions drawn and arguments made by complainant in his brief and respondent's motion is denied as to these; and that those listed as citations from pages 17 and 18 represent areas of dispute between the parties which have been addressed in the proposed decision and respondent's motion is denied as to these. Respondent also represents

that the specific citations listed as part of their motion represent only the tip of the iceberg and that "the number of inappropriate items are so numerous that they cannot be conveniently separated from the remainder of the brief." However, without more specificity, the Commission is unable to reach a conclusion as to such separability or a conclusion as their factual underpinnings in the record.

Both parties request as part of their motions that the Commission strike the other party's entire brief but the Commission denies such requests in the absence of a broader showing by either party that the objectionable items cannot be separated from the rest of the brief or were the result of bad faith and not just over-exuberant advocacy on the part of the other party.

Order

There is no probable cause to believe that complainant was discriminated against as alleged and this complaint is dismissed. The Motions to Strike filed by both parties are granted in part and denied in part in accordance with the above opinion.

Dated: \_\_\_\_\_, 1991      STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

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DONALD R. MURPHY, Commissioner

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GERALD F. HODDINOTT, Commissioner

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