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KENNETH G. JAHNKE,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF
HEALTH AND SOCIAL SERVICES¹,

Respondent.

Case Nos. 89-0094-PC-ER
89-0098-PC

* * * * *

DECISION
AND
ORDER

NATURE OF THE CASE

On August 9, 1989, appellant/complainant sent a letter challenging the selection process used to fill a Stores Supervisor 3 position at the Green Bay Correctional Institution (GBCI) and informing the Commission that he wished to file a discrimination complaint. As a result of this letter, the Commission opened an appeal case for appellant/complainant and assigned it Case No. 89-0098-PC.

On August 24, 1989, appellant/complainant filed a discrimination complaint with the Commission alleging respondent failed to hire him for a Stores Supervisor 3 position because of his age, sex and handicap, in violation of the Fair Employment Act, Subch. II, ch. 111, Stats. The Commission opened a discrimination complaint file for appellant/complainant and assigned it Case No. 89-0094-PC-ER.

¹Subsequent to the filing of these cases, the Department of Health and Social Services was reorganized. Effective January 1, 1990, the Green Bay Correctional Institution, at which appellant/complainant is employed, became a part of the newly formed Department of Corrections.

The parties agreed to waive the investigation of the discrimination complaint and to consolidate the two cases for hearing. The issue established for hearing is:

1. Whether respondent's failure to select appellant for the vacant Store Supervisor III position at Green Bay Correctional Institution was illegal or an abuse of discretion.
2. Whether there is probable cause to believe respondent discriminated against complainant on the basis of age, sex and/or handicap when it failed to select him for the vacant Store Supervisor III position at Green Bay Correctional Institution.

FINDINGS OF FACT

1. At all times relevant to the matters at issue in the instant cases, appellant/complainant was employed as a Storekeeper 2 at the Green Bay Correctional Institution (GBCI). Appellant/complainant's supervisor was Mr. Ted Eul.

2. Mr. Eul was in charge of the stores operation for GBCI and was classified as a Stores Supervisor 3. Mr. Eul reported to Mr. Richard DeBoth, whose position is classified as an Account Specialist 3 - Supervisor. Appellant/complainant's, Mr. Eul's, and Mr. DeBoth's positions are assigned to one of the organizational units supervised by the Institution Business Manager, Mr. Les Mack. Mr. Mack reports to the Institution Superintendent, Mr. Donald Clusen.

3. Sometime in March or April 1989, Mr. Eul retired and the respondent initiated action to fill the position. At about the same time, a Mr. John Hertel left the stores operation to become a correctional officer. Mr. Hertel had been a Storekeeper 1 for approximately 4 years (1984-1988). Mr. Hertel and Mr. DeBoth did not get along well, and Mr. DeBoth had talked to Mr. Hertel about his attitude and that it would impart on his (Hertel's) promotability. Shortly after Mr. Hertel left, appellant/complainant informed Mr. DeBoth that

he was interviewing for an officer position. Mr. DeBoth said it would be good to clean out the store or words to that effect.²

4. The position description (PD) for the Stores Supervisor 3 position, dated April 4, 1989, (Respondent's Exhibit #12) was developed by Mr. Mack, Mr. DeBoth, and Ms. Lemery, and identified the following duties and responsibilities for the position.

Position Summary

Under direction of the Account Specialist 3-Supv., direct the work of the GBCI Institution Stores & Canteen program. Supervise the work of a Storekeeper 2, Storekeeper 1 and a Motor Vehicle Operator 3 in the receipt, storage, issuance and recording of all items handled by the institution stores and canteen. Coordinate the issue and control of inmate clothing.

<u>Time %</u>	<u>Goals and Worker Activities</u>
75%	A. Supervision of Institution Stores and Canteen Operation
20%	B. Coordination of Inmate Clothing
5%	C. Supervision of Inmates and Follow Security Procedures

The PD identified the following knowledges as being most important for someone hired into the position.

Knowledge of storekeeping methods and procedures used in the receipt, storage and issuance of a variety of goods.

Knowledge of the kinds, grades, and uses of the supplies dealt with.

Knowledge of inventory control systems.

5. In the absence of his supervisor, complainant would assume responsibility for the ongoing stores operation. Complainant had received some instruction from Mr. Eul on certain functions he (Mr. Eul) performed,

²The finding of fact has been revised to more accurately reflect the record.

such as estimating. Mr. Eul did this in order to insure continuation of the operation in his absence. Complainant also worked on the computer that was installed in the GBCI Stores in August, 1988, and was familiar with its operation. Complainant also currently serves as a representative for the local union, and has in the past been a secretary for a local union.

6. A current open register existed for Stores Supervisor 3, and respondent requested a certification list. A certification list was generated on June 30, 1989, by the Department of Employment Relations. The certification list contained a total of 13 names, which were certified as eligible for consideration on the following basis:

<u>Number of Names</u>	<u>Reason</u>
5	Top 5 numerical scores
4	Names certified after addition of veterans points
1	Handicapped expanded certification
3	Expanded certification for women

Appellant/complainant's name was certified under handicapped expanded certification. The candidate selected, Colleen Janikowski, was certified under expanded certification for women. Ms. Janikowski had not previously been a state employe.

7. The panel that interviewed the 13 candidates was comprised of Mr. Les Mack, Mr. Richard DeBoth, and Ms. Deb Kono. Ms. Kono had 3 1/2 years of experience supervising the stores operation at Oshkosh Correctional Institution (OCI) in a position classified as Account Specialist 3 - Supervisor. Ms. Kono is currently employed by the Department of Transportation.

8. The questions used by the interview panel were developed by Mr. Les Mack and reviewed by Ms. Liz Lemery, who is the personnel manager for GBCI. Mr. Mack developed the questions based on his own experience and

knowledge of the job, and information he had about the filling of a similar job at the Oshkosh Correctional Institution. The questions were designed to elicit information concerning the candidates' knowledge about and/or experience with stores operations, computers, and supervisory situations.

9. All candidates were asked the following questions during the interviews conducted on July 5 and 6, 1989.

- 1) What factors must be considered when estimating needs for stock in the Institution Store?
- 2) As a Store Supervisor 3, you are First Step Grievance Representative for your employees. Your Stock Clerk presents you with a grievance on Institution policy. You agree with the Stock Clerk's grievance but no violation of Union Contract occurred. How would you proceed?
- 3) As Store Supervisor, you are a part of the Management Services team along with the Supervisors of the Business Office, Maintenance and Food Service Departments. At the team meeting, a policy is discussed and developed and considered, but you disagree with the policy. Your Stock Clerk asks what you think of the policy. How would you respond?
- 4) Describe types of computers and computer programs with which you are familiar. Describe one use of computer programs you have made. What other office machines have you used?
- 5) What is the difference between a perpetual inventory and a physical inventory?
- 6) What would you do if an employe under your supervision did not perform tasks in either the quantity or quality expected. You believe the person is capable of performing the job. You also notice the employe is using sick leave frequently and has disagreements with other staff.
- 7) Obviously you are not, at this time, aware of specific procedures within the prison, but what do you think should be done if the following happened to you as the Stores Supervisor?

One day, as the Stores inmate workers are leaving the Store, you notice one inmate walking out of the Store with a pair of shoes that do not belong to him. What would you do?

- 8) Please explain what training and experience (you have) that qualify you to be stores supervisor at G.B.C.I.

10. Question #8 was added by Mr. Mack after the questions were initially developed to provide the interview panel with information concerning the training and experience of the candidates, because the panel was given only the candidates' name.

11. The responses of the candidates were rated using benchmarks developed by Mr. Mack and reviewed by Ms. Lemery. Each question was worth a total of 5 points, with points being awarded based on how the candidates' response matched the following benchmarks:

Question # Pts. Interview Benchmarks

- | | | |
|----|-----|---|
| 1) | 5 - | Answer includes the following:
Amount of space.
Available funds.
Usage of items.
Shelf Life
Determine stability
of demand |
| | 3 - | Any two of the above five answers. |
| | 0 - | Don't know. |
| 2) | 5 - | Meet with your supervisor to discuss the grievance. Meet with employee and listen to their concerns. Explain policy to employee. Deny grievance since no contract violation has occurred. Bring matter to the attention of your supervisor for possible review of policy. |
| | 3 - | Meet with employee, discuss grievance, deny grievance because no contract violation has occurred. |
| | 0 - | Deny grievance but encourage to go to 2nd step. |
| 3) | 5 - | Even though you disagree with the policy, be sure you understand it and then indicate to the employee the reason for the policy and that it must be adhered to. |
| | 3 - | Refer the employee to your supervisor. |

- 0 - Tell the employee you don't like the policy and no one would listen to your ideas and input and there should be some way to get around the policy.

Question # Pts. Interview Benchmarks

- 4) 5 - Has worked and is very knowledgeable with database, about pre-developed spreadsheets.
- 3 - Has done data entry and has had a little exposure to various programs.
- 0 - Has had no computer experience.

- 5) Discretionary
(up to 5 points)

Perpetual - continuous record of receipts, disbursement, balances, unit cost, and total cost of inventory.

Physical - actual count of merchandise in stock to verify balances on perpetual inventory.

- 6) Discretionary
(up to 5 points)

Discuss your concerns with your supervisor.

Meet with employe, review Position Description and discuss expectations.

Have regular (3 to 4 week) follow-up meetings providing both positive and negative feedback.

If personal problems affecting work, refer for EAP.

If performance does not improve, proceed with concentrated PPD.

Document all meetings and discussions.

- 7) Discretionary
(up to 5 points)

Confiscate the shoes.

Notify the Security Department.

Write a report.

Alert your staff to the situation.

8) Discretionary
(up to 5 points)

No specific benchmarks.

12. All candidates were scored individually by each panel member prior to the panel members' discussing the candidates' responses.

13. The following chart identifies the total points awarded for each question by the interview panel to the successful candidate (Ms. Janikowski) and appellant/complainant.

<u>Question #</u>	<u>Appellant/Complainant</u>	<u>Ms. Janikowski</u>
1	4	12
2	10	12
3	3	15
4	6	14
5	15	15
6	4	15
7	15	15
8	<u>7</u>	<u>15</u>
Total	64	113

14. Appellant/complainant ranked lower than Ms. Janikowski primarily based on his responses to questions 1, 3, 4, 6, and 8. Each panel member rated Ms. Janikowski's responses as superior based on the following:

QUESTION 1 (ESTIMATING STOCK)

Appellant/Complainant - Use a high-low average for 2 months.

Can go up to 6 months.

Successful Candidate - Look at past usage, future needs based on population, and perishability (shelf-life) of items.

QUESTION 3 (RESPONSE TO SUBORDINATE QUESTION ABOUT POLICY YOU
DISAGREE WITH)

Appellant/Complainant - It is a management decision and does
not need to be discussed with subordinate.

Successful Candidate - Explain to subordinate why they want
policy, discuss good and bad points, and indicate that policy
is to be followed.

QUESTION 4 (FAMILIARITY WITH COMPUTERS/COMPUTER PROGRAMS)

Appellant/Complainant - Worked on computer in stores enter-
ing data, doing receipts, disbursements, and reports. Work
mostly with perpetual inventory and some experience with
capital inventory on PC.

Successful Candidate - Enter data into master software traffic
program at radio station, experience with Word Perfect,
spends considerable time on computers on a daily basis.

QUESTION 6 (EMPLOYEE PERFORMANCE PROBLEM)

Appellant/Complainant - Talk to employe and see if it would
help; if not, write up incident report.

Successful Candidate - Talk to employe, ask questions to deter-
mine problem, review job description, explain expecta-
tions, set up plan for improvement, assure employe they
are important, and offer personal assistance.

QUESTION 8 (RELEVANT TRAINING AND EXPERIENCE)

Appellant/Complainant - Done this kind of work all his life including 24 years for state, taken accounting courses and business law, more assertive since taking department's career development program.

Successful Candidate - Manager at Berman's responsible for evaluating, hiring and interviewing employees; involved with physical inventory and stocking; and gets along well with people.

15. Overall, the panel evaluated Ms. Janikowski's responses to the questions as more comprehensive and expansive than appellant/ complainant's responses.

16. The panel members separately totaled the points for each candidate. Each panel member gave Ms. Janikowski the highest number of points, and the panel recommended she be hired to Ms. Lemery.

17. Mr. Mack totaled the scores of all the panel members and averaged them for each candidate. Ms. Lemery and Mr. Mack discussed the top 3 or 4 candidates with Mr. Clusen, who made the final hiring decision.

18. Ms. Lemery checked Ms. Janikowski's references and received favorable comments. Ms. Janikowski was offered the position verbally with her acceptance being confirmed in a July 19, 1989, letter from Mr. Clusen.

19. In addition to appellant/complainant, a Ms. Judith Altergott, a Storekeeper 1 in the GBCI stores operation, was also a candidate for the Stores Supervisor 3 position. Ms. Altergott's spouse (Charles Altergott) works in the GBCI personnel office as a payroll and benefits assistant. Mr. Mack and

Mr. DeBoth were both aware of this relationship, but Ms. Kono did not know at the time of the interview that Ms. Altergott's spouse worked in the personnel office.

20. Ms. Judith Altergott was ranked third after the interview with a composite score of 90. The candidate ranked second had a composite score of 92.

21. Ms. Colleen Janikowski is the daughter of Ms. Judith Altergott and the step-daughter of Mr. Charles Altergott. None of the panel members were aware of the relationship between Ms. Janikowski and Ms. Altergott. Ms. Kono had no further involvement in the employment process after her participation as an interview panel member. Mr. Mack was informed by Mr. Clusen after the appointment was made that Ms. Janikowski was Ms. Altergott's daughter. Subsequent to that Mr. DeBoth also learned of the relationship.

22. Mr. Altergott knew both his spouse and step-daughter had applied for the Stores Supervisor 3 position. Mr. Altergott had no involvement in developing the questions or benchmarks for the interview. He did not contact any panel members or provide any information about the interview to his spouse or step-daughter.

23. Ms. Janikowski was interviewed before Ms. Altergott. Appellant/complainant was the last person interviewed.

24. Appellant/complainant thought the interview would involve discussing his background. He was nervous during the interview because of its structured nature and the fact that he had returned to town that day and had to rush to make the interview.

25. Between August 3, 1987, and November 13, 1989, a total of 22 persons were either newly hired or promoted into positions at GBCI from other

employing units and departments. (Internal promotions and transfers are not included in this total.) Of these hires, four persons (including Ms. Altergott and Ms. Janikowski) were related to someone in the personnel office. Three of the four persons (including Ms. Altergott and Ms. Janikowski) were selected from certification lists established by the Department of Employment Relations. The remaining person was selected using an Achievement History Questionnaire approved by the Department of Employment Relations.

26. Between December 5, 1987, and November 20, 1989, a total of 15 limited-term employees (LTE's) were hired. LTE's are non-permanent employees who work part-time and receive no benefits. One of the LTE's was the wife of a GBCI employee. She was hired to work only on Saturdays as needed in the canteen (inmate store).

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to §§230.44(1)(d) and 230.45(1)(b), Stats.
2. Appellant has the burden to prove that the decision by respondent not to hire him for the Stores Supervisor 3 position was illegal or an abuse of discretion.
3. Appellant has failed to sustain his burden.
4. The decision by respondent not to hire appellant for the Stores Supervisor 3 position was not illegal or an abuse of discretion.
5. Complainant has the burden of persuasion to show that there is probable cause, as probable cause is defined in s.PC 1.02(16), Wis. Adm. Code, to believe that respondent discriminated against him on the basis of age, sex, and/or handicap in its decision not to hire him for the Stores Supervisor 3 position.

6. The complainant has failed to carry his burden of persuasion.

7. There is no probable cause to believe that complainant was discriminated against on the basis of his age, sex and/or handicap with respect to respondent's decision not to hire him for the Stores Supervisor 3 position.

DISCUSSION

CASE NO. 89-0094-PC-ER (ISSUE #2)

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case by a preponderance of the evidence. This may be accomplished by showing (1) that he belongs to a protected group; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected under circumstances which give rise to an inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). If the complainant succeeds in establishing a prima facie case, the burden of proceeding then shifts to the respondent employer to articulate "some legitimate, non-discriminatory reason" for the employee's rejection. Once this is accomplished the complainant must be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the rejection were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent intentionally discriminated against the complainant remains at all times with the complainant, Burdine, supra, at 1094.

Although the evidentiary standard in a probable cause³ proceeding such as the one before us is not as rigorous as that applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint. Each of the complainant's claims of discrimination (sex, age, and/or handicap) will be discussed separately.

SEX

The complainant has established a prima facie case of sex discrimination. Specifically, he is a member of a protected class — male; he applied and was qualified for the Stores Supervisor 3 position; and an inference of discrimination can be drawn from the fact that the person selected for the position was of the opposite gender (female).

The respondent did articulate legitimate, non-discriminatory reasons for its hiring decision. It is clear from the record that the successful candidate had higher interview scores than the complainant. The scores were arrived at individually by the panel members using standardized benchmarks to evaluate the responses to the interview questions. The interview questions were related to the responsibilities of the job and were uniformly applied (along with the benchmarks) to all of the candidates. The interview panel had no information about the candidates other than what the candidates provided in response to the interview questions.

³Probable cause is defined in s. 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.

Complainant argued that these reasons were pretextual because he had more experience in actual stores operations than the successful candidate, and had, for certain periods of time, even assumed some of his former supervisor's (Mr. Eul) responsibilities in his absence. Experience was not heavily weighted in the interview questions, and only one question (#8) asked specifically about training and experience. However, in addition to question #8, questions #1, #5 and #7 were all directly related to functions or activities that complainant indicated he had been involved with, i.e., estimating stock, physical and perpetual inventory, and observing inappropriate inmate behavior. Complainant's answers to questions #5 and #7 were rated the highest (5) and equivalent to the successful candidate. His answers, however, to questions #1 and #8 were considered less satisfactory than the successful candidate's because complainant's answer to question #1 addressed only one of the benchmarks and his answer to question #8 was not considered by the panel members to be as comprehensive as that provided by the successful candidate. The fact that the interview questions did not weight experience more heavily does not show pretext. The questions were job-related, the panel members' ratings were based only on the response of the candidates to the questions, and at least 4 of the questions were related to complainant's experience. To the extent that complainant is suggesting that the questions, scoring methodology, and the scores he actually received were a pretext for sex discrimination, the argument is without support on the record. While the successful candidate (female) received scores with which complainant disagreed, and complainant felt that his scores should have been higher based on his experience, the questions used by respondent were job-related and the interview and scoring methodology was consistently applied to all candidates. While complainant

disagrees with the result, there is nothing in the record to show that the methodology used by respondent was indicative of pretext.

Complainant further states that the management questions #2 (grievance processing), #3 (disagreement with a policy), and #6 (employee performance problem) show pretext because the position being filled is a first-line supervisor, candidates are not likely to have any supervisory experience, and the person hired would be given supervisory training. Respondent provided testimony that the questions (#2, #3, and #6) were not designed to test specific supervisory skills, but rather to assess candidates' interpersonal skills and their application to hypothetical situations which they might be confronted with. The successful candidate's experience as a department manager apparently provided the basis for her answers to questions #3 and #6. While complainant indicated that he had directed the activities of staff in the absence of his supervisor, his responses were not in line with the benchmarks. On question #2 complainant scored within 2 points of the successful candidate, in part because of his involvement in union activities. Even if the Commission were to accept complainant's argument and not consider or score the management questions (#2, #3, and #6) as part of the interview process, the successful candidate's score would still be considerably higher than complainant's. (See Finding #13.)

Complainant stated that the successful candidate should not have gotten as many points on question #5 (they both were rated 5 by all panel members) as he did, because he had more actual work experience with inventory. Question #5 asks for a distinction to be made between a physical and a perpetual inventory. The response identified as appropriate in the benchmarks was to provide a definition of each which showed the distinction. This question

does not require experience, but only knowledge of the difference between physical and perpetual inventory. The question is job-related and assesses the candidate's knowledge regardless of the candidate's experience.

Complainant also argued that he should have gotten more points on question #8 (background related to the position). The successful candidate's response was considered more comprehensive and identified specific supervisory tasks she had done. The question is job related. While the complainant feels he should have gotten a higher score, he has not shown that the scoring of this question by the panel members was inappropriate or somehow skewed toward the successful female candidate. Even if the Commission were to assume arguendo that complainant should have gotten all 5 points for question #8, his overall score would still be lower than the successful candidate. This would hold true even if the granting of additional points is considered in conjunction with the elimination of the management questions discussed above. (See Finding #13).

Complainant has not shown that the interview questions, benchmarks, and selection process were discriminatory or biased based on the sex of the candidates. Complainant's arguments go to what the interview should have measured or how it should have rated him different, and do not show that the reasons offered by respondent for its hiring decision are a pretext to discriminate against complainant on the basis of sex. The hiring decision was based solely on the ratings given by the panel members to the candidates' responses. There is nothing on the record to show that the questions and/or the ratings were biased towards males or females, or were a pretext for discrimination. To the contrary, all candidates were treated uniformly based on their responses to the questions. Based on a candidate's background (work experience), he/she

may be better able to answer a question, but that does not constitute discriminatory treatment. To the extent complainant argues that the questions favored certain candidates, his argument goes to the background of the candidates and not their gender. In addition, respondent indicated during the hearing that they did not know the background of the candidates, and, therefore, added a question (#8) to provide them with more information on the candidates' work experience to use in the selection process. Consequently, the questions could not have been developed with any particular background or candidate in mind since respondent had no information about the candidates. The questions used were based on respondent's evaluation of what was needed by a candidate to be successful on the job. (See Finding #8.)

AGE

The complainant is a member of a protected class by virtue of his being over 40 years of age. (While the record contains no specific indication of complainant's age, a review of documents — particularly Complainant's Exhibit #4 — indicate that complainant is approximately 50 years of age.) He applied and was qualified for the Stores Supervisor 3 position, but was not selected by the respondent. To draw an inference of unlawful discrimination on the basis of age, the complainant must show that the person selected was not a protected group member, i.e., was under 40 years of age, or at least was substantially younger. There is no specific information on the record about the age of any of the candidates interviewed, except for the complainant. While the complainant has not established this third element of a prima facie case, the Commission will assume, arguendo, that he has established a prima facie case and proceed with the remainder of the McDonnell-Douglas analysis.

Respondent has articulated legitimate, non-discriminatory reasons for the hiring decision. The questions used by the interview panel were job-related. The questions were asked uniformly of all candidates and their answers scored using a pre-established benchmark rating system. The actual scores given by individual panel members were based on the candidates' responses to each question. The panel members did their ratings individually prior to any discussion of the candidate. There is no indication on the record that any candidates' scores on any individual question was changed or altered as a result of any discussion from that initially assigned by the individual panel member.

Complainant argues that this is pretextual because question #4 (knowledge and familiarity with computers) impacts disproportionately on older workers who have not had the kind of exposure to computers that younger workers have had. The record does not contain any support for this other than some indication that younger workers may have been exposed to computers in school. However, depending upon the people involved, it does not necessarily follow that younger workers have more experience/exposure to computers than older workers. In the instant case, complainant and the successful candidate both had exposure to computers. The fact that the successful candidate had more exposure to computers was related to her work history, and does not substantiate that computer questions either discriminate or are a pretext for discrimination.

A computer was installed in the GBCI stores in August, 1988. As of the time of the interview, complainant had approximately 11 months of exposure to the computer. In his testimony, complainant indicated that he was familiar with the computer, had done data entry and report generation, and was not

afraid of the computer. Additionally, he felt that computer operation was such a small portion of the job that the questions was not even relevant and should not have been used.

The record reflects that the Department of Corrections (of which GBCI is a part) is making increasing use of computers as evidenced by the installation of a computer in the GBCI stores. While knowledge of computers and experience operating a computer may not be the most significant element (from the standpoint of time percentage) of the Stores Supervisor 3 position, it is a function performed by the position and, subsequently, the question is job-related.

In the scoring of this question by the panel members, complainant was given credit for his involvement with computers. However, the successful candidate had more experience working with computers in entering and maintaining data and generating reports. The score given the complainant and the successful candidate was based on the content of their answers. Other than complainant's assertion that older workers are disadvantaged by computer questions, there was no substantiation that age played a factor either in the development of the questions and the benchmark rating system used to score candidate responses, or that question #4 had a disparate impact on older candidates.

As was indicated in the discussion of the sex discrimination charge, the interview panel rated the responses of candidates based on the content of the response. The response of any candidate will be directly related to his or her background and knowledge, and the complainant has not shown (other than by his assertion) that the hiring process discriminated against him on the basis of age.

Lastly, even if question #4 was to be eliminated from the interview, complainant's score would still be less than the successful candidate's score. (See Finding #13.)

HANDICAP

In establishing a prima facie case, complainant has shown that he applied for and was qualified for the Stores Supervisor 3 (element 2 of McDonnell-Douglas) and an inference of unlawful discrimination (element 3) can be drawn based on the fact that no other candidate for the position was identified on the certification list (Respondent's Exhibit #1) as handicapped. However, to show that he is a member of a protected group, i.e., handicapped, complainant must meet the definition of handicap found in the statutes.

Section 111.32(8), Stats., defines a "handicapped individual" as: an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such impairment; or
- (c) Is perceived as having such an impairment.

Complainant alleges that he is handicapped because of a speech problem. The Commission notes that at the hearing complainant was very deliberate when he testified or asked questions of witnesses, and that he was nervous about the hearing which seemed to exacerbate the deliberateness of his speech. While his speech was slower and somewhat uneven in pace, complainant was understandable and was able to clearly communicate thoughts, ideas and questions.

Respondent points out that complainant did not provide any medical evidence to substantiate that he had a handicapping condition. In addition, the interview panel members testified that they did not perceive him as handi-

capped, and, although complainant's delivery was different from other candidates, the interview panel had no problem understanding his answers. This may be due, in part, to the fact that two of the panel members (Mr. Mack and Mr. DeBoth) had worked with complainant for a period of years.

The Commission cannot, therefore, make a finding that complainant is handicapped as it is defined in §111.32(8), Stats. However, even if it were assumed that complainant had established a prima facie case, there still would not be probable cause to believe he was discriminated against on the basis of handicap.

The respondent has articulated legitimate, non-discriminatory reasons for its hiring decision. The questions were job-related and asked uniformly of all candidates. A standardized benchmark rating system was uniformly applied in scoring the candidates' responses to the questions. Each panel member scored each question and each candidate separately. The candidate with the highest score was selected.

Complainant argues that this is a pretext for discrimination because his speech problem results in him giving shorter, and sometimes more terse, answers to questions than other candidates who might elaborate more on their answer. Complainant also stated that the manner in which a candidate presents an answer can have a "halo effect." In his case, the effect could be negative, while for a candidate who was more fluent, he/she would make a better impression on the interview panel and potentially get a better score.

Respondent had each of the interview panel members testify about the answers given by complainant and the successful candidate. The panel members indicated that complainant's answers were shorter and, in some cases, more terse than those of the successful candidate. However, the

interview panel members did not score complainant's responses based on how he said something, but, rather, based the score on what he said (content). For example, question #1 (estimating stock) had five possible areas identified under the benchmark established for the question which were used to score the content of the candidates' answer. Complainant identified only one area (usage), while the successful candidate identified three areas (usage, stability of demand, and shelf life). The complainant's score was lower not because of how he answered the question, but, rather, based on the factual content of his answer. (See Finding #14.)

In addition, two of the interview panel members had been at the institution as long as the complainant. Mr. DeBoth has been the supervisor of the stores operation for at least 5 years, and Mr. Mack has been the institution business manager for even a longer period of time. It is doubtful that based on all the contact these two panel members had with the complainant that they took much note of how he articulated his responses to the questions.

There is nothing in the record to show that the interview panel members had any bias (positive or negative) in the scoring of complainant's responses. The interview panel members testified that they did not consider complainant handicapped and while the panel certainly noticed a difference in his speech pattern, complainant has not shown that this played any role in the development and scoring of the questions used in the hiring process.

Based upon the above information and the lack of a showing by complainant that the selection criteria used were not job-related and/or that respondent's articulated reasons for their hiring decision were a pretext for discrimination, the Commission concludes that there is no probable cause to believe respondent discriminated against complainant on the basis of age, sex

and/or handicap when they failed to hire him for the Stores Supervisor 3 position.

CASE NO. 89-0098-PC (ISSUE #1)

In an appeal of an appointing authority's decision after certification (§230.44(1)(d), Stats.), the standard to be applied is whether the appointing authority's decision was "illegal or an abuse of discretion." The appellant has not alleged any illegality under Chapter 230 of the statutes, and, therefore, the Commission need only address the issue of whether respondent's hiring decision was an abuse of discretion.

The term "abuse of discretion" has been defined as " ... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, Case No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, Case No. 81-74-PC (1982).

Respondent's hiring decision was based on interviews with 13 candidates whose names were included on a certification list provided by DER. A standard set of questions were asked uniformly of all candidates and their responses rated using a standardized benchmark system to distribute a maximum of 5 points per question to each candidate. Question #8 did not have any specific benchmarks although the total points to be awarded (5) was the same

as for other questions. The complainant did not allege and Commission does not find this lack of benchmarks to be problematic. The question is designed to elicit information from the candidate matching their background to the position. While a specific rating scheme could probably be devised, allowing the interview panel the discretion to score the candidates' response does not appear to be an unreasonable approach.

Appellant argued that his past performance as a Storekeeper 2, his familiarity with the stores operation, and his role of filling in when the supervisor was absent makes him the best qualified candidate for the job. Appellant stated that he had done the job and was more than capable of performing the Stores Supervisor 3 functions. The Commission views all 13 candidates certified for the position as being qualified and potentially able to perform the functions of the Stores Supervisor 3 position. The respondent had the task of selecting one person from among the 13 that they felt would be best able to perform in the position.

To this end, they developed standardized questions and a uniform rating system to evaluate the candidates. The questions were job-related and uniformly asked of all candidates. The process used in making the hiring decision was consistently applied to all candidates and the candidate selected received the highest score. The respondent determined that the successful candidate (the one with the highest score) was best able to perform the functions. While this determination is not consistent with the appellant's definition of who is best qualified for the position, the appellant has not shown that there was not a rational basis for respondent's hiring decision. The questions used were all job-related and the scoring methodology used was consistently applied. The appellant has not shown that the questions were not

job-related or that the scoring system/methodology, or its application, was inconsistent either in relation to normal civil service procedures or in its specific application to the candidates. Consequently, there has been no showing by appellant that the selection of Ms. Janikowski, and the process that led up to the selection, were an abuse of discretion.

Appellant also raised an issue that he received no encouragement or training to prepare him for the promotion, although he had asked on several occasions what he could do to prepare himself. In testimony, appellant stated that he had participated in the department's career development program which had improved his assertiveness. (See Finding #14 - answer to question #8.)

The record shows only that appellant asked if there was something he could do to prepare for a promotion. It is clear that appellant wanted to be a viable candidate for his boss' job (Mr. Ted Eul - Stores Supervisor 3). While management was aware of his interest (particularly, Mr. Mack and Mr. DeBoth), had provided him some experience in the position, and had sent him to the career development program, that certainly cannot be construed as a guarantee that appellant would get the job. In a like manner, the fact that management did not outwardly encourage appellant regarding a promotion does not mean that appellant would not get the job. In any case, respondent's action in regard to training and encouragement, or lack thereof, does not rise to the level of an abuse of discretion.

The appellant also raised the issue of nepotism concerning the fact that a number of recent hires were related to persons in the personnel office. One of appellant/complainant's witnesses stated that 4 out of the last 5 hires were related to someone in the personnel office. Respondent produced a listing

showing that there were 22 hires during the time period referred to by appellant's witness of which 4 were related to persons in the personnel office (Finding #25). Three of the persons hired (including Ms. Altergott and Ms. Janikowski) were selected from certification lists supplied by the Department of Employment Relations (DER). The other person was hired using an AHQ developed at GBCI and approved by DER.

Respondent provided testimony that, as in this case, the person at GBCI related to the candidate was not involved in any way in the examination and/or selection process and did not have any input into the recommendation made to Mr. Clusen. There is no information to rebut this assertion. While the Commission understands, at least from an appearance standpoint, appellant's concern, the appropriate civil service procedures for examining and selecting candidates appears to have been followed. There is nothing on the record to suggest that the system was abused or manipulated in these hiring decisions.

In the instant case, the person selected, Ms. Janikowski, will end up supervising her mother. While this is certainly not the best situation, the respondent's decision must be addressed from the standpoint of whether it was an abuse of discretion. Certainly, from a procedural standpoint there doesn't appear to be any abuse of discretion. The respondent asked for a certification from an existing list and used the standard practice of conducting a structured interview. The appellant has not shown that any part of this process was modified or otherwise altered to provide an advantage to the successful candidate because of her relationship with current GBCI employees.

There was some testimony that it was not uncommon to have more than one family member working at the institution. While this is probably true, it does not necessarily justify respondent's hiring decision. In reviewing the

issue of nepotism, the Commission takes note of the Code of Ethics found in Chapter ER-Pers 24, Wis. Admin. Code. Specifically, ER-Pers 24.04(2)(e) and (f)⁴ address directly the issue of immediate family members being involved in the hiring or supervision of other members of their immediate family. These rule provisions anticipate that the kind of situation that exists in the instant case will occur.

In the hiring of immediate family members, into permanent positions, the only restriction placed on the respondent is that the immediate family member's name was certified from an "open-register". [§ER-Pers 24.04(2)(e)] Respondent has met this certification requirement in the hiring of Ms. Janikowski. In the case of the LTE hire, the GBCI employe (specifically the Security Director) was not involved in the actual hiring of his spouse. While he did provide his spouse with an application, there is nothing on the record to show that he was involved in any way in the hiring decision after the application was submitted for consideration to the GBCI personnel office.

The provisions of §ER-Pers 24.04(2)(f) apply to situations after the hire, and are not directly applicable to a hiring decision. It does, however, further enforce the premise that the Code of Ethics anticipate situations in which

⁴§ER-Pers 24.04 Standards of conduct

(2) The state must, by necessity, specifically prohibit those activities that will cause a conflict of interest to the employe or to the state of Wisconsin. Therefore:

(e) An employe may recommend or decide to hire or promote another person for a permanent, seasonal or sessional position when the person affected is a member of the employe's immediate family, if that person has been certified from an open or competitive promotional register. No employe may recommend or make a limited term or project appointment when the person to be hired is a member of the employe's immediate family.

(f) No employe shall give preferential or favored treatment in the supervision or management of another employe who is a member of his or her immediate family.

family members may be working together, even as supervisor and subordinate, in the same work unit.

In the instant case, all of the interview panel members testified that they did not know that Ms. Janikowski was Ms. Altergott's daughter until after the selection decision was made. Additionally, Mr. Altergott (Ms. Altergott's spouse and Ms. Janikowski's stepfather), who works in the payroll area of the personnel office, had no involvement in developing the interview questions, did not contact anyone on the interview panel, or otherwise try to influence the hiring decision. Other than the outward appearance of hiring two relatives in the same work unit and having another employed in the personnel office, there is nothing in the record from which the Commission can conclude that this relationship causes respondent's decision to be an abuse of discretion.

Lastly, appellant asserted that either management didn't want to hire him, or there was a desire to "clean out" the stores area. These allegations are supported on the record by the bald assertion of appellant, Mr. Eul's comment that he had heard a rumor from an unspecified source that they did not want a "Eul clone," and a comment made by Mr. DeBoth, after a Mr. Hertel (Storekeeper 1) had left to become an officer and the appellant was interviewing for an officer position, that it might be good to clean out the store. Appellant's assertion and Mr. Eul's comments are not supported by any other information outside of their statements and the Commission can not attribute any weight to these allegations in addressing the abuse of discretion issue.

The statement attributed to Mr. DeBoth was testified to by the appellant. Appellant did not ask Mr. DeBoth whether he made that statement or what he meant by it. The Commission can not conclude much about what the statement

means or whether it is indication of some bias against appellant. The statement could well have been made in frustration over the potential loss of both stockkeepers and the impact on the stores operations. Without further information, these statements and allegations in and of themselves do not support a conclusion of an abuse of discretion.

In addition, the record does not reflect any information on how these statements or suggested bias impacted on the selection process so as to adversely affect the appellant. As has been discussed, the questions were job-related and scoring was done uniformly based on the content of the candidates' responses. Certainly appellant should have had the experience to answer question #1 (estimating stock needs) in a more comprehensive manner. In addition, since appellant had functioned in the Stores Supervisor 3, question #8 (Comparison of candidates' experience to the position.) should have been answered more completely, because of all the candidates he had the most intimate knowledge of the position.

Appellant specifically thought Mr. DeBoth may have been biased against him. A Mr. Hertel, who had worked for four years as a Storekeeper 1 in GBCI (1984-88), testified that he left to become a correctional officer because Mr. DeBoth had talked to him about his attitude, and said he (Hertel) would not get promoted with an attitude such as his. First of all, Mr. DeBoth was talking about Mr. Hertel and not appellant. Secondly, there was an apparent personality conflict between Mr. Hertel and Mr. DeBoth. None of these apply to appellant. His work has been rated as good to very good, and there is no indication that Mr. DeBoth feels appellant has an attitude problem.


The Commission understands that appellant was disappointed when he was not selected for the position. However, based on the above analysis, none

of the issues raised by the appellant rise to the level of an abuse of discretion. As a result, the Commission concludes that the failure of respondent to select appellant for the Stores Supervisor 3 position was not illegal or an abuse of discretion.


ORDER

The hiring decision of respondent is affirmed and these cases are dismissed.

Dated: December 13, 1990 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

GFH:rcr


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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*Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the position(s) that is the subject of this proceeding is now held by the Secretary of the Department of Corrections.