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ROBERT CHIODO,
 Complainant,
 v.
 President, UNIVERSITY OF
 WISCONSIN SYSTEM (Stout),
 Respondent.
 Case No. 90-0150-PC-ER

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INTERIM
ORDER

This matter is before the Commission following the issuance of a proposed decision and order by a hearing examiner pursuant to §227.46(2), Stats. The Commission has considered the parties' written objections and arguments, and will adopt the proposed decision and order, with the following observations with respect to some of respondent's objections thereto.

This case involves a complaint of age discrimination with respect to the appointment on an acting basis of Rex Patterson (and the concomitant failure to appoint complainant) to the position of director of administrative computing at UW-Stout. Respondent has objected to the admission of evidence relating to Patterson's subsequent permanent appointment to essentially the same position, which appointment was based largely on his track record while serving in an acting capacity.¹

As was explained in the proposed decision, this evidence was admitted to show that complainant's non-appointment to the acting position was indeed an adverse employment action despite its temporary nature:

The only real dispute concerning the question of whether complainant established a prima facie case has to do with the fact that the appointment in question was on an acting rather than a permanent basis. Respondent asserts that because of his distinction, complainant did not suffer an adverse employment action at all. However, the acting assignment carried a salary augmentation -- complainant had received an extra \$2107 on an annual basis for having served as the acting Director

¹ Respondent objects primarily to proposed Finding #18: "Patterson's appointment as Computer Services Director effective July 1, 1991, was made without any kind of recruitment or competition. Patterson was appointed because it was believed he had done a good job as acting Computer Services Director."

of Administrative Computing in 1989, and Patterson's salary was augmented on a \$5000 annual basis in connection with this appointment. Furthermore, it would beggar common sense to suggest that it would not be positive for an employe's career prospects to receive an acting appointment to a position that had just been vacated and presumably would have to be filled later on a permanent basis. Obversely, it would be negative for an employe's career prospects not to get such an appointment. Such a negative effect was exacerbated in this case by the fact that not only did complainant get passed over for the acting assignment, but also it was given to his subordinate, who thus became complainant's boss.

Related to the foregoing is an evidentiary issue which arose during the hearing. Complainant introduced evidence over respondent's objection that Patterson in fact was appointed to the position in question. This was about a year after his acting appointment, was without competition, and was based on his demonstrated good performance while doing the job on an acting basis. This evidence was admitted solely for its tendency to show that the failure to have appointed complainant to the position on an acting basis was in fact an adverse employment action. Proposed decision, pp. 7-8 (footnotes omitted).

However, respondent asserts that this evidence played a larger role in the decision than as above stated:

Respondent adamantly disagrees with the examiner's proposition that the highly prejudicial and irrelevant evidence admitted into the record was considered solely for the stated reason. If the examiner had articulated this narrow rationale during the course of the hearing as an explanation for overruling the respondent's repeated objections to the admission of evidence irrelevant to the issue before the Commission, respondent would have stipulated to the admission of the evidence for that narrow and specific purpose. Respondent's exceptions to proposed decision and order, pp. 3-4.

The Commission does not discern anything in the proposed decision which suggests that the contested evidence played a wider role than the proposed decision explicitly states, as set forth above. Furthermore, there is nothing in the transcript which suggests the evidence was admitted for a broader purpose. This is illustrated by the following transcript excerpts of the adverse examination of the appointing authority, Vice-Chancellor Womack:

Q The position, I have a document here which indicates that he [Patterson] was appointed to the position that he had been acting in, because he had been acting in it. Isn't that the reason he was appointed as a permanent person in that position?

A He was appointed because he had demonstrated the strengths and abilities to manage that operation and work within a 3-director structure after a period of time.

Q Well, Bob Chiodo never had a chance to work in a 3-director structure, as you planned it, did he?

A He did not.

Q Right. And he did not have that opportunity because Patterson got that job on July 9th, 1990, correct?

A Patterson was--

ATTORNEY [FOR RESPONDENT]: Well, now I'm going to object because this is really leading into the second position. What's at issue here is Mr. Chiodo's appointment to an interim position. You are focusing on what could or could not have happened in reference to a permanent hire that goes beyond the scope of this hearing.²

* * *

ATTORNEY [FOR COMPLAINANT]: Right. Well the question, basically I'm going back to July 9th, and the importance of, because one of the defenses that has been raised in this case is the insignificance of the interim position ... what I'm trying to establish in this hearing, Mr. Examiner, is that the interim position was an important position....

* * *

ATTORNEY [FOR RESPONDENT]: ... We are here for a limited purpose, and that is to hear information in reference to the interim position appointment in July of 1990. What happens subsequent to that is immaterial, especially in relation to the permanent hire, because that's the subject of the second complaint, which is not before the Commission....

HEARING EXAMINER: I, I, I will overrule the objection, and I'll make it clear for the record. My understanding of [complainant's] counsel's presentation at this point is to focus on the importance of the interim position and not deal with the mechanics or substance of how the permanent position was filled. So I don't think this goes beyond the scope of, of, the issue before the Commission.... Transcript prepared by respondent, pp. 43-45.

² Complainant has another complaint (No. 93-0124-PC-ER) before this Commission challenging Patterson's permanent appointment to the position in question. The parties agreed to hear the instant case separately, while the latter case has been held in abeyance.

The significance of the "the importance of the interim position," *id.*, runs to respondent's contention that its failure to appoint complainant to the interim position did not constitute an adverse employment action necessary for a prima facie case, see, e.g., respondent's post-hearing brief at pp. 17-18:

Complainant has, however, failed to establish the second element of a prima facie case. Respondent determined that Mr. Patterson had superior communication and interpersonal skills that [sic] did complainant, skills the respondent believed to be essential to the interim position. Complainant failed to prove that he has suffered an adverse employment action when a department colleague was temporarily appointed as the Acting Director of Administrative Computing, a position complainant may have coveted, but was in no way entitled to.... (Emphasis added).

Respondent also objects to reliance on Dean of Students Larkin's August 2, 1990, letter of recommendation for complainant (Complainant's Exhibit 13) as evidence of complainant's communications skills, arguing that it was written essentially to help out a friend, and that Larkin admitted on cross-examination that he could not say what his evaluation of complainant would have been if it were to have been made for official purposes. The Commission agrees that it must consider the circumstances surrounding the writing of this letter in determining how much weight it should be accorded. However, it is entitled to some weight. Furthermore, the transcript of Larkin's testimony on this point demonstrates that he was not as equivocal as respondent contends:

Q And if you had been asked by Chancellor Womack or somebody who was evaluating Bob [Chiodo] to give your opinion regarding his communication skills and those types of things, would you or would you not have given those opinions that are there?

A That's a little tougher to answer.

Q Why is that?

A Because I'd have to know the nature of why I'm being asked the question. If it was an evaluation [that would have * [a private ear], I'm open and frank. I wasn't asked that. I don't know what I would have responded at that time.

Q Ok.

A This is, this may be a mix. I consider Bob a friend. I never had any problems with him. I think he has a lot of ability. That's the nature of the letter that I wrote.

Q Right.

A So I don't know that I deal in speculation. If you ask me a question, how would I evaluate him at that point in time, that's probably an accurate summary.

* * *

Q If you had been asked at or around July 9th, what your opinions were of Bob's communications skills, what would your opinion have been?

A I think I stated it in the letter.

Respondent's transcript, pp. 73-74 (brackets in original) (emphasis added).

Respondent takes issue with the proposed decision's characterization of Patterson as a "subordinate" of complainant. Respondent cites the following testimony from Schuknecht's deposition (Complainant's Exhibit 25):

Q Would you at least see potential problems in leapfrogging a subordinate [Patterson] over their direct supervisor [Chiodo]?

A I'm hesitating, because the word "subordinate" is not exactly right.

Q Okay.

A I didn't see Rex as being particularly subordinate to Bob.

Q Okay.

A Their duties were primarily in different areas, although it required the two of them to work together.... But I -- I hesitate at the subordinate/supervisor relationship of the two of them. Although they were not on a par in terms of the people they supervised, they were not in a -- one was not subordinate to the other. pp. 20-22.

While Schuknecht saw Patterson operating relatively independently, the record evidence clearly establishes that complainant was Patterson's official supervisor. For example, Schuknecht went on to testify as follows:

Q The reason I used that term is because I saw the personnel evaluations.

A Yeah.

Q Bob did Rex's yearly evaluation.

A Yeah.

Q So I used it in that fairly traditional sense of if he's evaluating him --

A That's appropriate. Id. at 21.

The Commission has considered all of the other objections and arguments by the parties and concludes that the proposed decision will be adopted as is, except for minor typographical or editorial changes.

ORDER

The proposed decision and order, a copy of which is attached, is adopted by the Commission. Pursuant to that order, the parties are to advise the Commission within 30 days of the entry of this order whether they have reached agreement as to the remedy, or whether the Commission will have to conduct further proceedings on that subject.

Dated: June 25, 1996

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

AJT:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Robert Chiodo
c/o Atty. Michael Fox
44 E. Mifflin St., Ste. 403
Madison, WI 53703

Katharine Lyall
President, UW
1720 Van Hise Hall
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 Respondent.

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PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This case involves a claim of discrimination on the basis of age in violation of the WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, stats.) with respect to respondent not appointing complainant as Acting Director of Administrative Computing in 1990.

FINDINGS OF FACT

1. Complainant, who was born on March 11, 1934, began his employment with respondent on January 1, 1987, in an academic staff position with the title of Associate Director of Computer Services, at an annual starting salary of \$40,000.

2. Complainant was hired following a nation-wide search. The position announcement (Complainant's Exhibit 8) included the following:

The Associate Director is responsible for the supervision of the Administrative Computing Center and management of information systems. The incumbent must be able to work with administrators, administrative groups and industry representatives. Excellent communications skills are essential. The Associate Director Reports to the Director of Planning and Information Management.

Management experience, preferably in a university environment, is required. Preference will be given to candidates with a degree in computer science or a related field, experience with IBM System/370 or 43xx hardware, DOS/VSE or VM/SP operating systems, recent applications programming/systems analysis experience, and telecommunications systems planning experience.

At the time he was appointed, complainant's abbreviated job description was as follows:

Manage the Administrative Computing Center. Supervise and schedule the staff of the Administrative Computing Center, coordinate systems analysis and programming activities. Provides advice and develops recommendations related to information processing and information management. Additional assignments may be designated by your supervisor. (Respondent's Exhibit 1.)

3. Complainant's training and experience at the time he was hired included a BA in education, an MBA in organizational systems management, and extensive experience managing computer systems over approximately a 20 year period. For example, his most recent experience is summarized as follows in his resume (Complainant's Exhibit 22):

Headquarters-American Koyo Corp., Westlake, OH
Manager, management Information Systems 1983-1986

Responsible for strategic business systems planning and development of corporate-wide business systems. Manage MIS function including systems, programming and operations. Recommended and installed nationwide Electronic Mail Network, large AppleLan office automation system, Electronic Invoicing/Releasing/Cash Payment systems using EDI standards and CPU-CPU communications with customers. Hardware/Software environment included IBM 4361 and IBM/Apple micro office automation LANS, on-line, real-time national and international network used remote satellite transmission technology. Used ADS/O 4GL software to develop a central IDMS Database System. Trained in Japan on JIT and KANBAN.

4. Complainant's immediate supervisor at UW-Stout was Glen Schuknecht, Director of Planning and Information Management. In addition to responsibility for the Administrative Computing Center, which was the complainant's immediate responsibility, Mr. Schuknecht's position also was responsible for campus planning, the immediate responsibility for which was Gloria Bjornerud's.

5. As part of his responsibilities as Associate Director of Computer Services, complainant had supervisory authority over Rex Patterson, who initially was a systems analyst. About two years after complainant began his employment with respondent, he promoted Patterson to manager of *management information systems*, supervising the applications programmer analysts in the unit. In that capacity, Patterson was responsible for

supervising the programmer analysts, and for acting as liaison between the users of the applications system and the programmers and the complainant to ensure appropriate services were being provided and any problems were corrected.

6. Complainant had the primary responsibility for liaison with Gordon Jones, the director of the academic computer center, and essentially a peer of complainant's, and David Kaun, campus manager of telephone communications, who was in charge of the maintenance of the computer network on campus, as well as microcomputers and printers used on campus. Complainant interacted frequently with both Jones and Kaun, and did this more frequently than did Patterson.

7. At least in part because of Schuknecht's lack of technical expertise in computer systems and related areas, complainant essentially had complete responsibility for the day to day management of the administrative computing center.

8. As a result of Schuknecht having been given a special temporary assignment by the chancellor on April 24, 1989, of developing a recommendation for the reorganization of computer operations on campus, Schuknecht was relieved of his regular responsibilities as director of planning and information management. Complainant was given a temporary assignment of acting director of administrative computing¹ with a temporary annual salary adjustment of \$2107, which increased his base salary from \$41,763 to \$43,870.

9. Schuknecht returned to his regular position on October 1, 1989, and complainant's status reverted back to that of associate director of computer services.

10. Schuknecht retired on July 6, 1990.

11. On July 9, 1990, Jan Womack, Assistant Chancellor of Administrative Services, who had begun employment at UW-Stout in July 1989, appointed Patterson to fill the position of the director of administrative computing on an acting basis pending the anticipated staffing process for a permanent appointment.

¹ Bjornerud became the acting director for planning under a similar arrangement.

12. As of July 9, 1990, Patterson was 37 years old and complainant was 56.

13. Complainant continued in his position of associate director of computer services, which meant that he was now reporting to Patterson, his former subordinate. However, following the announcement of Patterson's appointment on July 9, 1990, complainant became ill and commenced a leave of absence which lasted until he returned to work at UW-Stout on November 14, 1991.

14. Immediately prior to his appointment as acting director of administrative computing, Patterson was still considered a subordinate of complainant's as manager of management information systems. The scope of his duties and responsibilities were much narrower than complainant's, which included all areas of administrative data processing, operations, office systems, networks, telecommunications, budgets, and strategic planning. Patterson had a BA in history and an MS in media technology, which is a program that prepares educators for using media equipment in the classroom, while complainant had an MBA in organizational systems management. Patterson had been hired at UW-Stout in 1984 as a limited term Management Information Specialist to "[i]nterview users to determine needs for data and information and analysis; chart data flow; develop input screens to be used by operators working with Student DataBase, develop output screens and report formats for users; document the final system." (Complainant's Exhibit 5). This job was Patterson's first work experience in the area of computer science. Patterson had much more limited supervisory responsibilities than complainant. In summary, Patterson's training and experience in computer science and management was much less than complainant's.

15. On July 10, 1990, the chancellor and Assistant Chancellor Womack approved, effective that date, a \$5,000 annual salary augmentation for Patterson as additional compensation in connection with his acting assignment. This increased his annual salary from \$33,964 to \$38,964.

16. During the period Patterson served as acting director of administrative computing, UW-Stout moved forward with the reorganization of computer operations on campus, referred to above in Finding 8. On July 26, 1990, Womack made certain recommendations, which included the creation of the position of Executive Director of Computing and Telecommunications, which reported to the Assistant Chancellor Administrative Services (Womack).

There were three positions reporting to the Executive Director of Computing and Telecommunications:

- 1) Director of Mainframe Operations and Management Information Systems;
- 2) Director of Computer Users Support Services;
- 3) Director of Telecommunications and Technical Support Services.

The chancellor adopted essentially this recommended organization. However, the title of Director of Mainframe Operations and Management Information Systems was changed to Computer Services Director.

17. At Womack's request, the chancellor appointed Patterson to the position of Computer Services Director, effective July 1, 1991, at an annual salary of \$49,500.

18. Patterson's appointment as Computer Services Director effective July 1, 1991, was made without any kind of recruitment or competition. Patterson was appointed because it was believed he had done a good job as acting Computer Services Director.

19. The positions in which Patterson served with the titles of acting Director of Administrative Computing, acting Computer Services Director, and Computer Services Director, were essentially the same, with some minor differences. This also was essentially the same job complainant had filled on an acting basis in 1989 when Schuknecht was on his acting assignment. The day to day activities of these positions as variously entitled above, were essentially the same as those performed by complainant in his position of Associate Director of Computer Services, when he reported to Schuknecht when the latter was Director of Planning and Information Management.

20. Womack made the decision to appoint Patterson as the acting Director of Administrative Computing effective July 9, 1990. She did not consult with anyone at the time she made the decision as to the relative merits of complainant and Patterson related to this acting appointment.

21. Womack's stated reason for appointing Patterson rather than complainant as acting Director of Administrative Computing was because she believed Patterson had superior communication and interpersonal skills.

22. Patterson did have good communication and interpersonal skills.

23. Complainant also had good communication and interpersonal skills. Complainant's performance evaluations throughout his employment at UW-Stout had always been very good, and he had never been criticized with respect to his communication and interpersonal skills.

24. As of July 9, 1990, complainant was substantially better qualified than Patterson for the position of acting Director of Administrative Computing, based on his far more substantial relevant education, his at least comparable communication and interpersonal skills, and his far more substantial experience which included not only several months of successfully serving as acting Director of Administrative Computing, but also several years successfully performing the day to day activities of the position while he was employed as Associate Director of Computer Services.

25. Respondent's articulated rationale for appointing Patterson rather than complainant to the position in question was a pretext for age discrimination.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish that respondent discriminated against him on the basis of age when it did not appoint him to the position of acting Director of Administrative Computing in July 1990.
3. Complainant has sustained his burden of proof.
4. Respondent discriminated against complainant on the basis of age when it did not appoint him to the position of acting Director of Administrative computing in July 1990.

OPINION

Complainant established a prima facie case of age discrimination by having made the following showing:

1. He was 56 years old at the time he was not appointed to the position in question in July, 1990.
2. He was qualified for the position on the basis of his knowledges, skills and abilities, in addition to having previously successfully performed the same acting assignment for several months in 1989.

3. Despite his qualifications, he was not appointed.

4. Respondent appointed someone who at the time was 37 years old. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817, 5 FEP Cases 965 (1973); Puetz Motor Sales v. LIRC, 126 Wis. 2d 168, 173, 376 N.W. 2d 372 (Ct. App. 1985).

The only real dispute concerning the question of whether complainant established a prima facie case has to do with the fact that the appointment in question was on an acting rather than a permanent basis. Respondent asserts that because of this distinction, complainant did not suffer an adverse employment action at all. However, the acting assignment carried a salary augmentation -- complainant had received an extra \$2107 on an annual basis for having served as the acting Director of Administrative Computing in 1989, and Patterson's salary was augmented on a \$5000 annual basis in connection with this appointment. Furthermore, it would beggar common sense to suggest that it would not be positive for an employee's career prospects to receive an acting appointment to a position that had just been vacated and presumably would have to be filled later on a permanent basis.² Obversely, it would be negative for an employee's career prospects not to get such an appointment. Such a negative effect was exacerbated in this case by the fact that not only did complainant get passed over for the acting assignment, but also it was given to his subordinate, who thus became complainant's boss.

Related to the foregoing is an evidentiary issue which arose during the hearing. Complainant introduced evidence over respondent's objection that Patterson in fact was appointed permanently to the position in question.³ This was about a year after his acting appointment, was without competition, and was based on his demonstrated good performance while doing the job on an acting basis.⁴ This evidence was admitted solely for its tendency to show that

² As of the date of the transaction in question (July 9, 1990), a reorganization of campus computer operations was in the works, but the record demonstrates that the position in question, although retitled and moved in the organizational chart, remained essentially the same.

³ Complainant has another complaint pending concerning alleged discrimination subsequent to respondent's decision not to appoint him to the acting position on July 9, 1990. The parties stipulated that that case would not be heard contemporaneously with the instant case.

⁴ Because the position in question is academic staff, the classified service requirements for staffing set forth in subchapter II, Chapter 230, stats., were not applicable to this appointment.

the failure to have appointed complainant to the position on an acting basis was in fact an adverse employment action.

Turning to the second phase of the McDonnell Douglas analysis, respondent's articulated rationale for its decision was that Patterson had better communication and interpersonal skills than complainant, and that this was of particular significance in the context of the changes that would be occurring in connection with the reorganization. At this point, the complainant has the burden of establishing that respondent's articulated reason for its decision was pretextual, and that respondent discriminated against him because of his age.

Complainant has produced significant evidence of pretext. To begin with, complainant's credentials in computer science were far superior to Patterson's. His resume (Complainant's Exhibit 22) reflects extensive formal training and education in computer science and related areas, and many years of high-level corporate experience in computer center management and related kinds of work. In addition, he had actually performed successfully as the acting Director of Administrative Computing for several months in 1989 when Schuknecht was on a special assignment. Also, even when Schuknecht had been present, complainant effectively managed administrative computing, subject to Schuknecht's general oversight. Patterson, on the other hand, had very little formal training or education in computer science, and his experience was limited to the years he had been employed at UW-Stout subsequent to his appointment as an MIS 2 in 1984. He had far less extensive supervisory experience.

Complainant also presented extensive evidence that his job performance at UW Stout had been exemplary. In particular, Schuknecht, who was complainant's immediate supervisor, was very positive in his evaluation of complainant's performance. For example, his January 1990 performance evaluation of complainant was as follows:

Bob Chiodo is an excellent manager. He is a knowledgeable professional, with the ability to effectively organize available resources for maximum results. He understands systems and uses them well in a variety of ways. In the short time he has been at UW-Stout he has improved documentation in the computer center from virtually none to an acceptable level. He has systematized a number of procedures, resulting in increased productivity of the entire staff. Few people fully realize or appreciate the degree of improvement in the level of service and the range of service provided by administrative computing. His

performance is well above the range acceptable for his position as associate director. (Complainant's Exhibit 4.)⁵

Schuknecht also testified that complainant would have been the most logical person on campus to have taken over as acting head of administrative computing after he retired.

Complainant testified that no one had ever complained about or expressed any criticism of his performance to him, and there was no evidence in the record of anything negative about his work record at UW-Stout.

Complainant's far superior overall credentials in and of themselves might not necessarily establish pretext, because respondent could have had a particular legitimate reason for wanting Patterson rather than complainant in this position. Respondent contended that it did have such a reason -- Patterson was a better communicator and had better interpersonal skills, and this was important in the context of the reorganization of the campus computing system that was occurring at the time. However, while the record reflects that Patterson had good communications and interpersonal skills, it also reflects that complainant also had good skills in these areas.

For example, in an April 17, 1989 evaluation prepared with respect to salary issues, complainant's supervisor (Schuknecht) commented as follows:

Finding qualified personnel in the information processing field is difficult. Finding good people with management skills and good interpersonal skills is almost impossible. The attached salary and turnover data from the Chronicle of Higher Education supports the argument for a salary adjustment for Bob Chiodo. (Complainant's Exhibit 10)(emphasis added).

An August 6, 1990 letter of reference by Schuknecht for complainant, includes the following:

Bob Chiodo has been responsible for the daily operation of the Administrative Computing center, directly supervising a professional staff of eleven. Under his capable leadership both the scope and level of computer services have been expanded.

Bob has worked effectively with the "user" community, establishing weekly meetings with representatives of the administrative offices which depended upon the Administrative Computer Center for support.

⁵ Womack reviewed and signed this evaluation form, as the next level supervisor, without having put anything in the space available for modification of the rating at her level.

He works well with individuals at all levels, communicates effectively, and has the ability to analyze complex situations. Bob is effective in dealing with vendors, and negotiated significant savings in the costs of equipment and support services. (Complainant's Exhibit 14)(Emphasis added).

Another letter of reference, dated August 2, 1990, from Associate Dean of Students, Joseph Larkin states:

In today's world it is a rare occasion when you can go into a computer shop and find someone who understands and cares [emphasis original] about problems. Bob Chiodo does care, can solve problems, and has the unique ability to translate computerize into language removed from the mystical acronyms and numbers. [emphasis added].

Bob's resume is impressive. So is Bob! The experience is not overstated nor is the expertise. There is a definite scarcity of this level of talent. Interview Bob and you will agree.

You may at this point wonder why such an individual is now available. I've been in educational administration twenty five years. Only in education do we do things that defy logic! Bob is involved in one of those potential debacles. I will be most willing to discuss this, just give me a call. (Complainant's Exhibit 13).

The only evidence in the record supporting respondent's assertions comparing complainant's ability to communicate with Patterson's are Womack's opinions:

Q Okay. Now, you indicated to me in answer to a previous question that you thought that Mr. Patterson was the best person for the job as interim director. What in particular did you feel was superior about Mr. Patterson's credentials as opposed to Mr. Chiodo's which led you to that conclusion?

A Primarily I made that decision based on communication skills.

Q And what do you mean by that?

A Interaction with other people.

Q And what do you mean by that?

A Just the ability to communicate and work with other people.

Q Had anyone told you that Mr. Patterson was a better communicator than Mr. Chiodo?

* * *

A I don't recall if anyone specifically told me that Rex Patterson was a better communicator. I doubt that. That doesn't seem reasonable to make that -- just to make that statement in a conversation, so --

Q Had anybody criticized to you Mr. Chiodo's communication skills, as he used them to serve his function as either the acting director of administrative computing or -- what was his position after he went back from being acting director?

A Associate director, the same as--

Q Associate director. In either one of those had anybody been critical of his communication skills that you know of?

A I don't believe anyone came to me and criticized his communication skills.

* * *

Q Had anyone recommended to you that you put Mr. Patterson in charge precisely because of his superior communication skills?

A No. I made that decision.

December 18, 1990, Womack deposition, pp. 23-25 (Complainant's Exhibit 24).

A May 23, 1995, deposition of Womack included the following:

Q . . . [Y]ou mentioned communication skills and I've never heard or seen in any document some evidence of communicative difficulty. And if you've got it, give it to me now. If you can't remember it, you can't remember it. But what specific difficulties, if any, did you have in communicating with Bob Chiodo?

A I think that I just -- my evaluation or my perception was inability to have good communication. And that's just an important piece of the ability to work together in management. I don't have any details for you.

* * *

Q I am limiting this question. I'm not talking about Rex Patterson. We're just talking about Bob Chiodo's inability to have good communication. And I want to know what that means. What evidence of inability to have good communications can you tell me about?

A I just really--

Q Just Bob Chiodo.

A I really can't recall anything specific.

* * *

Q I'd asked you a broad question about evidence that you had regarding Bob Chiodo's unsatisfactory communications as you could recall anything prior to July of 1990, meaning July 9 of 1990. I want to make sure I use the other word that you used. What evidence, if any, have you ever written or spoken about concerning incidents that would show Bob had bad or subpar or substandard interpersonal skills?

A I don't recall any.

May 23, 1995, Womack deposition, pp. 52-53, 58. (Complainant's Exhibit 26).

At the actual hearing of this matter, Womack's testimony in response to questions by respondent's counsel included the following:

Q You've said that you viewed Mr. Patterson's communication skills as appropriate to the appointment. Can you provide any specifics of his behaving that helped you form that position?

A It was my observation that people across campus, who wanted computer assistance and advice from the computer center, sought out advice from either Glen Schuknecht or Rex Patterson. People across campus seemed to have a confidence level in their ability to interact with Mr. Patterson. T., 59.⁶

It is not clear whether this statement, which was in response to a question concerning the basis of Womack's opinion as to Patterson's communication's skills, was meant to imply she believed that users of the computer center went to Schuknecht and Patterson rather than complainant because of problems in dealing with complainant.⁷ In any event, complainant has established that his communication and interpersonal skills were at least on a par with Patterson's.

⁶ Both parties prepared and submitted hearing transcripts. All transcript references are to the transcript prepared by respondent. This is not meant to imply that respondent's transcript would be considered dispositive in the event of any discrepancies between them.

⁷ According to Schuknecht's testimony, the nature of Patterson's job as systems analyst led to more direct involvement with administrative computer users than complainant. Schuknecht deposition, p. 21 (Complainant's Exhibit 25).

Pursuant to Kovalic v. DEC International, Inc., 161 Wis. 2d 863, 876-78, 469 N.W. 2d 224 (Ct. App. 1991), the complainant must establish not only that the respondent's proffered reason for its decision was pretextual, but also that it was a pretext for age discrimination.⁸ When the Commission considers the entire record in this case, it must conclude that respondent's articulated reason for not appointing complainant as acting Director of Administrative Computing was a pretext for age discrimination.

As discussed above, complainant's training, skills, experience, knowledges and abilities in computer science were not just superior to Patterson's -- they were vastly superior. Complainant's performance at UW-Stout had been excellent, and he had already successfully served in the acting director capacity in 1989. While respondent in effect took the position that all these factors were outweighed by Patterson's assertedly superior communication and interpersonal skills, the only evidence in this record that Patterson had better communication and interpersonal skills was Womack's opinion. However, this opinion was almost totally devoid of specificity, and there was no evidence in the record that complainant's communications skills had been criticized by anyone else. Womack's opinion was not corroborated by anyone else, including Schuknecht, who, as complainant's immediate supervisor from the commencement of complainant's employment at UW-Stout, was in a better position to have made such an evaluation. To the contrary, Schuknecht stated that complainant "works well with individuals at all levels [and] communicated effectively" (Complainant's Exhibit 14),⁹ and Associate Dean of Students Larkin praised complainant in these areas. Thus, complainant has shown not only that his overall credentials were far superior to Womack's, but also that respondent's only articulated reason for hiring an employe 19 years younger than complainant lacked credibility. Furthermore, this is not a case where the record reveals that a more or less extraneous nondiscriminatory factor was the real reason behind the employer's action. Cf. Rentmeester v. WGC, 92-0182-PC-ER (5/27/94) (respondent's rationale for

⁸ The court pointed out that in some "cases where a plaintiff establishes pretext and the employer's decision remains unexplained," id., 876, the evidence of pretext standing alone "may be sufficient to prove the ultimate fact of discriminatory intent." id., 877 (citation omitted).

⁹ Schuknecht, who had not been consulted by respondent concerning the acting appointment, also believed that complainant was the most logical choice for the job.

decision affecting complainant's conditions of employment found to have been pretextual, but the decision was far more likely to have been motivated by a vitriolic labor-management dispute than by complainant's handicap). Under all of these circumstances, the Commission concludes that complainant has sustained his burden as set forth in Kovalic.

Because the parties agreed prior to hearing to reserve the issue of remedy pending a ruling on liability, the Commission will retain jurisdiction of this matter for a determination on remedy.

ORDER

The parties are directed to consult regarding remedy and advise the Commission within 30 days of the entry of this order whether they have reached agreement on the question of remedy, or whether the Commission will have to conduct further proceedings in this regard.

Dated: _____, 1996 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:pf

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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