

5. About qualifications it stated:

Bachelors degree required (equivalent training and experience considered). Managerial experience in government purchasing. A good understanding of the constraints and ethics of government purchasing and the experience to provide problem resolution within those constraints. Excellent written and verbal skills to provide the necessary communications between State administrators, University administrators, faculty and various University purchasing staffs. To lead the management reviews and the biennial meetings, a thorough knowledge of the State Purchasing Manual will be required within three months of hire. Normally more than 5 years of professional level experience as a purchasing director or senior purchasing agent with a minimum of 3 years in a supervisory/managerial position in a large or major agency or comparable procurement and management experience would be necessary to obtain the required knowledge.

6. In his letter-application, Balele submitted a detailed narrative resume of his background, a regular (standard) resume, exam results from a similar position, course evaluations he had received for a course he had taught and a handout he had prepared for a course.

7. When Balele applied for the subject position, he was employed as an Administrative Assistant 3 (pay range 11), Bureau of Procurement, Department of Administration (DOA). He was first hired into that position in September 1985 by Larry Eisenberg, the bureau director.

8. Between September 1985 and June 1990, when he applied for the subject position, Balele spent 30-40 percent of his work time logging agency requests to purchase contractual services into a computer; 20 percent reviewing the documentation to make sure specified requirements were met; 20 percent preparing Secretary and Governor's case letters approving or disapproving agency purchasing authority; and the remainder, preparing a variety of tasks including answering agency questions about purchasing and teaching purchasing agents about the process.

9. Janet Richardson was Balele's first-line supervisor from September 1985 until the summer of 1987, when she was replaced by Janet Abrahamsen, who became the chief of the procurement services section. When Abrahamsen left her position in 1989, Robin Gates became Balele's acting first-line supervisor and remained so in 1990.

10. Mr. Balele was first hired in May 1981 as a Research Analyst 3 in the federal property program. This was his first job in state civil service.

11. Mr. Balele's first noted employment was a political appointment as deputy county executive in Maswa County, Tanzania in 1971. As deputy,

11. Mr. Balele's first noted employment was a political appointment as deputy county executive in Maswa County, Tanzania in 1971. As deputy, Balele assisted the county executive in all county affairs and supervised a staff in the executive branch. Balele worked in that position two years -- until December 1972.

12. From January 1973 to December 1975, Balele held an accountant position with Shericu Association, Shinyanga, Tanzania. There he supervised a section staff and was responsible for financial statements, budgets, feasibility studies and such; was answerable for external audits; and functioned as consultant on international trade.

13. As provided in his regular resume, Balele received a certificate from Mzumbe School Management, which he attended from January 1969 to December 1971; a Bachelor of Science degree in Ag-Business Administration from UW-Platteville in 1979; and a Master of Science degree from UW-Platteville in 1980. Also, Balele had taken several state-sponsored training courses, which included budgeting and purchasing.

14. Francis L. George, Assistant Vice President, University of Wisconsin System, supervised the Office of Procurement and the subject position. He requested recruitment of the position and directed the recruitment process. The recruitment plan was approved by System's Affirmative Action Office.

15. Mr. George developed the criteria for reviewing the job applicants' resumes and selected three people to screen the resumes. Those selected were: Dexter Thusius, position incumbent; Robin Gates, then Director of the Bureau of Procurement; and Larry Eisenberg, former Director of the Bureau of Procurement.

16. George met with Thusius, Gates and Eisenberg to discuss the criteria for evaluating the resumes. Four categories -- writing skills, government purchasing experience, supervisory experience and management, organization and analytical skills -- were selected. A maximum of 20 points could be scored in each category except management, organization and analytical skills. In this last category 40 points could be scored.

17. Thusius, Gates and Eisenberg evaluated the application materials from 60 candidates for the position, using the four criteria. Each screener used his own method of evaluating the materials; there were no written bench marks.

18. After the scores were sent to George, they were entered into the computer on a spread sheet format and the scores of the screeners were merged into a composite score for each candidate.

19. George selected the candidates with the top three composite scores for interview.

20. The top three candidates and scores were: Janet Abrahamsen, 280; Mark Skutley, 266; and Ellen James, 257. Balele's composite score was 146, placing him in the bottom third of the candidate pool. After the interviews, George selected Abrahamsen for the position.

21. This selection was approved by the U.W.S. Affirmative Action Director.

22. In June 1990, when she applied for the position, Abrahamsen was a section chief in the State Bureau of Procurement, DOA, having initially gained that position in August 1987. During that period, she supervised 9 employes, including Balele, as Procurement Services Section Chief and later 5 employes as Information Technology Section Chief.

23. Before August 1987, Abrahamsen was an Analyst/Lead Analyst in Executive Budget and Planning, DOA, for almost 4 years.

24. And before that, between May 1982 and September 1983, Abrahamsen supervised 26 employes as Section Chief in the Inheritance & Excise Tax Bureau, Department of Revenue (DOR).

CONCLUSIONS OF LAW

1. This matter is before the Commission under §230.45(1)(b), Wis. Stats.
2. Complainant has the burden to show that he was discriminated against by Respondent on the basis of color, race and/or national origin or ancestry in regard to the decision not to appoint him to the position of Director, Office of Purchasing Services.
3. Complainant has failed to sustain his burden.
4. Complainant was not discriminated against as alleged.

DISCUSSION

The issue in this matter is:

Whether respondent discriminated against complainant on the basis of color, national origin or ancestry, and/or race in violation of the

Wisconsin Fair Employment Act (WFEA) when it did not hire complainant for the position of Director, Office of Purchasing Services.

Complainant makes his claim under the disparate treatment theory and the disparate impact theory. Since less evidence was presented regarding disparate impact, the Commission will address complainant's arguments under that theory first. In brief, the disparate impact theory, as complainant claims here, is that respondent's employment practices operated to disqualify a disproportionate number of minority candidates for the position in issue. Complainant argues that such employment practices were: removing advertised qualifications after resumes had been received; scoring based on hearsay or past impressions about candidates; and having an all-white resume panel, consisting of the incumbent and former supervisors.

The evidence does not support complainant's arguments. The criteria used to evaluate candidates was substantially the same as advertised. The advertisement stated that candidates needed good writing and verbal skills, a good understanding of government purchasing, and experience in problem solving. The candidates were evaluated on writing skills, government purchasing experience, supervisory experience and management, and organization and analytical skills. Also, contrary to complainant's argument, the advertisement did not exclude candidates without a bachelor's degree. Complainant presented no evidence showing that screeners' consideration of candidates as well as their application materials impacted disproportionately on minorities, or was unlawful. Finally, other than his assertion, complainant presented no evidence that the use of an all-white, male screening panel impacted disproportionately on minority candidates.

Typically, statistical evidence is utilized in disparate impact actions to establish a prima facie case of unlawful discrimination. The only statistical evidence presented here was that the position at issue was in the Executive/Administration/Manager job group, which consisted of 7 positions; that 8.76 percent of the qualified and available labor pool were minorities; and that none of the positions were filled by minorities. The statistical data here is equivocal and inconclusive. It is insufficient to establish a prima facie case of discrimination.

With regard to disparate treatment claims, the Commission uses the analytical framework initially applied in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v.

Burdine, 450 U.S. 248 (1981). Using this analytical method here, it is clear that complainant has established a prima facie case of discrimination, and that respondent has rebutted same. The question, then, is whether the evidence presented satisfies the burden of proving the reasons for not hiring complainant are a pretext for discrimination.

Complainant's arguments under the disparate treatment theory are the same as those under the impact theory. Therefore, complainant's arguments about advertised criteria will not be addressed again since the same facts apply under this theory. However, complainant's arguments about the methods used to score candidates' resumes and the use of an all-white screening panel present aspects not yet addressed.

Complainant alleges that George and the three resume screening panelists -- Eisenberg, Gates and Thusius -- motivated by racial animus against African Americans and black Tanzanians, conspired to effect a preselection of a white candidate to the position at issue. Complainant alleges there were two "camps" -- Eisenberg, Gates and George, who favored Abrahamsen, and Thusius, who preferred Mark Skutley. Complainant argues that candidates Abrahamsen and James approached and convinced Eisenberg and Gates not to use the advertised position qualifications when screening to accommodate them for the position, and that the accommodation is reflected by the scores given Abrahamsen and James by Eisenberg and Gates. These arguments are not supported by the evidence. Contrary to complainant's allegation of facts, the job announcement indicated that a candidate could qualify for the position on the basis of a bachelor's degree or equivalent experience. Also, complainant presented no evidence of any contact by Abrahamsen and James with any member of the screening panel, as he alleges.

Complainant provided the only testimony supporting his allegation of racial hatred on the part of George, Eisenberg, Gates and Thusius, and gave no testimony about George or any of the resume screeners making derogatory remarks about African Americans or blacks from Africa. Instead, he testified to many incidents, from which he infers racial hatred. By illustration, he testified that he was not invited to attend a meeting in Platteville. He asserts that this was because Eisenberg did not want to be seen in the same car with a black, especially of African national origin. Eisenberg testified that complainant was not invited on the trip because complainant was not giving a presentation at the program. Other testimony disclosed that one passenger in the car to Platteville was an African American woman.

Similar testimony was given by complainant about work-related incidents with Gates. Again by illustration, complainant testified that he recommended to Gates that all government grants letters include anti-discrimination language. Complainant testified that Gates refused to do so and only complied under threat of suit by complainant and confirmation by the department's attorney. Conversely, the contract compliance officer testified that state highway money was exempt from statutory contract compliance requirements, including anti-discriminatory language. Gates wanted to know if this exemption applied to other grant monies. The question was put to the department attorney. Complainant asserts this is evidence of racial animus by Gates. The Commission believes this can equally be viewed as evidence of a conclusion based on incomplete information. Nothing in this incident suggests racial animus.

Complainant asserts that George previously had demonstrated hatred toward him because of his race and national origin. As proof, complainant points to his testimony about a statement George made five years ago while interviewing him. Complainant testified that George uttered to his assistant: "(Complainant) says he has experience from a country in Africa." From this and because "George has never hired a black person," complainant asks the Commission to find that George has racial animus against him. Complainant, in his brief, cites five other similar incidents involving George and concludes that George's views and acts are those of a racial "bigot."

George testified that he abhors racism. He described personal experiences with racial discrimination he and his wife have suffered. His wife is Japanese and from Hawaii. George testified that he moved to Madison because of its multicultural quality.

Complainant testified little about Thusius as a racist, except to say that Thusius and George complained to his supervisor, Eisenberg, about his presentation at a purchasing conference. Thusius and George testified that they believed complainant's presentation was patronizing. Complainant believed that they complained because they did not like his remark that the audience had to treat blacks and whites equally.

Even though all the incidents involving George, Eisenberg, Gates and Thusius asserted by complainant as proof of racial animus were not discussed here, those of record² were reviewed and considered. The evidence presented

² Complainant's brief included many representations of fact not in the record together with some documents, which also were outside the record.

regarding these incidents does not support a finding of racial and national origin animus as complainant alleges.

In conclusion, the Commission believes that complainant failed to prove, under the theory of disparate impact or disparate treatment, respondent discriminated against him because of his race, color or national origin. However, the unambiguous evidence does demonstrate that complainant perceives any differences about work-related matters with his white supervisors and other whites with authority, as based on racial animus.

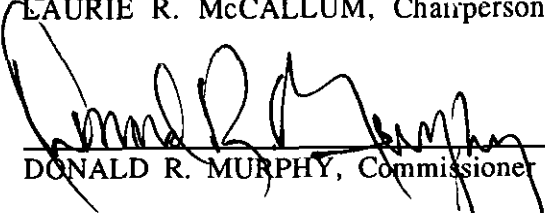
ORDER

Complainant's claim of discrimination against respondent for selecting Janet Abrahamsen instead of him for Director of the Office of Purchasing Service is dismissed.

Dated: March 9, 1994 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:dkd


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the

Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)