STATE OF WISCONSIN PERSONNEL COMMISSION

FRANK J. HINZE,

Complainant,

v.

Secretary, DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION

Respondent.

Case No. 91-0085-PC-ER

RULING ON MOTION

On May 11, 1993, respondent filed a Motion for Order to Allow the Respondent to Offer Certain Evidence and to Appoint a New Hearing Examiner. The following findings of fact are derived from information provided by respondent in the subject Motion and accompanying brief and were unrebutted by complainant.

1. The complainant filed a charge of discrimination against the respondent on July 3, 1991. The complainant charged that the respondent failed to hire him for a Regulation Compliance Investigator 1 (pay range 9) position in the Division of Trade and Consumer Protection, Bureau of Consumer Protection, because of discrimination based on age and/or sex. The complainant is a white male over 40.

2. In his complaint, the complainant alleges among other things that Fran Tryon, who was one of the two interviewers for the position in question and is the director of the Bureau of Consumer Protection where the position is located, told people that she intended to hire him and made unfair statements concerning his character.

3. At the prehearing conference convened by the Commission, settlement was discussed but no settlement possibilities were apparent, and a hearing was scheduled for April 22 and 23, 1993.

4. The parties met at 9:00 a.m. on the first day of hearing prepared to proceed with their cases. Counsel for respondent represents that respondent was prepared to present evidence to show that Fran Tryon, one of the interviewers and the director of the Bureau of Consumer Protection, was, on several

occasions prior to making her hiring recommendation and drawn into conversation, questioned by the complainant concerning the hire; that, although she attempted to respond to the complainant in a polite manner which encouraged him to participate in the hiring process without commenting on the outcome of the process, she became aware through other sources, as well as through comments made by the complainant himself, that the complainant had the impression he had been assured he would be offered the job and had been indiscriminately telling people this; and that Melanie Hayes, the other interviewer, was also aware before making her hire recommendation that the complainant had been telling other people that Fran Tryon had assured him he would be hired and also knew that this was not the case.

5. Counsel for respondent has also represented that both interviewers were prepared to testify that this knowledge caused them to question the complainant's judgment and reliability and contributed to their recommendation that the complainant was not as well qualified as the two candidates who were hired; and to testify that they felt that the complainant was qualified to perform the position in question.

6. Before going on the record, the hearing examiner suggested the parties meet with him in the hallway for a settlement discussion. As a result of such discussion, the parties agreed to adjourn the hearing pending the outcome of complainant's competition for a range 12 investigator position in the section in which Ron Paul was employed. Complainant and Mr. Paul are friends. Counsel for respondent indicated his concern to complainant, complainant's counsel, and the hearing examiner that the complainant might tell department employes that the department was considering offering him a position in a manner which might negatively affect the current pay range 12 recruitment, and which might give the impression that the department was somehow admitting fault in the original hiring process. It was impressed upon the complainant's attorney that the complainant must take care not to discuss the terms of the negotiation indiscriminately. The complainant's attorney stated he would so inform the complainant but that he could not make any promises.

7. The hearing examiner then adjourned the hearing based on the terms proposed by the respondent, and scheduled a conference with the attorneys on the following morning to discuss new hearing dates. The respondent's representatives then informed three of its witnesses, Fran Tryon, Melanie

Hayes and John Alberts, all managers in respondent's Division of Trade and Consumer Protection, that the hearing was to be postponed to allow the complainant to compete for a pay range 12 investigator position in the Division of Animal Health, and were cautioned not to discuss this with anyone. All then returned to respondent's central office except Melanie Hayes, who went home. The time was approximately 10:30 a.m.

8. In a memo dated May 7, 1993, counsel for respondent stated as follows:

> At 12:00 p.m. I received a telephone call from Gail Nordheim. She was irate because she had just been told by Ron Paul that we had offered the Investigator position (pay grade 12) which was being recruited for Ron Paul's section as a settlement in Hinze's discrimination complaint. I asked her to ask Ron Paul (who was in her office) who told him that. She told me Ron Paul refused to say because it was confidential. She asked again and Ron Paul told her that it was confidential source from within the personnel commission. Ron then left Gail's office and I proceeded to explain to Gail the basis for the agreement and what the agreement entailed. She agreed to meet with Elizabeth Kohl and myself to make sure there were no further misunderstandings.
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> After the phone call I discussed the events with Elizabeth and then went to John Alberts office where he was meeting with Fran. This was before 12:30. Neither of them had spoken to anyone about the settlement. Melanie had gone straight home after the hearing. But they both said Bob Park was telling people that we had offered Hinze a position with Animal Health. Later John asked Bob who told him that. He said Dan Vogel told him that and that he understood Vogel was told that by Frank Hinze.

The respondent has offered the following as the basis for the subject Motion:

> The respondent is prepared to show that an important non-discriminatory factor in its hiring decision was that the interviewers questioned the complainant's judgment and reliability based on their observations relating to his behavior during the hiring process. This behavior included the complainant misconstruing statements he heard or was told had been made concerning his job prospects in such a way that he came to believe he was being guaranteed a job, and then indiscriminately and irresponsibly expressed this view to any number of the respondent's employees.
>
> The events discussed in the attached memo to file show the identical behavior of the complainant under very similar circumstances. The fact that complainant exhibited the same behavior as that observed by the interviewers, and under similar circumstances, is both relevantant and probative as to whether the ob-

> servations made by the interviewers prior to the hire recommendations were accurate and should have caused them to question the complainant's reliability and judgment, and as to whether the complainant's allegations concerning statements made by Fran Tryon are accurate.

It is axiomatic that respondent, in defending a hiring action, would not be allowed to offer as a justification factors not actually considered by the hiring authority in reaching such decision. However, that does not mean that respondent would be prevented from introducing evidence tending to corroborate impressions or beliefs held by those involved in the hiring process regardless of when that evidence came to respondent's attention. This does not introduce a new factor into the equation but simply serves to validate a factor already considered. In the instant case, it is contended by respondent that Ms. Tryon and Ms. Hayes, based on impressions they had of complainant through his interaction with them prior to and during their interview of him, had concerns regarding complainant's judgment and reliability. Respondent further contends that complainant's actions subsequent to a recent settlement conference raised similar concerns regarding his judgment and reliability and were probative in regard to this factual aspect of the case. The Commission concludes that the evidence sought to be introduced by respondent has reasonable probative value in the context of this type of administrative proceeding.

Complainant argues that the evidence sought to be introduced by respondent is barred by operation of §904.08, Stats., which states as follows, in pertinent part:

> **904.08 Compromise and offers to compromise.** (1) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations in likewise not admissible. This subsection does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, proving accord and satisfaction, or proving an effort to compromise or obstruct a criminal investigation or prosecution.

However, it is not evidence as to the existence of an offer or the existence of an acceptance of a settlement which is at issue here, but evidence as to complainant's behavior in reaction to what was negotiated. In addition, it is not

complainant's conduct during settlement negotiations which is at issue here but complainant's conduct subsequent to such negotiations and outside the scope of such negotations. The Commission concludes that the evidence at issue here is not required to be excluded by operation of §904.08, Stats. The Commission also notes here that §904.08, Stats. is not applicable to administrative proceedings and that §227.45, Stats., states the following evidentiary requirements for administrative proceedings:

> (1) . . . an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

Respondent also moves for the appointment of a new hearing examiner. The fact that respondent has served notice that it intends to call Mr. Stege as a witness presents Mr. Stege with an apparent conflict of interest as the designated hearing examiner. In view of the fact that respondent has represented that it intends to question Mr. Stege as to the events surrounding and subsequent to the above-referenced settlement conference and the Commission has concluded that evidence as to such events has reasonable probative value, the Commission agrees with respondent that a different hearing examiner should be appointed in Mr. Stege's stead.

Order

Respondent's Motion is granted.

Dated: July 13, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

JUDY M. ROGERS, Commissioner