

FINDINGS OF FACT

1. Ms. Rosenbauer, based on her examination score, qualified for an interview for respondent's vacant position of Food Service Supervisor 3.
2. Ms. Ingrid Schaacke, respondent's Director of Dining Services, was the sole individual who conducted the interviews for respondent. She prepared a grid-form prior to the interviews which contained the following categories: supervision, training, public relations, purchasing, inventory, menu planning, cash handling, budget preparation, production, special events and sanitation.
3. Ms. Schaacke did not prepare written questions in advance of the interviews to ensure that each candidate was asked the same question for each of the categories on the grid.
4. Ms. Schaacke scored each interviewed applicant for each grid factor. She did not, however, record the basis for the scores. In other words, the forms themselves do not contain notes of the answers given by the interviewed candidates to any questions which may have been posed by Ms. Schaacke.
5. Ms. Rosenbauer's interview was scheduled and occurred on May 7, 1991. Ms. Schaacke's interview of Ms. Rosenbauer was very short, lasting only 10 or 15 minutes. The interview began by Ms. Schaacke sharing with Ms. Rosenbauer a copy of the position description (PD) and providing Ms. Rosenbauer an opportunity to review the PD. Ms. Rosenbauer shared a copy of her resume with Ms. Schaacke. Time was taken to allow Ms. Rosenbauer to review the PD, and to allow Ms. Schaacke to review the resume. Ms. Schaacke then asked if Ms. Rosenbauer had any questions regarding the PD, and Ms. Rosenbauer said she had no questions. Little else was said during the interview, except as specifically noted in these FINDINGS of FACT.
6. Ms. Schaacke did not ask Ms. Rosenbauer for details regarding her training or work experience. Ms. Schaacke did not complete a grid-form for Ms. Rosenbauer during the interview.
7. A period of time existed during the interview when no words were spoken. Ms. Rosenbauer then asked if the interview was completed and Ms. Schaacke said it was. After this, Ms. Schaacke asked Ms. Rosenbauer when her

baby was due to be born. Ms. Schaacke asked no further questions about Ms. Rosenbauer's pregnancy.

8. Ms. Schaacke hired a male candidate, James T. Metallo, for the position sought by Ms. Rosenbauer. Ms. Schaacke provided Mr. Metallo during his interview with an opportunity to supplement information shown on his resume. She did not provide Ms. Rosenbauer with an opportunity to supplement information shown on her resume.

9. Jeffrey Trost also interviewed for the position. He shared a copy of his resume with Ms. Schaacke. He reviewed the PD and was asked if he had any questions about the job, which he did not. Ms. Schaacke only asked him two other questions: whether he had experience working in a restaurant and whether he had experience promoting a restaurant. Mr. Trost had little or no experience in these areas because the majority of his work was in institutional settings, such as Southern Wisconsin Center. His interview lasted about 10 minutes.

10. Respondent's hire for the Food Service Supervisor 3 position, was not an affirmative action hire for women, minorities or any other group protected by state or federal law. Respondent's use of Ms. Schaacke as the sole interviewer was not illegal and was not an abuse of discretion. Respondent was under no legal obligation to use an interview panel of more than one person, nor did respondent have any internal policies which required use of an interview panel of more than one person.

11. The interview structure for this hire did not provide candidates with the same or essentially the same opportunity to present relevant information about their training and experience and therefore was an abuse of discretion.

12. Ms. Schaacke's non-selection of Ms. Rosenbauer was not based upon the fact that Ms. Rosenbauer was pregnant at the time of the interview, nor was it based upon Ms. Rosenbauer's sex. Ms. Schaacke has willingly granted pregnancy leave to other employes and has gone beyond legal requirements in granting requested job alterations upon return from pregnancy leave. She also has passed from probation a pregnant employe. Further, Ms. Schaacke has hired for several of respondent's vacant management positions and the individuals hired were about equally split between men and women.

13. Ms. Schaacke's preselection of Mr. Metallo was raised as a potential fact in this case, but was not shown to be true. Mr. Metallo, in fact, was Ms. Schaacke's third-ranked choice for the job. The first-ranked individual was not hired because his prior employers did not confirm the level of experience claimed by the candidate. The second-ranked individual was not hired because he did not respond to respondent's request for a second interview.

14. At the time of the hire in this case, respondent had changed the focus of its food program, mainly due to the approaches preferred by Elmer Hamann, respondent's Director of Auxiliary Services. Respondent's prior focus had been on serving food cafeteria style which student meal-ticket holders paid for in advance whether the food was desirable or not. Mr. Hamann's changed focus was to require payment of food only when the student felt the meal offered was desirable, and to offer a variety of dining methods from cafeteria lines to formal dining atmospheres. Respondent therefore valued in the candidates a background which include experience with dining settings where customers had a choice in what they ate and paid for, as well as experience with non-cafeteria-line dining atmospheres. Both criteria were job-related and Mr. Matello met them better than Ms. Rosenbauer.

15. The position for which Mr. Matello was hired was expected to oversee the Sandberg Residence cafeteria and the Palm Gardens (pizza), as well as to cater special events. Catering comprises 20-25% of the position. The Sandberg Residence and the Palm Gardens offer dining through self-service cafeteria lines.

16. Respondent has 20 different dining operations ranging from cafeteria lines to formal dining. Each dining operation is expected to be self-sufficient from a budget perspective. In other words, the money paid by customers is expected to be sufficient to cover operational expenses. Each dining operation competes with all other operations for customers (comprised mostly of students, faculty and campus visitors); and respondent's 20 dining operations, of course, are in competition with non-university offerings, such as McDonalds.

17. Mr. Matello had more experience than Ms. Rosenbauer with working in restaurants which competed for customer business. The majority of Ms. Rosenbauer's experience (including her most recent experience) was with correctional dining rooms where the majority of customers are inmates and

have no choice of where to dine. In other words, inmates eat either the food presented at the institution, or they do not eat. The same would be true of her experience at Southern Wisconsin Center.

18. Mr. Matello was more qualified for the Food Service Supervisor 3 position than was Ms. Rosenbauer.

19. Mr. Matello had more experience than Ms. Rosenbauer in catering special events.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission, pursuant to sections 230.44(1)(d) and 230.45, Wis. Stats.

2. Complainant failed to meet her burden of showing by a preponderance of the evidence that respondent's failure to select her for the Food Service Supervisor 3 position was discriminatory.

3. Appellant failed to meet her burden of showing by a preponderance of the evidence that respondent's failure to select her for the Food Service Supervisor 3 position was illegal.

4. Appellant did meet her burden of showing by a preponderance of the evidence that respondent's failure to select her for the Food Service Supervisor 3 position was an abuse of discretion.

OPINION

Credibility Determination

The events which occurred during Ms. Rosenbauer's interview were contested with polar versions offered by Ms. Rosenbauer and Ms. Schaacke. The hearing examiner believed that Ms. Schaacke failed to provide each candidate with the same opportunity to explain their qualifications. Specifically, where Ms. Schaacke noted from the candidate's resume that the candidate's background was institutional, the hearing examiner believes Ms. Schaacke made certain assumptions about the individual's job qualifications and scored the candidate based upon those assumptions. Ms. Schaacke did not ask these candidates (such as Rosenbauer and Trost) questions to provide them with an opportunity to either confirm or dispel the assumptions she made.

The hearing examiner's conclusion in this regard is based upon credibility determinations in part, and upon portions of Ms. Schaacke's own testimony. For example, Ms. Schaacke initially testified that she asked each candidate questions about each category on her grid-form. However, when she was asked to go over each category for Ms. Rosenbauer, Ms. Schaacke said she was not sure if she asked Ms. Rosenbauer questions about her purchasing experience because the resume indicated some experience. Similarly, Ms. Schaacke could not say for certain if she asked Ms. Rosenbauer about her menu planning experience. Ms. Schaacke noted from the resume that any menu planning experience would have been gained in an institutional setting.

Discrimination Complaints

The analytical framework for discrimination cases was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). This framework provides that the burden is first on the complainant to show a prima facie case; that this burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination.

Complaint based on sex: Ms. Rosenbauer did not establish a prima facie case of sex discrimination. It is true that she is female and, as such, is protected under the Fair Employment Act. It is also true that she was qualified for the Food Service Supervisor 3 position. However, she did not show she was rejected for the job under circumstances giving rise to an inference of discrimination.

The person making the hiring decision (Ms. Schaacke) was of the same sex as Ms. Rosenbauer, making it unlikely that the decision to hire Mr. Matello was based on sex. Ms. Schaacke's history of management hires being about the same for men as women further dispels an inference of sex discrimination.

Even if Ms. Rosenbauer had established a prima facie case of sex discrimination, respondent offered a legitimate, non-discriminatory reason for its action. Specifically, Ms. Schaacke said Mr. Matello was hired instead of Ms.

Rosenbauer because he was more qualified for the position. Ms. Rosenbauer did not show this proffered reason was pretextual³.

Complaint based on sex⁴: Complainant did not establish a prima facie case of discrimination based on pregnancy. It is true that Ms. Rosenbauer was pregnant at the time of her interview and that the Fair Employment Act would prohibit her rejection if based on her pregnancy. It also is true that Ms. Rosenbauer was qualified for the position of Food Service Supervisor 3. However, she did not show she was rejected under circumstances giving rise to an inference of discrimination.

A potential inference of discrimination existed due to Ms. Schaacke's question about Ms. Rosenbauer's pregnancy, a topic which is inappropriate during an interview. However, this inference of discrimination was rebutted by the following evidence: a) Ms. Schaacke's credible testimony that she did not consider the question to be part of the interview and, in fact, asked the question to show interest in Ms. Rosenbauer as a person; b) Ms. Schaacke's record of willingly granting pregnancy leaves for other employees, c) Ms. Schaacke's passing off probation of a pregnant employee, and d) going beyond legal requirements by granting accommodation requests of employees returning from pregnancy leave.

Again, even if Ms. Rosenbauer had shown a prima facie case of discrimination based on sex⁵, she failed to rebut respondent's legitimate reason for failing to hire her. In other words, she did not show she was more qualified for the job than Mr. Matello.

Appeals

Alleged Illegal Hire: Ms. Rosenbauer was unable to cite one applicable legal authority to support her contention that more than one

³ The Commission replaced the word "untrue" with the word "pretextual" to more accurately describe complainant's burden of proof.

⁴ The Commission replaced the word "pregnancy" with "sex" to reflect that discrimination complaints founded on pregnancy are considered under the FEA protected basis of sex.

⁵ Ibid.

individual should have conducted the interviews. Nor could Ms. Rosenbauer cite one internal policy of respondent's in support of this contention. Therefore, she failed to establish that an illegal hire occurred.

Alleged Abuse of Discretion: Ms. Rosenbauer's claim of abuse of discretion for failing to have more than one interviewer fails for the same reason noted in the prior paragraph. Ms. Rosenbauer, however, did show an abuse of discretion based on respondent's failure to give the same or essentially the same opportunities for applicants to provide information regarding their qualifications for the position.

An 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, 79-208-PC. In determining whether an abuse of discretion occurred, the Commission considers whether the selection criteria used by the appointing authority were related to the duties and responsibilities of the position and whether the criteria were uniformly applied. Royston v. DVA, 86-0222-PC (5/10/88) and Jorgensen v. DOT, 90-0298-PC (6/12/91). Here, the criteria cannot be characterized as applied uniformly when Ms. Rosenbauer did not have the same or essentially the same opportunity to present her qualifications as did the person selected.

Remedy: The appropriate remedy in this case is limited to a cease-and-desist order. Back pay is not an available remedy because Ms. Rosenbauer did not establish her discrimination complaints or establish that she would have been hired absent the abuse of discretion.⁶

An individual who prevails in his/her appeal would be entitled to appointment of the next available comparable position but only if he/she shows that he/she would have been hired in the contested position if the illegality or abuse of discretion had not occurred. Thornton v. DNR, 88-0089-PC (11/15/89). Ms. Rosenbauer is not entitled to this form of relief because she did not show she was more qualified for the position than the person selected.


⁶ This sentence was changed and the last sentence deleted to correct a misstatement. Attorneys fees may be available in appeal cases under the limited circumstances described in the Equal Access to Justice Act.

The appropriate remedy here is as follows: Respondent on remand should desist from the same kind of abuse of discretion if appellant should reapply for employment in the classified service in the future.⁷

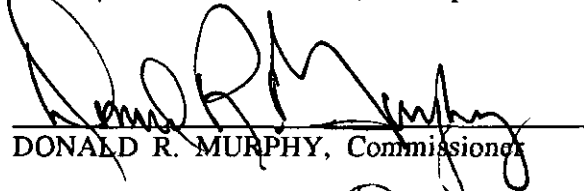
ORDER

Case No. 91-0071-PC-ER (discrimination complaint) is dismissed. With respect to Case No. 91-0086-PC, respondent's actions are rejected and this matter is remanded to a respondent for action in accordance with this decision.

Dated: September 24, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR


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

⁷ A new final paragraph was added to the DISCUSSION section and the text of the ORDER was changed from the proposed decision and order to more accurately reflect the remedial authority available to the 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.