



STATE OF WISCONSIN

PERSONNEL COMMISSION

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PASTORI BALELE,

                  Complainant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES, and  
Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

                  Respondents.

Case No.          91-0118-PC-ER

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DECISION  
AND  
ORDER

This matter is before the Commission on a complaint of discrimination on the basis of color, race, national origin and ancestry. Respondents' having stipulated, for the purpose of this case only, that its decision to use Option 2 (Method) to recruit for the work positions at issue had a disparate impact on minorities, including complainant, a hearing was held on the following: Whether the complainant was qualified for the positions of (a) Human Services Administrator 5 - Deputy Administrator, Division of Vocational Rehabilitation, or (b) Human Services Administrator 5 - Deputy Administrator, Division of Community Services, and if so, whether complainant would have been hired for either of these positions if he had been allowed to compete for them.

FINDINGS OF FACT

1. Complainant Pastori Balele is a black African from Tanzania, who was employed in the state Department of Administration (DOA).
2. Respondent Department of Health and Social Services (DHSS), like DOA, is a state agency. Respondent Division of Merit Recruitment and Selection is a unit within the Department of Employment Relations (DER), a state agency.
3. On June 10, 1991, DHSS announced a Career Executive vacancy for a Human Services Administrator (HSA) 5 - Deputy Administrator position in its Division of Vocational Rehabilitation.
4. Later, on July 10, 1991, DHSS announced a Career Executive vacancy for a HSA 5 - Deputy Administrator position in its Division of Community Services.

5. Complainant Pastori Balele submitted applications for both positions, and on each occasion was disqualified by DHSS because he did not have Career Executive status.

6. The job announcements for both positions were substantially the same and included a description of the basic duties and responsibilities of the position as follows:

The major responsibilities of this position include: develop plans, policies, and procedures for the division's programs and operations; coordinate programs and initiatives with high level government officials, legislators, advocacy and citizen groups; direct policy analysis and implementation, draft legislative proposals and administrative rules in all program areas; oversee planning for and development of the division's objectives and priorities for biennial and annual budget reviews; prepare annual operating budgets and workplans; provide leadership through regular management staff meetings to ensure proper communications with bureaus, offices and field offices; participate in resolving emergency situations; conduct ongoing evaluation of division programs, operations and projects; oversee the division's efforts in attaining and maintaining a balanced work force; and represent the division at meetings of community, state, regional and national bodies, organizations and groups to facilitate mission-supportive changes and initiatives, to explain or clarify division/department activities, and to respond to citizen concerns.

7. Also the job announcements for both positions specified the same knowledge requirements. Under the heading Knowledge Required, the announcement provided as follows:

Management techniques and practices; policy development; budget development and monitoring; human/social services program administration; public interaction; strategic planning; central/field operations; management review/program auditing; total quality management principles and practices; program system technology; and verbal and written communication.

8. At the end of each announcement was the instruction to verify on the submitted resume either attainment of Career Executive status or Career Executive appointment and scheduled Career Executive status attainment date.

9. Twelve candidates were interviewed for the HSA 5 Deputy Administrator, Division of Vocational Rehabilitation position.

10. This group consisted of one black male, four white females and seven white males.

11. The interview panel was comprised of Mike Hughes, Director, Office of Policy and Budget, a white male; Jean Rogers, Administrator, Division

of Management Services, a white female; and Judy Norman-Nunnery, Administrator, Division of Vocational Rehabilitation, a black female.

12. The interview panel caucused after each interview and again after all interviews were completed. Then they compared notations and agreed upon the ranking of each candidate.

13. The panel selected Janet Van Vleck, a white female, as the top candidate and shared that information with the department secretary.

14. On July 8, 1991, Judy R. Norman-Nunnery as appointing authority appointed Janet Van Vleck to the vacant HSA 5 position in the Division of Vocational Rehabilitation.

15. Like the HSA 5 interview process, twelve candidates were interviewed for the Deputy Administrator vacancy in the Division of Community Services.

16. The ethnic makeup of this group was: one black male, three white females and eight white males.

17. The interview panel for the Community Services vacancy consisted of Jean Rogers (previously identified); Ann Haney, Administrator, Division of Health, a white female; and Eloise Anderson, Administrator, Division of Community Services, a black female.

18. At the conclusion of the interview, Thomas Alt, a white male, was selected to fill the vacant HSA 5 position.

19. On August 29, 1991, Eloise Anderson, as appointing authority, hired Thomas Alt, appointment effective September 22, 1991, for the HSA 5 position in the Division of Community Services.

20. Complainant has worked in the state's Department of Administration six years as an Administrative Assistant 3 (PR 1-12), and four years as a Research Analyst 4 (PR 8-05).

21. Prior to that, between 1971 and 1972, complainant was employed two years as a deputy county administrator, Maswa County, Tanzania.

22. In 1972, complainant resigned his county administrator position to become an accountant for Shirecu Cooperative Union, Shimyanga, Tanzania, where he remained until 1975.

23. Two months before coming to the United States in 1975, complainant was appointed General Manager of Kigoma Cooperative Union, Kigoma, Tanzania.

24. Complainant's educational background includes: B.S., Agriculture Business Administration, UW-Platteville, 1979; M.S., Agricultural Industries, UW-Platteville, 1981.

25. Janet Van Vleck, Career Executive Status appointee to the HSA 5 position, DVR, DHSS submitted a resume with her application form to respondent which included information as follows: Education: M.A., Management - Public Administration, 1971, American University; B.A., English, 1962, Ohio State University. Work Experience: November 1984 to present, Unemployment Compensation, Deputy Administrator, Department of Industry, Labor and Human Relations (DILHR); October 1983 - November 1984, Job Service Assistant Administrator, Central Operations, DILHR; August 1979 - April 1983, Director, Bureau of Personnel and Employment Relations/Assistant Administrator, Administration Division, Department of Revenue (DOR); February 1978 - August 1979, Administrator, Administration Division, DOR; December 1972 - February 1978, Director, Bureau of Mar. Analysis, Administration Division, DILHR; September 1971 - December 1972, Management Analyst, AD, DILHR; November 1968 - December 1969, Director, Madison WIN (work incentive), Wis. State Empl. Ser. (WES), DILHR; July 1966 - November 1968, Research Analyst, WES, DILHR; October 1964 - July 1966, Job Placement Interviewer, WES, DILHR; September 1962 - October 1964, Claims Authorizer, Chicago Payment Center, Social Security Administration.

26. Thomas Alt, Career Executive Status appointee to the HSA 5 Division of Community Services position, submitted a resume with his application form to respondent which included information as follows: Work Experience: March 1988 to present, Director, Bureau of Information and Telecommunications Management, Department of Administration (DOA); January 1987 - February 1988, Assistant to the Director, Bureau of Engineering Services, DOA; January 1983 - December 1986, Deputy Secretary, DOA; September 1979 - January 1983, Director, Bureau of General Services, DOA; August 1974 - September 1979, Executive Budget Office, State Budget Office, DOA. Education: M.A., Public Policy and Administration, UW-Madison, 1974, high honors graduate; B.S., Political Science, UW-Platteville, 1973, high honors graduate.

27. On September 3, 1991, complainant hand delivered a complaint of discrimination against respondent regarding the recruitment and hire of the positions in issue.

CONCLUSIONS OF LAW

1. The Commission has the authority to hear this matter pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proving that he was discriminated against by respondent on the basis of color, race and/or national origin in regard to its failure to interview him for the subject positions and appoint him to either of the subject positions.
3. As stipulated for the purposes of this case only: The limitation of recruitment for positions in issue only to applicants with Career Executive Status resulted in a disparate impact upon minorities including complainant.
4. Complainant has failed to meet his burden of proof.
5. Complainant has not established that respondent discriminated against him as alleged.

DISCUSSION

Respondent stipulated, for the purpose of this case only, that its decision to use Option 2 to recruit for the Career Executive positions in issue had a disparate impact on minorities, which included complainant. Further, respondents consented to judgment on this issue, provided complainant proved a prima facie case of discrimination. Within that framework, the issues agreed for the hearing were: Whether the complainant was qualified for the positions of (a) Human Services Administrator 5 - Deputy Administrator, Division of Vocational Rehabilitation or (b) Human Services Administrator 5 - Deputy Administrator, Division of Community Services, and if so, whether complainant would have been hired for either of these positions if he had been allowed to compete for them.<sup>1</sup>

Using the model of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93, S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), complainant meets the burden of proving a prima facie case of discrimination in hiring by establishing that he: (1) is a member of a class protected by the Fair Employment Act, (2) applied for and was qualified for an available

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<sup>1</sup> Complainant, unrepresented by legal counsel, filed a 78-page brief with attachments, including affidavits, exhibits and appendices. Most of his arguments pertain to the issue of disparate impact, which was stipulated and other matters not before the Commission, and this discussion will not allude to them, but will discuss only the relevant arguments.

position, and (3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Clearly, on the basis of his race and national origin, complainant is a member of a group protected against discrimination under the FEA. Although complainant did not have Career Executive status, setting aside the question of whether he would have qualified for interview, the unambiguous evidence demonstrated that complainant met the basic qualifications for the positions in issue. Previously, on more than one occasion, complainant had passed examinations which resulted in certification and interviews for Deputy Administrator positions. Finally, complainant was not selected for either of the subject positions, but instead appointments were made to white persons of U.S. national origin. Therefore, complainant has met the McDonnell test for establishing a prima facie case of discrimination in hiring.

The remaining question is: If complainant had been given the opportunity to apply for the subject positions, would he have been selected for either of them? Under Caviales v. DHSS, 744 F. 2d 1289 (7th Cir. 1984), respondent has the burden of proving complainant's inevitable rejection.

A respondent's witness, Eloise Anderson, Administrator, Division of Community Services (DCS), described DCS as a 400-employee unit, responsible for social service programs and mental disabilities service programs, except institutional, for the elderly, disabled, children and families in need of long-care support. As appointing authority for the DCS, HSA 5 position, she stated that she was looking for a candidate with special technological knowledge and skills, high level budget experience and high level management experience. Anderson stated that Thomas Alt was the most qualified candidate because of the level of skills in technology, budget, government interaction and management that he brought to the position. Anderson stated that if she had been given the opportunity -- she was asked a hypothetical -- she would not have selected a candidate with complainant's qualifications, because that person lacked high level state governmental experience and management.

Judy Norman-Nunnery, Administrator, Division of Vocational Rehabilitation (DVR), also a witness for respondent, stated that her division consisted of 625 employees and operated a budget of \$80 million. As appointing authority for the DVR position, which, like the DCS position, was in pay range 21, she stated that it was her opinion that Jan Van Vleck was the most qualified candidate for the position. Norman-Nunnery stated that preference was put on the individual who had the strongest management experience, knowledge

in management theories and technology. Norman-Nunnery stated that an individual (with complainant's qualifications ) would not be equal to nor exceed the qualifications of the selected candidate.

Complainant argues that the appointees to the subject positions were not properly certified and therefore were ineligible for the position. He bases his argument on respondent DMRS's response to interrogatories in which DMRS states: "not all employees in the career executive program have taken exams, although a majority have.... They may have to take exams to be considered for other career executive positions." Complainant presented no evidence regarding whether the successful candidates were properly certified. The only evidence of record is that the appointees had career executive status and were among those certified for the positions.

In connection with the first argument, complainant argues that he was legally more qualified than those selected for the positions. This argument is predicated upon complainant's prior unproven assertion that the appointees were ineligible. Therefore, it must fail. In addition, complainant presented no proof that his prior certifications would have been acceptable for the subject positions. The previously mentioned DMRS's interrogatories, which were entered into the record as Complainant's Exhibit 10c stated, in effect, that existing registers (certification lists) for a position included in the career executive program may not necessarily meet the criteria established for another Career Executive position.

Complainant also makes the following arguments: (1.) If affirmative action laws, policies and procedures had been followed by respondents, he would have been selected if he had been allowed to compete. (2.) Respondents believed education and experience gained in Africa is inferior to that in this country. (3.) The successful candidates were preselected. (4.) Alt was "prepped" for the DCS position. (5.) Respondent believes that because a black male candidate for subject positions ranked 5th, any other black individual would finish lower than the successful candidates. (6.) Subjectivity of the appointing authority played an important role -- "If the secretary (DHSS) did not like the individual recommended that individual was out of luck." Also, complainant made many arguments not relevant to the issues.

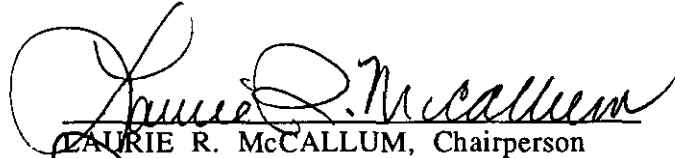
Complainant was the sole witness in his behalf. Since he was unrepresented, he testified in the narrative. Some of complainant's testimony was neither based on personal knowledge nor met exceptions to the hearsay rule. Other testimony was not probative of the issues. But in the best light,

complainant presented no evidence which would support a finding favoring any of the listed arguments. As it happened in both instances, the appointing authority was a black African-American female. Their testimony provided no inference of bias against blacks of any national origin. The hearing examiner could discern no hesitancy in their testimony. It appeared to be given freely, without trepidation, constraints or coercion.

ORDER

Complainant's complaint is dismissed and this matter is remanded to respondent for action consistent with its stipulation.

Dated: April 30, 1993 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

DRM:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, 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.