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JOHN P. SAGADY,
 Complainant,

v.

Executive Director, EDUCATIONAL
 COMMUNICATIONS BOARD

 Respondent.

Case No. 92-0101-PC-ER

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DECISION
 AND
 ORDER

Nature of the Case

This matter is before the Commission pursuant to §230.45, Wis. Stats., on an allegation by complainant John P. Sagady that the Educational Communications Board, the respondent in this matter, declined to hire him in favor of a less qualified handicapped individual in violation of the Wisconsin Fair Employment Act, §111.321 et seq., Stats. A hearing was held on June 18, 1993, before Donald R. Murphy, Commissioner. At the conclusion of the hearing, the parties gave closing oral arguments.

Findings of Fact

1. Respondent (Educational Communications Board), a state agency, conducted interviews during April and May of 1992 for a permanent Management Information Specialist (MIS 3) vacancy.
2. ECB interviewed five finalists, including the complainant, who had been a limited term employee with ECB from August of 1991 to March of 1992.
3. ECB assigned Marcia Jensen, Data Processing Manager, and Mark Silbaugh, Programmer/Analyst, to interview the MIS 3 finalists.
4. The five finalists interviewed by Jensen and Silbaugh were: John Sagady, the complainant; Larry Vesperman, the successful candidate; Dennis Mulholland; Alan Rabin; and Chester Barbasiewicz.

5. The finalists were told at the interview that the MIS 3 position would be changing, requiring heavy personal computer (PC) support and heavy user support.

6. All five finalists were asked the same ten questions during the interview.

7. The finalists were rated by Jensen and Silbaugh on the basis of their responses to the interview questions and their pertinent training and experience listed in their resumes.

8. After the interviews were completed, Jensen and Silbaugh rated and ranked the finalists as follows:

<u>Rank</u>	<u>Name</u>	<u>Score(Silbaugh)</u>	<u>Score(Jensen)</u>	<u>Avg.</u>
1	L. Vesperman	185	208	196.5
2	D. Mulholland	190	201	195.5
3	J. Sagady	199	185	192.0
4	C. Barbasiewicz	180	201	190.5
5	A. Rabin	160	165	162.5

9. The following factors were used to rate the finalists:

1) Both the number of years and pertinency of experience of the applicants in Mainframe/Mini, PC's, Telecommunications, Connectivity, Operations, Analysis, Programming, Hardware Maintenance, Cabling and User Support.

2) The applicants answers in relation to the specific training and experience questions.

3) Reference check (for top 3 applicants) to verify interview information

10. Jensen performed reference checks. Vesperman was given a very strong reference from Fox Valley Technical College. Sagady received a marginal to average report from Peter Wallace, a primary user.

11. Respondent selected Vesperman to fill the vacant MIS 3 position because they believed he was the best qualified applicant.

Conclusions of Law

1. The Commission has the authority to hear this matter pursuant to §230.45(1)(b), Stats.

2. Complainant's claim of reverse handicap discrimination is protected within the meaning of §§111.321 and 111.322, Stats.

3. Respondent is an employer within the meaning of §111.32(6), Stats.

4. Complainant has the burden of proving respondent hired a less qualified handicapped person instead of him in violation of §111.321, Stats.

5. Complainant has failed to meet his burden of proof with respect to reverse discrimination.

Opinion

The issue in this case is whether respondent discriminated against complainant on the basis of handicap when they selected a handicapped person instead of complainant for the subject MIS 3 position in 1992.

Using the model for analyzing discrimination cases set forth in McDonnell-Douglas Corp. v. Green, 411 U.W. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases (1981), it is clear that complainant was qualified for the MIS 3 position he sought in the spring of 1992. The evidence shows that complainant was one of five finalists interviewed by respondent for the position and was ranked by respondent after the interviews as one of the top three applicants for the position. The evidence also shows that the successful applicant, Larry Vesperman, was handicapped. Although the successful applicant did not describe himself as such, the interviewers were aware that Vesperman had a prosthetic replacement for his left arm. Upon inquiry, Vesperman advised the interviewers that his disability would not interfere with his performance of any MIS 3 duties. After the interview, Vesperman's statement that his disability would not interfere with his work performance was verified by references. Otherwise Vesperman's disability was not taken in account.

Complainant's basic argument is that respondent hired Vesperman to meet an affirmative action quota for employment of handicapped people. In support, complainant claims: that he had the same interview score as Vesperman, the successful candidate; that the position description provided the applicants was different from that testified to by Jensen; that respondent failed to look at his references, but instead called a person not identified by complainant as a reference; and the person hired was handicapped.

Complainant presented no evidence to substantiate his claim. Ms. Jensen (now Meyer) testified that the same interview procedure was used for each finalist and that complainant's combined interview score was third among the five finalists. Jensen also testified that she did not call references listed by complainant when he was hired as a limited term employee because she already had their responses. For that reason, she contacted Peter Wallace, a primary user who was familiar with complainant's work. Also, Jensen testified that she was complainant's immediate supervisor and was familiar with complainant's work abilities. Jensen testified that she had talked with complainant about being careless in his work and abrasive to users. It was Jensen's opinion that the subject position would involve increased user interaction. Jensen testified that references were not used in the rating scores of the applicants. None of this testimony was refuted by complainant, other than stating he did not agree with it.

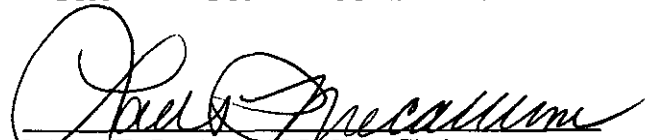
Complainant presented no evidence connecting his claims of unfair selection procedures with his allegation of reverse discrimination. Complainant's assertions of Jensen's bias against him seemed unrelated to the fact that Vesperman was handicapped. The Commission can only conclude that Vesperman was selected because respondent believed that his job skills best fit the needs of the position.

Order

This complaint is dismissed.

Dated: September 24, 1993

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

DRM:lrn


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

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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.