

5. In 1989, the successful applicant for the SO 3 promotion was 37 years of age. Complainant was 41 years of age at the time.

6. In 1990, the successful applicant for the SO 3 promotion was 40 years of age. Complainant was 41 years of age at the time.

7. In 1987, the successful applicant for the Security Supervisor 1 promotion was 51 years of age. Complainant was 38 years of age at the time.

8. In 1989, the successful applicant for the Security Supervisor 1 promotion was 58 years of age. Complainant was 41 years of age at the time.

9. In 1992, there were 4 SO 3 positions to be filled by promotion. After a list of candidates was certified to the respondent, a two-step interview process was established and implemented. The first interview panel interviewed and rated ten individuals. Complainant was rated "highly qualified" and ranked among the top five by this panel.

10. The first panel forwarded the list of candidates considered "qualified" and "highly qualified" to a second panel. This second panel asked a different set of questions of each of these candidates whom they interviewed and did not rely on the rating of the candidates by the first panel. Of the four SO 3 positions to be filled, one was assigned to the University Hospital and the other three were campus route positions. The University Hospital position was offered to and accepted by Shahida Pasha who was 43 years of age at the time. Two of the three campus route positions were offered to and accepted by Peter Disher who was 27 years of age at the time, and Lance Boyle who was 26 years of age at the time. The third campus route position was offered to and declined by William Slater who was 47 years of age at the time and by Kenneth Kraus who was 36 years of age at the time.

11. Since complainant had not been one of the second panel's top 5 candidates, the members of the second panel decided to ask that additional names be certified to them. This was done and the third campus route position was offered to and accepted by James Kinnamon who was 41 years of age at the time.

12. Complainant was 43 years of age at the time of the 1992 SO 3 promotions.

13. Respondent considered a candidate's length of experience on campus routes, the identity of the campus routes on which such experience was obtained, and how recent such experience was; as well as the quality of the candidate's work performance with the Department, including considerations

of leadership, initiative and motivation, work relationships with peers, and judgment.

14. The written materials upon which the members of the second interview panel relied did not indicate the candidates' ages or dates of birth. The panel members did not solicit this information from the candidates during the interview and were not aware of the candidates' ages.

15. Mr Boyle, at the time of his interview by the second panel, had three years of experience with the Department and two years of recent experience on the campus route to which he was assigned upon his promotion to the SO 3 position.

16. Mr. Disher, at the time of his interview by the second panel, had over 2 years of experience with the Department on the campus route to which he was assigned upon his promotion to the SO 3 position. In addition, Security Supervisor 2 James Kaszubski, one of the panel members, was of the opinion that Mr. Disher's work performance was superior to complainant's and that he was a more highly motivated employee than complainant.

17. Mr. Kraus, at the time of his interview by the second panel, had more extensive route experience than complainant and had been employed by the Department in a security position since 1985.

18. Mr. Slater, at the time of his interview by the second panel, had more extensive route experience than complainant and had been employed by the Department in a security position since 1985.

19. Mr. Kinnamon, at the time of his interview by the second panel, had 7 years of campus route experience, although this experience was not as recent as complainant's, and was regarded by the interviewers as a more highly motivated employee than complainant.

20. The final hiring decision was effectively made by Susan Riseling, the University of Wisconsin-Madison Chief of Police and Security. Chief Riseling had held this position since March of 1991. In making this decision, Chief Riseling relied upon and accepted the recommendations of the members of the second interview panel, i.e., Mr Kaszubski and Phillip Dixon, a Police and Security Captain in the Department. Both Mr. Kaszubski and Mr. Dixon had had an opportunity to observe each of the candidates for the SO 3 positions in the performance of their assigned duties in the Department; and had received information about the work performance of the candidates in the Department from the candidates' supervisors. They did not review the personnel files of

any of the candidates or solicit recommendations or references from the candidates' supervisors as part of the hiring process. Chief Riseling did not seek information regarding the age of any of the candidates nor was she specifically aware of the age of any of the candidates.

21. As the result of information received from observing complainant's work performance and from discussing complainant with his supervisors, Mr. Kaszubski and Mr. Dixon were aware of the following at the time of complainant's interview by the second panel:

a. While assigned to campus routes, complainant's supervisor Michael Gruber had observed that complainant frequently did not lock buildings as required; this had been reported to Mr. Gruber by Security Officers on the shift subsequent to the shift worked by complainant; and Mr. Gruber had counselled complainant about this on several occasions.

b. In the opinion of his supervisors, when an emergency call went out requesting assistance, complainant had a reputation for being the last to arrive to render assistance

c. Complainant, in the opinion of his supervisors, had less respect from his peers than the successful candidates for the SO 3 positions

d. Mr Gruber had counselled complainant about taking his break times in such a manner that it interfered with the schedule for locking buildings, and complainant had challenged Mr. Gruber's directive and had complied with it only inconsistently subsequent to the counselling sessions.

e. A review of the duty roster indicated that complainant did not take the initiative to perform additional security-related tasks as often as certain other SO 2s similarly situated.

f. Complainant had checked out a Department radio to provide private volunteer security services in relation to a visit by the Dalai Lama which were not sanctioned by the Department or a part of his assigned Department duties.

g. At the time complainant left his campus routes assignment, Mr. Gruber was of the opinion that complainant was not qualified to serve in an SO 3 position on campus routes.

22 Also rated as "highly qualified" by the first interview panel but not offered one of the SO 3 promotions was candidate Steven Butzlaff who was 28 years of age at the time.

23. During complainant's interview by the second panel, Mr. Dixon stated that complainant had a few more gray hairs than the last time he'd seen him.

24. Mr. Dixon, at the time the interviews were conducted by the second panel, was 52 years of age, had been with the Department 27 years, had been promoted 3 times, had competed unsuccessfully for promotion 6 or 7 times, and was 51 years of age when he had received a promotion in 1991 from Chief Riseling.

25. Mr. Kaszubski, at the time the interviews were conducted by the second panel, was 41 years of age, had been with the Department 12 years, had been promoted 2 times, had competed unsuccessfully for promotion at least 6 times, and was 36 years of age when he had received his last promotion in 1987.

26. Chief Riseling had effectively made 19 promotion decisions since she had assumed her position in March of 1991: 9 to promote candidates over the age of 40, 2 to promote candidates age 38 or 39, and 8 to promote candidates under the age of 38.

27. Mr. Dixon had participated in decisions to promote 16 candidates: 7 over the age of 40 and 9 under the age of 40.

28. Mr. Kaszubski had participated in decisions to promote 11 candidates: 7 over the age of 40 and 4 under the age of 40.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to prove that respondent discriminated against him on the basis of his age when they did not hire him for one of the Security Officer 3 positions in April and May of 1992.

3. The complainant has failed to sustain this burden.

Opinion

The issue to which the parties agreed is as follows:

Whether respondent discriminated against complainant on the basis of age when they did not hire him for one of the Security Officer 3 positions in April and May of 1992.

The applicable case law is very clear in holding that a complainant in a discrimination case such as the instant one has the burden to prove, by a preponderance of the evidence, the requisite facts. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981). The analytical framework for discrimination cases alleging disparate treatment was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). This framework provides that the burden is first on the complainant to show a prima facie case of discrimination; that this burden then shifts to respondent to rebut this showing by articulating a legitimate, non-discriminatory reason for its action; and that the burden then shifts back to the complainant to show that this reason is a pretext for discrimination.

In the context of a case challenging a hiring decision, a complainant would establish a prima facie case of age discrimination by showing that he: (1) was in the protected age category, (2) that he applied for a job for which he was qualified; (3) that, despite his qualifications, he was not hired; and (4) that an applicant not in the protected age category was hired. In this case, the complainant clearly satisfies the first three elements. In regard to the fourth element, the four original offers of the subject SO 3 promotions went to one candidate older than complainant (Slater), one the same age (Pasha), and two younger (Disher and Boyle). The fifth offer (after Slater declined) went to a candidate younger than complainant (Kraus), and the sixth offer (after Kraus declined) went to a candidate younger than complainant (Kinnamon). As a result, complainant appears to have made out a prima facie case of age discrimination in relation to only the Disher, Boyle, Kraus, and Kinnamon offers.

The burden then shifts to the respondent to articulate legitimate, nondiscriminatory reasons for its decisions to make these offers to Disher, Boyle, Kraus, and Kinnamon. In regard to Mr. Disher, respondent states that Mr. Disher had more extensive and more recent experience on campus routes and on the particular route to which he was assigned after promotion than did complainant; and that his work performance and motivation as a Security Officer for the Department was superior to complainant's. In regard to Mr. Boyle, respondent states that Mr. Boyle had more extensive and more recent experience on campus routes and on the particular route to which he was assigned after promotion than did complainant. In regard to Mr. Kraus,

respondent states that Mr. Kraus had more extensive experience on campus routes than did complainant. In regard to Mr. Kinnamon, respondent states that Mr. Kinnamon had more extensive route experience than did complainant, and that his motivation and initiative as a Security Officer for the Department were superior to complainant's. These reasons are legitimate and non-discriminatory on their face.

The burden then shifts to the complainant to demonstrate pretext. Complainant argues first in this regard that the fact that respondent relied on the extent and recency of campus routes experience instead of length of time as a Security Officer for the Department demonstrates pretext. The basis for this argument appears to be complainant's contention that the skills at each of the Security Officer assignments are basically interchangeable and transferable and length of time in a Security Officer position would be a better indicator of ability to assume a higher level SO position than assignment to a particular SO route. However, the record shows that each campus routes assignment is distinctive and, although some basic skills transfer between SO assignments, significant training must be done on each route in order to achieve sufficient familiarity. The record shows that the criteria of extent and recency of campus routes experience were reasonable in view of the duties and responsibilities of the SO 2 campus routes positions and were consistently applied by respondent and complainant has failed to show pretext in this regard.

Complainant also seems to argue that the problems with his work performance relied upon by respondent in making its decision not to offer him one of the SO 3 positions were inconsequential and respondent's reliance on them, therefore, demonstrates pretext. Certainly, failure to lock or otherwise secure campus buildings or the taking of breaks in a manner which interfered with the schedule for securing buildings are not inconsequential considerations in relation to an employee assigned security responsibilities. In addition, this problem had been pointed out to complainant by Mr. Gruber on more than one occasion. An employee's failure to quickly respond to requests for assistance, to take the initiative to perform additional security-related tasks, or to garner the respect of his peers is not an inconsequential consideration when this employee is seeking promotion to a position where he would be leading the work of lower level Security Officers. In addition, complainant failed to show that this opinion or perception on the part of his

superiors was misplaced. Finally, the questioning of the judgment of an employee who uses a Department radio to perform a personal task not only not related to his Department assignments but with the potential for conflicting with the performance by other Department personnel of their police or security assignments does not seem misplaced.

Complainant contends that the failure of Mr. Dixon or Mr. Kaszubski to solicit references from his supervisors or to consult his personnel file demonstrates pretext. The record shows, however, that Mr. Dixon and Mr. Kaszubski followed the same procedure in regard to each candidate. In addition, the record shows that both Mr. Kaszubski and Mr. Dixon, over the period of complainant's employment as a Security Officer by the Department, had contact with complainant's supervisors relating to his work performance and were of the opinion that they were familiar with his work and that of the other candidates and complainant has failed to rebut this showing.

Complainant argues that his failure to be promoted despite having applied for promotion at least five times prior to 1992 demonstrates pretext. The record shows that, of these five promotional opportunities, three were filled by candidates older than complainant, one by a candidate about the same age, and one by a younger candidate. This pattern does not sustain complainant's theory of age discrimination. In addition, the record shows that it is common for Security Officers to apply for promotion numerous times before achieving success and is attributable to the few number of SO 3 and Security Supervisor positions available within the Department.

Complainant argues that the decision to request additional candidates for consideration after promotional offers were declined by Mr. Slater and Mr. Kraus demonstrates pretext. However, the record shows that this affected not only complainant but another candidate who had been rated "highly qualified" by the first panel, i.e., Steven Butzlaff, who was 28 years of age at the time. In addition, this decision was based not only on respondent's concern about the size of the pool of remaining candidates but also their opinion that complainant's work performance indicated that he was not a "lead off" candidate for promotion to an SO 3 position. As discussed, this opinion on the part of Mr. Kaszubski and Mr. Dixon was firmly grounded.

Consistent with the above, the Commission concludes that complainant has failed to demonstrate pretext.

Another consideration in regard to this case is the fact that the record shows that neither Mr. Kaszubski, Mr. Dixon, nor Chief Riseling were aware of the ages of the candidates. It was probably obvious to the interviewers who met the candidates that complainant was older than Mr. Disher or Mr. Boyle who are 16 and 17 years younger than complainant, respectively. However, this is not a safe assumption in regard to Mr Kinnamon who is 2 years younger than complainant or Mr Kraus who is 7 years younger than complainant.

Complainant has also offered as direct evidence of discrimination Mr. Dixon's comment during the interview relating to the graying of complainant's hair. Although this could be interpreted in the abstract as a reference to complainant's age, in the context of this case it appears more likely to have been an attempt at initiating casual conversation between two long-time acquaintances and co-workers who had at least one thing in common: graying hair.

Although complainant compiled certain information relating to the age of individuals promoted within the Department, this information was not reduced to any type of usable statistical format. In addition, the information fails to indicate the number of times respondent had an opportunity to promote a candidate over the age of 40 to a particular position. Complainant has failed to show that respondent's promotional practices showed a disparate impact based on age.

Order

This complaint is dismissed.

Dated: November 29, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:lrn


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.)