

On October 18, 1993, a Conference Report was mailed to the parties which noted the matters established at the prehearing. Included was a reminder that witness lists and exhibits must be exchanged at least 3 working days prior to the hearing. A special attachment for unrepresented complainants was mailed to complainant. The attachment contained a discussion of the procedure and burden of proof which would apply at hearing.

The witness list and exhibit exchange deadline was reinforced by the Commission in a letter dated January 24, 1994, sent to the parties from Judy M. Rogers, the assigned hearing examiner. The letter included the following reminder:

Please be reminded that witness lists and exhibits must be exchanged at least 3 working days prior to the hearing. This means the Commission and opposing party must receive the information on or before 4:30 p.m. on Friday, March 4, 1994.

On March 7, 1994, Richard Henneger, attorney for DNR, telephoned the hearing examiner but she was unavailable because she was presiding at a different hearing out of town. The hearing examiner returned Attorney Henneger's call the morning of March 8, 1994, at which time Attorney Henneger reported that complainant had filed no exhibits or witness lists. He was concerned because several of respondent's employees were scheduled to appear at the hearing as witnesses for respondent. He did not wish to have them appear if complainant did not intend to go forward to hearing. Also, a Commission staff person informed the hearing examiner that complainant called on March 7, 1994, asking if his attendance was needed at the hearing.

The hearing examiner initiated a telephone conference with complainant and respondent's attorney on the afternoon of March 7, 1994. The complainant affirmed that he had no witnesses or exhibits; in short, no evidence to produce at the hearing scheduled to start on the following day. He indicated all he wanted from the Commission was a final decision he could appeal to court.

The parties ultimately agreed to settle this case as follows: 1) the hearing would not go forward because it would be pointless to go forward when complainant, who has the burden of proof, has no evidence to offer, and 2) the findings of fact and conclusions recited in the ID would serve as the

Commission's final decision, except the Commission's final decision would be issued on the merits.

Prior to accepting complainant's agreement to settle on the above-noted terms, the hearing examiner informed complainant that any appeal to state court of the Commission's decision issued under the agreement would be reviewed based on the record established at the Commission level which would be comprised solely of the findings of fact because no hearing record would exist. The examiner specifically noted that complainant probably would not be entitled to attempt to establish a new record in an appeal to state court, but that an appeal to federal court (if any such right exists here) might include an opportunity to attempt to establish a new record for the federal court appeal.¹ Complainant said he understood and still wished to settle as previously discussed.

The following findings of fact are taken directly from the ID, as agreed upon by the parties.

FINDINGS OF FACT

1. At the times relevant to this charge the complainant, a Wisconsin Winnebago (Native American) individual, was employed by DNR as a Forest Fire Control Assistant 2 until February 9, 1992, when he was reallocated to the position of Forestry Technician 4.
2. On October 27, 1991, the respondent issued a statewide announcement for the position of NRS-1. The application deadline was November 20, 1992. The complainant was certified and applied for the position on or around May 8, 1992. Fifty certified (white) individuals were referred to respondent by the Department of Employment Relations (DER) on May 6, 1992. Under expanded certification, four minority individuals (2 Hispanic and 2 Native American,

¹ To initiate a federal court action, the complainant would want to request a "Right to Sue" letter from the federal Equal Employment Opportunity Commission (EEOC), Milwaukee District Office, 310 W. Wisconsin Avenue - Suite 800, Milwaukee, WI 53203-2292. His charge with the Personnel Commission was cross-filed with the EEOC, per his request. His EEOC charge number is 26H930051. Time limitations apply so it would be prudent for complainant to contact EEOC immediately to discuss time deadlines and procedural requirements.

including the complainant) were referred to DNR by DER. One individual was listed as a transfer applicant.

3. The complainant contended he was discriminated against in the interview and hiring process for the NRS-1 position, even though he was "both mentally and physically, if not better qualified, than those candidates that were hired." Complainant stated that respondent fails to provide equal employment opportunities by discriminating on the basis of race, color and ancestry in their "hiring, admitting and promotional processes."

4. According to DNR, all (50) certified candidates were invited to participate in a physical fitness test battery, an oral interview, and a practical exam. The physical fitness test battery was directed on a pass/fail basis. The complainant passed the physical fitness exam. DNR stated that all applicants were subjected to the same selection process and were graded and scored separately by interviewers and/or evaluators. Twenty nine applicants participated in the oral interview and the practical exam process. Eleven (non-Native American) individuals were selected for the available positions, one was a transfer appointment.

5. Complainant, in a letter dated November 19, 1992 to Gerald Vande Hei, Chief of Managing & Marketing Section, Bureau of Forestry, asked why he was not hired and what self-improvements he could make to increase his prospects for future consideration. Vande Hei responded in a letter dated January 28, 1993, as follows, in relevant part:

...In answer to why you were not hired; the interview team recognized your strong points. Your "people skills" are perhaps your strongest attribute. You are a warm and sincere individual and I believe very honest as well. However, overall your concepts of technical forestry and the serious issues that a forester must deal with were not as well demonstrated as compared to the candidates that were hired.

...There are two areas that I would suggest for improvement. First, you should broaden your knowledges of forestry issues.... You might also want to consider college level courses, either through correspondence or evening classes if available.

The other area that you might consider for improving would be oral communications. In order to sell ones self a person must be able to inform and advise others as to what should be done and how to do it. If a person has the technical skills, a good understanding of the current issues, and objectives and the communication tools to supervise and

direct both people and the forestry objectives he or she will compete very well. I hope these suggestions and comments are helpful to you....

6. A job announcement for the NRS-1 position, dated October 27, 1991, indicated there would be several vacancies in the upcoming (6 to 12) months. Appointees would be assigned to a one-year training program at various training locations to learn DNR forestry programs, policies, and procedures. Duties included professional forest and fire management; forest recreation management and nursery operations; stand examination and surveying; assistance to public and private landowners; timber sale and forest tax law administration. In addition, the NRS-1 position was expected to perform, direct, and train crews and detection personnel in fire fighting procedures. The knowledge required for the position included:

Silviculture and forest management principles and practices, including protection, utilization, economics, inventory analysis, recreation aesthetics and sociology; creative approaches to the protection and enhancement of natural resources; strong oral and written communication skills.

Additionally, applicants were required to meet certain medical requirements, pass a physical agility test and, if appointed, obtain certification as a law enforcement officer while on probation.

7. The NRS-1 position goals and worker activities as outlined in the position description included implementation of the private forestry assistance program as 16% of the time; participation in forest fire control program as 34% of the time; administration and implementation of the forest tax law programs as 15% of the time; provision of administration and supervision by completing reports, acting as liaison with local and county boards and committees, supervising the total forestry program, etc. as 5% of the time; provision of education and cooperative assistance by providing resource education, information, and assistance to local schools, groups, governments, etc. as 7% of the time; provision of Public Lands Management by assisting with forest reconnaissance and management updates, timber sale establishment, tree planting and cultural operations on state land as 10% of the time; establishment of timber sales on county forests as 5% of the time; provision of assistance to other governmental units in conservation related

problems as 3% of the time and administration of the Cooperative Fire Program as 5% of the time.

ORAL INTERVIEWS

8. The oral interview panel consisted of Duane Dupor, Bureau of Forestry's Chief of Production and Reforestation; Jerry Vande Hei, Bureau of Forestry's Chief of Management and Marketing and Shirely Bargander, Antigo Area Forestry Supervisor. Each interviewer asked the same questions and the interviewers graded each applicant on a hundred point scale. The oral interview was weighted as 70% of the total selection process.

9. DNR provided a copy of the oral interview questions used during the interviews for the position in question. Applicants were asked to describe their forestry education and work experiences. They also were asked to identify personal qualities they thought were necessary to be a successful forester and then identify which of the qualities they needed to strengthen, and explain how they would do that. Applicants were asked to identify some of the evolving issues affecting forestry programs and to explain how they would assist with implementing change in the forestry program. Applicants were asked about skill building, asked to describe their own team efforts and the contributions they made to the team effort. Candidates were told the position entailed both fire control and forest management responsibilities and, if they had a preference for either, to explain why. Candidates were asked to share any additional information they would like DNR to know about themselves. Candidates were told that if hired, they would start on July 13, 1992; they were required to pass a medical exam and, if hired, they would be assigned directly to a field station.

10. Complainant was interviewed on May 22, 1992. DNR provided a copy of complainant's "Personnel Interview Worksheet." This form evaluated the complainant's oral interview under several categories, such as work experience, educational experience, "quality relating to position", personal characteristics and interview performance. Complainant's score was 69.0, which was the average of the three interviewer's individual scores of 70, 67, and 70 (total: 207).

11. Twenty-nine applicants completed the oral interview. The eleven successful candidates received interview scores ranging from 76.67 to 92.33. Six candidates received scores higher than the complainant, but lower than the lowest scored successful candidate whose score was 75.67. (ref. par. 19)

12. Complainant stated, "I felt the interview process I participated in was developed and manipulated to insure the maintenance of the Bureau of Forestry status quo relating to racial/ethnic minorities." Complainant submitted as evidence, a memorandum of "Expanded Staff Meeting Minutes" dated April 30, 1993, which he contended "reaffirms the need to correct a serious problem" with the Bureau of Forestry and DNR. The memo states:

Affirmative Action DNR ranks 11th of the 12 state agencies in racial/ethnic minorities and 12th of 12 in females in nontraditional positions. We need to take a hard look at our goals. In some cases we cannot attract people to our positions.

13. In his May 21, 1993 rebuttal statement, complainant contended he "...also felt that with my reallocation in March of 1992 I was eligible as a lateral transfer to a NRS-1 forester position." Complainant submitted as evidence a November 20, 1989 memorandum that explains "Employee Transfer Requests" procedures.

14. Complainant could not have been considered for a lateral transfer at the time of the application deadline (November 20, 1991) because at that time he was a Forest Fire Control Assistant 2, at pay range 8, as compared to the NRS-1 position at pay range 9. Complainant was an eligible candidate based on his inclusion as part of the expanded certification list; he was not on the transfer list. Complainant could have attempted to transfer (although there is no evidence that he did so) when he was reallocated in February of 1992. If he had attempted transfer, he would not have had to re-certify but he still would have had to compete for the position.

PRACTICAL EXAM

15. The "practical exam" lasted 30 minutes and consisted of an in-basket exercise, telephone conversation, and TV interview. Four evaluators, Dave Daniels, North Central District Information Officer; Jim Miller, Fire Prevention

and Law Enforcement Specialist; Kurt Wilson, Area Forestry Supervisor; and Kip Pagel, Forester, graded each part of the practical exam separately. A total of 243 points could be awarded for the entire practical exam. The complainant received a score of 28 for the in-basket exercises, 47.67 for the telephone portion of the exam and 82.75 for the TV interview; for a total of 158.42 points. The practical examination was weighted as 30% of the total selection process.

16. The "In-Basket Exercise" tested the applicant's ability to understand and handle paper work such as correspondence, calendar changes and phone messages. There were eight "In-Basket Exercises" for the applicant's response. For example, applicants could score up to 45 points under an "In-Basket Exercise" referred to as "response to Betty Jean Johnson," up to 10 points for the "Edmond Memo", 5+ points for the "Antrees Letter," etc. Under each heading there was a list of standards by which the applicants' responses were measured and scored. A perfect score would be around 90 points. The complainant's score sheet reflected a score of 28 points. "In-Basket" scores for the eleven successful applicants ranged from 31 points to 86 points.

17. The "Telephone Call Interruption" exercise required applicants to handle a telephone call from an individual who wanted an estimate of timber value, which required an on site inspection. Applicants were scored under five main headings: who the call was from (could score up to 15+ points if the applicant got all the pertinent information, such as name, address and phone number of caller); what the caller wanted (up to 15 points); where they should meet (up to 15 points); when the appointment would be made, and with whom (up to 10 points). (Emphasis added) Finally, evaluators scored the applicants on "Courtesy and Tact," (worth 15 points). A perfect score would be around 70 points. The complainant received scores from three evaluators - 49, 51 and 43, averaging out to 47.67. "Telephone Call" scores for the eleven successful applicants ranged from 41.66 to 71 points.

18. The "Camera Television Interview" score sheet stated:

Of necessity this evaluation will be more subjective than the others. While knowledge of the subject will be important in the real world our objective here will be to see if the candidate can handle a typical TV interview, for the purposes of this evaluation content is secondary.

Evaluators were provided definitive characteristics to look for under several rating categories which included, organization of answers (10 points); use of words (10 points); contact with camera or point (10 points); deliver (10 points); knowledge of material (10 points); time management (10 points) and effectiveness of expression (40 points). A perfect score would be around 100 points. The complainant received scores from four evaluators - 84, 91, 70 and 86, for an average score of 82.75. "Television Interview" scores for the eleven successful applicants ranged from 66.25 to 97.75.

19. A composite score sheet lists the scores of all 29 candidates under the categories referenced above. Based on the respondent's rating process of the oral interview being weighted at 70% of the total selection process and the practical examination at 30%, the eleven successful candidates and the complainant were rated as follows:

<u>APPLICANT #/ SPECIAL NOTE</u>	<u>PRACTICAL EXAM (.30)</u>	<u>ORAL EXAM (.70)</u>	<u>COMBINED SCORE</u>
1	28.73	64.63	93.36
2	26.83	60.43	87.26
3/Declined			
4	28.20	58.33	86.53
5/Not selected			
6	22.46	59.96	82.43
7/Transfer	26.36	57.17	83.53
8	25.37	56.93	82.30
9	21.33	57.63	78.96
10	27.14	54.48	81.62
11/Not selected			
12	20.11	55.77	75.88
13	22.29	54.60	76.89
14/Not selected			
15	24.44	52.97	77.41
16-24/Not selected, scores ranged from	69.20 to	76.03	
25/Complainant	19.56	48.30	67.86
26-29/Not selected, scores were	59.08, 62.24, 55.07, 57.60		

20. Complainant submitted statistics regarding DNR's minority employment in support of his claim that DNR discriminates against minorities in employment. He said a survey was conducted in 1985, amongst minority employees wherefrom it was found that minority employees generally found working conditions were good. However, he said a "major problem" involved the existence of racial/sexual harassment because some employees were

experiencing problems with supervisors "underestimating their abilities, and the stigma associated with being a [sic] affirmative action hire." According to the April of 1993 statistical report, the DNR employs 53 minorities (4.8%) in its Central Office and 112 minorities (3.8%) in the District. DNR's "Affirmative Action Position Report - Minorities", showed 7 American Indian individuals (including complainant) employed in the "technician" category (Forestry Technician 2, 3, 4, etc.), 6 in the "professional" category, 4 in the "protective service category," 3 in the "office/clerical" category, 1 in the para professional category and 1 in the "administrative/official" category (total of 22).

DISCUSSION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 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).

The complainant, Josiah H. Thunder, alleged that DNR discriminated against him because of his race/color, national origin and ancestry, in its interview and hiring process for a Natural Resource Specialist 1 - Forestry position in May of 1992.

In the context of a hiring decision, the elements of a prima facie case are that the complainant: 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination. (An example of circumstances which would give rise to an inference of unlawful discrimination would be a situation where the employer, after rejecting a protected and qualified candidate who desired the position, continued to seek applicants with the complainant's general qualifications or selected a person from outside complainant's protected group. See McDonnell-Douglas Corp. v. Green, supra.

The complainant arguably has established his prima facie case of discrimination. As for the first element, he is protected by the Fair Employment Act as a Native American individual. As for the second element, his name appeared on the certification list for the position in question indicating that he was qualified for the position. The complainant was rejected under circumstances that give rise to an inference of unlawful discrimination in that eleven non-Native American individuals were hired and he was not.

As an additional issue, complainant contended that following his reallocation from Forest Fire Control Assistant 2 (pay range 8) to Forestry Technician 4 (pay range 10) in March of 1992, he was "eligible as a lateral transfer" to the NRS-1 position (pay range 9). The application deadline for the position was November 20, 1991. There was no evidence presented to suggest that complainant requested or applied for a transfer in either November of 1991 or in March of 1992. If he had applied for transfer in March of 1992 (although there is no evidence that he did so), he would not have been required to re-certify, but he still would have had to compete for the position along with all the other applicants. This is supported by evidence that there was one (successful) transfer applicant in the November of 1991 applicant listing and this transfer applicant competed the same as other applicants. Due to the fact that complainant offered no evidence in support of this allegation, the transfer issue is not discussed further in this decision.

DNR has successfully rebutted the complainant's prima facie case of discrimination by presenting legitimate, non-discriminatory reasons for hiring individuals other than the complainant. Specifically, DNR submitted a letter from Chief of Managing & Marketing, Gerald Vande Hei, which informed complainant that he might consider improving his oral communication skills. DNR said complainant participated in the hiring process at the oral interview level and his "practical exam scores, especially in the in-basket portion, also would need improvement." DNR said its practical exam and oral interview were designed to elicit the candidates' job-related experience and abilities, the same interview questions were asked of all (29) candidates and each part of the practical exam was graded separately by the evaluators.

Once respondent rebuts the complainant's prima facie case, the complainant may still prevail by demonstrating that respondent's legitimate

reasons are actually a pretext for intentional discrimination. In this case, the complainant claimed the interview process "was developed and manipulated to insure the maintenance of the Bureau of Forestry status quo relating to racial/ethnic minorities." The evidence showed that following complainant's certification for the position, he passed the physical exam. This placed him on equal footing with 28 other individuals for participation in the oral interview and "Practical Exam" process. Complainant's claim that DNR's interview process was "developed and manipulated" was not supported by the facts. A total of seven panelists participated in rating the oral examination and the three components of the "Practical Exam" using the same rating guidelines for all applicants. An examination of available interview and exam documents revealed that DNR's oral interview and "Practical Exam" process was designed to measure candidates against job-related criteria, the same interview questions were asked of all the candidates and all candidates were evaluated against the same rating guidelines.

Specifically, complainant's oral exam score was 48.30. Nine presumably white candidates whose oral exam scores were higher than complainant's also were not selected for the positions. The "Practical Exam" consisted of an in-basket exercise, telephone conversation and TV interview. Again, there was no evidence to show that DNR used some subjective criteria in rating the candidates, or in making its selections. Complainant's scores in all three "Practical Exam" categories were lower than the scores of the successful candidates. There was no evidence that DNR's scoring procedure was inconsistently applied from one applicant to another. Complainant failed to demonstrate how DNR's hiring process was designed to measure candidates in a biased manner, as alleged.

Complainant's second pretextual argument was his assertion that DNR has a history of failing to promote or hire minorities. In support of this allegation, complainant produced statistical documents which showed that DNR employed 112 minority individuals throughout the agency. Another report showed that DNR employed 7 Native American individuals in complainant's "technician" job classification and a total of 22 Native American individuals throughout the agency. As evidence that DNR underutilized minorities, complainant provided minutes from an April of 1993 staff meeting, which stated:

Affirmative Action - DNR ranks 11th of the 12 state agencies in racial/ethnic minorities and 12th of 12 in females in nontraditional positions. We need to take a hard look at our goals. In some cases we cannot attract people to our positions.

These statistics and DNR's acknowledgement of its failure to meet its affirmative action goals tends to support complainant's case, even though the statistics reflect an entire agency and do not take into account the available qualified labor pool from which DNR is able to hire employees. For example, with regard to the position in question, the record established there were four certified minority applicants (including complainant) out of fifty certified candidates. Only two of these minority individuals (complainant and an Hispanic applicant) participated at the oral interview and "Practical Exam" level with 27 other (non-Native American) candidates. Both scored lower than the successful candidates. Complainant's statistical evidence when weighed against the findings discussed above, i.e., there was no specific evidence of pretext in respondent's hiring procedure, interview questions were job related and the candidates were evaluated against the same rating guidelines; is insufficient to establish discrimination.

Based on the findings in this decision, there was insufficient evidence to conclude that DNR's rationale for its hiring selections was a pretext for race/color, national origin or ancestry discrimination. There was no evidence presented to show that DNR's actions were a departure from its established hiring policy or procedure, or that the oral interview or "Practical Exam" was applied in a subjective, biased or discriminatory manner. All applicants appear to have been held to the same standards regardless of race/color, national origin or ancestry.

CONCLUSIONS

1. Complainant is a member of the following groups protected under the Fair Employment Act: race/color, national origin and ancestry.
2. Respondent did not discriminate against complainant on the basis of his race/color, national origin or ancestry when respondent did not hire him for a Natural Resource Specialist 1 - Forestry position in May of 1992.

ORDER

That complainant's complaint be dismissed.

Dated May 2, 1994.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR:dkd


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Josiah H. Thunder
113 Thomas Avenue
P.O. Box 351
Mellen, WI 54546-0351

George E. Meyer
Secretary, DNR
101 South Webster Street
P.O. Box 7921
Madison, WI 53707-7921

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.)