

violations by the offender and recommending discipline up to revocation of supervision.

5. At the time of the selection decision in question, the primary responsibilities of Correctional Officers employed by DIS included providing surveillance of and transportation for the offenders. Officers had no caseload responsibility nor did they have responsibility for making treatment referrals for the offenders to meet their case plan.

6. Prior to the hire in question, the Southern Sector complement of Probation and Parole Agents was, with one exception, entirely white males. Affirmative action was mentioned within unit meetings in the Southern Sector.

7. On approximately April 5, 1993, respondent received a phone call from complainant's former girlfriend. Mr. Jentz spoke with the woman who indicated she and complainant had been in court that day. She accused the complainant of stalking her and indirectly asked Mr. Jentz if he felt complainant was a danger to her. Mr. Jentz referred her to a local shelter for battered women and discussed the incident with his supervisor, Mr. Mixdorf. Mr. Jentz then called the complainant into his office. During their meeting, complainant stated he had broken up with his girlfriend 7 months earlier. He wept during the conversation and Mr. Jentz asked if he could refer complainant to the Employee Assistance Program. Complainant indicated he was already in counselling. Mr. Jentz called the local EAP coordinator that day and passed the coordinator's name on to the complainant.

8. A vacancy for a a Probation and Parole Agent 1 position in the La Crosse office occurred in the Spring of 1993. No one opted for contractual transfer into the position, so, pursuant to standard practice in the Division's Southern District, the position was opened up for permissive transfer/demotion for persons employed in positions in equal or higher pay ranges.

9. The interview questions were developed by Dorrie Lundquist who had experience as a training unit supervisor with responsibility for training Probation and Parole Agents. The questions had been used before in other hiring procedures and had been submitted to the respondent's Affirmative Action staff for review. The questions were related to the duties of the Probation and Parole Agent position. Ms. Lundquist also prepared the bench-

mark responses which were used for analyzing the responses to the interview questions.

10. On June 4, 1993, respondent conducted oral interviews of the six individuals who had expressed an interest in the position. The interviews consisted of 5 questions. The candidates had a total of 30 minutes to respond. The three interviewers were Ms. Lundquist, Amos Anderson, who had served as a Probation and Parole Supervisor, and Wayne Mixdorf. Each interviewer independently assigned a numerical score for the candidate's response to each question, and then, after each candidate, the interviewers caucused and had an opportunity to revise their scores.

11. In addition to the information stated by the candidate, the interviewers had a copy of each candidate's resume.

12. The complainant's resume included the following information: Complainant had been employed by respondent Department of Corrections since February of 1991, as a Correctional Officer. He had worked at the Racine Correctional Institution for six months, and then with DIS's predecessor, Community Residential Confinement (CRC), where he supervised minimum security inmates on electronic monitoring. The resume also reflected that the complainant received a Bachelor of Arts degree in Criminal Justice from the "University of Platteville [sic]."

13. Another candidate for the vacancy was Kim Brinckman who, at the time of the interviews, was employed in respondent's Black River Falls office as a Program Assistant Supervisor 2. Ms. Brinckman's resume also indicated that she had worked for respondent since September of 1989 and had taken various 1 or 2 day seminars on domestic abuse, criminal personality, social work methods and adult/adolescent alcoholics. During the course of the interview, Ms. Brinckman also indicated that she had taken DOC training for Probation and Parole Agents and had actually served as the probation and parole agent of record for a minimum caseload of 15 cases while she was employed as a clerical supervisor. This responsibility included writing case plans and using assessment techniques. She also had served as a co-facilitator in working with domestic abuse patients and had been a volunteer at a Native American half-way house as well as with other community groups. Ms. Brinckman had some, but not extensive, experience working with different

racial and ethnic groups. She expressed a non-judgmental attitude toward such groups.

14. After the conclusion of the interviews, the scores from the interviewers were tabulated with the following results:

Candidate ¹ (sex)	Score by each of three interviewers			Total	Rank
	Anderson	Lundquist	Mixdorf		
Dorf (M)	26 ²	26	31	83	4
Brinckman (F)	32	29	35	96	1
Hills (F)	23	16	21	60	5
Hanson (M)	20	16	24	60	5
Dinegan (M)	27	31	30	88	3
Burke (M)	28	32	30	90	2

15. The five questions posed during the interview asked each candidate to: 1) Relate work experience, education or life experiences relating to the duties of the position; 2) describe the critical elements of a case plan; 3) prioritize a group of 7 phone messages in terms of making return calls and explain the rationale; 4) describe critical elements of an investigation into a violation of the terms of supervision; 5) relate experience working with persons of different socio-economic, racial, and ethnic backgrounds.

16. The panelists' scores for complainant and Ms. Brinckman as to each of the five questions are listed below:

Candidate/question	Score by each of three interviewers			Total
	Anderson	Lundquist	Mixdorf	
Complainant				
1	6	6	8	20
2	5	5	6	16
3	6	5	6	17

¹The candidates are listed in the order in which they were interviewed.

²The document (Resp. Exh. 6) that tabulates the interview results incorrectly totalled Mr. Anderson's score for the complainant as 24 rather than 26 points. This error changes complainant's total points from 81 to 83, but does not change his overall ranking or the other conclusions reached by the Commission.

4	6	7	6	19
5	3	3	5	11
Brinckman				
1	8	7	7	22
2	5	5	7	17
3	6	6	8	20
4	7	6	7	20
5	6	5	6	17

17. Complainant's response to the question 5 included what could be interpreted as stereotypical remarks and complainant indicated a lack of understanding and respect for individuals in other socio-economic, racial and ethnic groups.

18. The interviewers concluded that the top three candidates were qualified for the position, complainant was borderline, and the bottom two ranking candidates were not qualified. There were no comments before, during or after the interview process by any of the interviewers indicating that sex was a basis for their scoring of the candidates.

19. Mr. Jentz specifically declined to participate in the interview process because he was aware that the complainant and Ms. Brinckman were both candidates, and Mr. Jentz sought not to compromise his current and future role as a supervisor.

20. On June 7 or 8, Mr. Mixdorf contacted Mr. Jentz, told him of the interview results and directed him to check out references and make a final decision.

21. Mr. Jentz then contacted Ms. Brinckman's immediate supervisor as well as her previous supervisor. Both references were very positive, and on that basis, Mr. Jentz recommended the hiring of Ms. Brinckman. Mr. Jentz then made an employment offer to Ms. Brinckman during the morning of June 9, 1993. In discussions with Mr. Mixdorf, it was understood that Mr. Jentz would advise complainant of the decision and would provide complainant with an understanding of the the areas he needed to work on in order to be successful in a future Probation and Parole Agent selection process.

22. Later on June 9th, Mr. Jentz had to carry out a series of investigative interviews at ATTIC, a transitional housing facility for offenders in La

Crosse. Mr. Jentz called complainant to transport an offender to jail. When complainant arrived, Mr. Jentz was in an office at ATTIC and complainant immediately asked about the Probation and Parole Agent hire in La Crosse. Complainant asked the question in front of a student intern who was working with respondent. In response to the question, Mr. Jentz said, "They filled it, you didn't get it, a woman got it. Mixdorf said they wanted a woman. You didn't get it because they wanted a woman. I'll give you tips on it later."

23. Mr. Jentz invited the complainant to meet on June 10th. During that meeting in his office, Mr. Jentz denied that sex was the actual reason for the hiring decision and explained areas where complainant could improve in order to become successful in future agent interviews.

24. Ms. Brinckman took a statewide examination for the Probation and Parole Agent classification in March of 1992. She was certified in April and was interviewed in June of 1992 by a panel in Oshkosh as part of an effort to fill a large number of positions. After conducting the interviews, the panel placed each candidate into one of three categories: "Well Qualified," "Qualified," or "Not Qualified." Ms. Brinckman was rated as "Well Qualified." Ms. Brinckman was offered a Probation and Parole Agent position in Milwaukee in April of 1993. She declined the offer, based upon geographical preference.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Wis. Stats.
2. The complainant has the burden to establish that the alleged sex discrimination occurred.
3. Complainant has not sustained his burden.

OPINION

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.

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S.248, 101 S.Ct. 1089 (1981).

The complainant has established a prima facie case of sex discrimination. The complainant, as a male, is a member of a class protected under the Fair Employment Act. He applied for and was reasonably qualified for the vacancy as indicated by his score during the interview, and he was rejected under circumstances which give rise to an inference of unlawful discrimination because of the statement made by Mr. Jentz on June 9th to complainant which indicated that another candidate was selected because of her sex.

Respondent contends that the reason it hired Ms. Brinckman was because of her superior performance during the interview rather than because of her sex. The remaining question is whether this contention is pretextual.

The Commission has carefully reviewed the record relating to the selection process used to fill the vacant Probation and Parole Agent position. The interview questions were used to fill a variety of vacancies, rather than just the one in La Crosse. Benchmark responses were also developed well in advance of the June 4th interviews. All of the interviewers participated in all of the interviews and the interview notes made by the members of the panel are reasonably consistent. The panel followed the same procedure in carrying out all of the interviews. Each of the five questions was graded individually. The scores awarded by the panelists were also reasonably consistent. All of the three interviewers gave the complainant a score that was lower than the score awarded to the successful candidate, Ms. Brinckman. All three of the panelists denied that the sex of the candidates played any role in their analysis, and all three denied that the sex of the candidates was even discussed at any time during the selection process.

Complainant argues that "objective factors" established that he was the most³ qualified candidate for the Probation and Parole Agent position. In analyzing the "objective factors," complainant compares educational backgrounds and work experience. Complainant had significantly more formal education than Ms. Brinckman. Complainant's resume (Resp. Exh. 1) showed that

³Although, in his post-hearing brief, complainant suggests that he was the "most" qualified candidate, his analysis only compares his own qualifications to those of the successful candidate, Kim Brinckman. Complainant fails to compare himself to Mssrs. Burke and Dinegan, both of whom also received higher scores from the interview panel than did complainant.

he held a bachelor's degree in criminal justice, with a minor in psychology from the University of Wisconsin-Platteville. These were the sole entries on his resume under the heading of "Education." In contrast, Ms. Brinckman's resume (Resp. Exh. 14) does not reference any formal secondary or post-secondary education other than an "Introduction to Sociology" course taken from January through May of 1993 at the Western Wisconsin Technical College. However, her resume does list a variety of educational seminars and Ms. Brinckman discussed her educational background more extensively during the interview. (See Finding 13) Complainant may have had additional relevant educational experiences, but he failed to describe them in his resume or during the interview. In order to be considered by the interview panel in rating the candidates, complainant had to provide the relevant information to the panel. He failed to establish that he did so.

The second "objective factor" which complainant relies upon to support his observation that he was most qualified for the vacancy is his work experience. It is true that the complainant had experience with DIS, and its predecessor, CRC, which related directly to certain of the duties assigned to a Probation and Parole Agent. However, so did Ms. Brinckman.⁴ She had served as agent of record for 15 offenders while she was employed as a DOC Program Assistant Supervisor in Black River Falls. Her experience was not merely clerical in nature as suggested by the complainant.

Education, work experience, and life experiences⁵ were the components in only one of the five questions relied upon by the panel in ranking the six candidates. As indicated in Finding 16, complainant received a net total of 2 points less than Ms. Brinckman on question 1. The remaining 13 point discrepancy in the scores of these two candidates arose from the other four questions, including a 6 point differential on the last question which related to experience with and expressed attitudes toward individuals in various socio-economic groups, races and ethnic groups.

The Commission notes that it is not the complainant's prerogative to choose the selection criteria for the position in question. The two "objective

⁴Complainant contends, incorrectly, that Ms. Brinckman "had no experience performing the duties required of the Agent." Brief, page 6.

⁵Ms. Brinckman provided substantially more information than did complainant relating to the category of relevant "life experiences."

factors" identified by the complainant do not correspond to all the criteria taken into consideration by the interview panel. The questions used by the panel and the benchmark responses did not relate solely to the vacancy in La Crosse, but were applied to numerous positions. There is no indication that the questions or benchmarks preferred candidates of one sex rather than the other.

The other focus of the complainant's case is the statement made by Mr. Jentz to complainant on June 9th, in which Mr. Jentz indicated that the sex of Ms. Brinckman was the basis for the decision not to select the complainant for the vacancy and that Mr. Mixdorf had informed Mr. Jentz of this fact. It is a rare discrimination case that includes such a statement. Respondent stipulated that the statement was made in substantially the form set forth in Finding 22, but denies the truth of the statement.

Both Mr. Jentz and Mr. Mixdorf deny that Mr. Mixdorf ever told Mr Jentz that sex played a role in the selection decision. On the day after the June 9th conversation, Mr. Jentz told complainant that sex did not play a role in the decision and that his June 9th statement was incorrect.⁶ Mr. Jentz testified that his false statement to complainant was motivated by his conclusion that complainant was emotionally fragile and the statement was a misguided "heat of the moment" effort to spare the complainant embarrassment that would be caused if Mr. Jentz explained on June 9th the true reason for complainant's non-selection. The record does establish that the statement was made when Mr. Jentz was actively involved in trying to resolve a complex series of incidents which had occurred at a transitional housing facility for offenders in La Crosse. It is also clear that the complainant asked the question about the selection decision at a very inappropriate time. Complainant posed the question in a very public setting rather than in Mr. Jentz's office. A student intern was present and offenders were milling about. The intern was within a few feet of complainant and Mr. Jentz. Mr. Mixdorf confirmed that Mr. Jentz had wished to tell complainant of the results of the interviews in a private setting in a way

⁶In his post-hearing brief, complainant suggests that it was not until after the complainant had filed his complaint of discrimination that Mr. Jentz "was able to review and recharacterize his statements on June 9." Brief, page 8. This suggestion ignores complainant's own testimony that during the June 10th conversation, Mr. Jentz denied that Ms. Brinckman's hire was due to her sex and tried to correct his June 9th statement.

that emphasized ways in which complainant could improve his performance at future interviews. Mr. Jentz had a reasonable basis for concluding that complainant had his heart set on the position and could react very emotionally when advised of the results. Complainant's conduct 2 months earlier when he wept in Mr. Jentz's office regarding the break-up of his relationship with his girlfriend suggested that the conversation with complainant about the agent position should be in a private rather than a public setting. When complainant asked, out of the blue, his question on June 9th about the results of the interview, Mr. Jentz had to think on his feet. Certainly it would have been preferable if Mr. Jentz had simply told the complainant that they could discuss the matter privately the next day. Instead, Mr. Jentz came up with a response that was designed to protect complainant. It also had the unintended effect of raising discrimination issues. The other evidence presented at hearing indicates that the reason expressed by Mr. Jentz on June 9th for not selecting the complainant for the agent position was false and was a misguided effort to avoid telling complainant, in a very public setting, the true reasons for the decision.

Complainant suggests that the June 9th situation "was not a high pressure situation, at least as Steve Dorf was concerned." Brief, page 10. Nevertheless, the complainant admits elsewhere in his brief that the situation at ATTIC on June 9th was "somewhat chaotic." Brief, page 8. Mr. Jentz, at the time complainant requested information about the hire, was in the middle of the "somewhat chaotic" situation at ATTIC and had previously decided on a totally different setting for explaining the selection decision to the complainant. The testimony reflected that complainant's question was raised soon after he arrived at ATTIC. Even if the complainant did not feel it was a high pressure situation, it is apparent that Mr. Jentz perceived it as such.

Complainant also contends that respondent's action was illegal because it made the decision to select Ms. Brinckman based upon her sex "without having any formal affirmative action plan in place." Brief, page 10. In support of this contention, complainant recites the evidence that there were discussions during one or more management meetings in the DIS Southern Sector about the absence of minority and/or female employees within the Sector and about the need to "be sensitive to hire with an affirmative eye." Jentz testimony. Complainant suggests that an "ad hoc" affirmative action plan was at

work when the Probation and Parole Agent position was filled, and that such conduct is prohibited by Lehman v. Yellow Freight System, Inc., 651 F. 2d 520, 26 FEP Cases 75, (7th Cir., 1981) In Yellow Freight the employer had made a decision to select a black applicant because of his race, and did not hire the white applicant. The employer had an affirmative action plan, but it was not used for the hiring decision in question. The court affirmed the claim of discrimination brought by the white applicant, after holding that the employer could not invoke the defense of having made a hiring decision pursuant to a permissible affirmative action plan, because the procedural and substantive requirements for an affirmative action program were not met.

In contrast to the fact situation in Yellow Freight, the decision to hire Ms. Brinckman was not based upon her sex. Neither Mr. Mixdorf, the rest of the interview panel nor Mr. Jentz relied upon an "ad hoc" affirmative action plan to select Ms. Brinckman rather than the complainant. There is simply no basis for analyzing the selection decision as an affirmative action hire.

The Commission concludes that the decision not to select the complainant was actually based upon his responses to the interview questions, rather than upon his sex. The successful candidate, Ms. Brinckman, was selected because she was the top-rated candidate during the interviews and her references maintained that ranking.

There was substantial testimony elicited at hearing about the reference on complainant's resume to having received a bachelor's degree from the University of Wisconsin-Platteville, even though the complainant admitted that he was three credits short of such a degree. Complainant testified that he told the interview panelists that he had not received the degree but none of the panelists recalled that he had made such a noteworthy statement and their interview notes merely reflected that he stated he had 167 credits in criminal justice. The Commission concludes that the complainant is not credible on this point. Possession of a degree is an important distinction and complainant was credited during the interview for having such a degree because of the clear statement on the resume and the absence of a clear statement to the contrary during the interview. However, this dispute and similar discrepancies raised by respondent really have no impact on the resolution of this matter. The issue is one of whether the respondent discriminated against the complainant based upon his sex. There is no contention by respondent that a lack of trust-

worthiness by complainant played any role in the selection decision actually made. After-acquired evidence is not a bar to relief. McKennon v. Nashville Banner Pub. Co., ___ U.S. ___, 130 L. Ed. 2d 852 (1995)

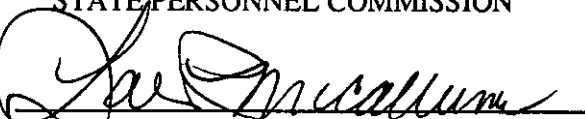
ORDER

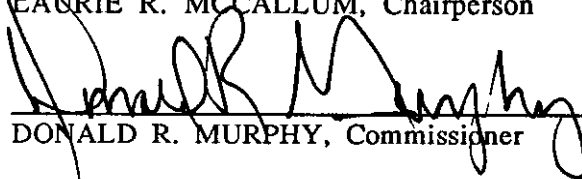
This matter is dismissed.

Dated: June 9, 1995

STATE PERSONNEL COMMISSION

KMS:kms
K:D:Merits-sex (Dorf)


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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

2/3/95