

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 JAMES DURFEE, \*  
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                   Complainant, \*  
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 v. \*  
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 Attorney General, DEPARTMENT \*  
 OF JUSTICE, \*  
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                   Respondent. \*  
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 Case No.      94-0047-PC-ER \*  
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FINAL  
DECISION  
AND  
ORDER

A Proposed Decision and Order was issued in the above-noted case on November 1, 1994. The Department of Justice (DOJ) submitted written arguments to the full Commission by letter dated November 22, 1994. Mr. Durfee had an opportunity to file or present arguments to the full Commission, but did not. The Commission considered the decision and DOJ's arguments. The Proposed Decision and Order is adopted as the Commission's Final Decision and Order, except for the corrections requested by DOJ which the Commission agrees are necessary to accurately reflect the record. The changes are designated with lettered footnotes.

PROCEDURAL SUMMARY<sup>A</sup>

Mr. Durfee filed a charge of discrimination on March 16, 1994, alleging the Department of Justice (DOJ) discriminated against him on the bases of age and sex when he was not hired for one<sup>B</sup> Program Assistant 2 (PA2) position which he interviewed for in October 1993. On May 5, 1994, the Commission

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<sup>A</sup> This new heading was added to indicate the start of repeating the text from the proposed decision.

<sup>B</sup> Changes were made in line 3 of the first paragraph of the procedural summary, to accurately reflect that the hiring for only one PA2 position was contested.

received Mr. Durfee's request to waive investigation and to proceed directly to hearing. The Commission granted his request at its meeting of May 11, 1994.

The hearing issue was defined at a prehearing conference held on July 19, 1994, as shown below.

Whether respondent discriminated against complainant on the basis of age and/or sex when it did not hire him as a Program Assistant 2 in 1993.

The hearing issue was amended during a telephone conference on September 26, 1994, at which time Mr. Durfee indicated he planned to proceed with his claim on the basis of sex discrimination only.

The hearing initially was scheduled for September 26, 1994, but was rescheduled at Mr. Durfee's request for good cause shown, within the meaning of PC 5.02(1), Wis. Admin. Code, and without objection from DOJ. The hearing was held on October 11, 1994, with oral arguments made at the close of hearing.

Based on the record established at hearing, the Commission makes the following findings of fact.

#### FINDINGS OF FACT

1. DOJ had a vacant PA2 position. The applicable union contract required posting for potential transfer by PA2s already employed by the state. DOJ fulfilled the requirement by posting an announcement dated September 30, 1993. (Exh. R-1) The job description as noted in the transfer announcement is shown below.

**JOB DESCRIPTION:** Provide administrative assistance and program support for the Bureau of Computing Services. Maintain the BCS budget and expenditures systems. Prepare requisitions for departmental computing equipment acquisitions using DOA WISMART and internal processes/procedures. Maintain BCS service request system and monitor status. Perform inventory control and accounting logging all purchases and handling disposition of surplus equipment. Handle incoming and outgoing mail and act as receptionist for BCS. Prepare and update revisions to bureau procedures and perform other related assignments.

2. No one applied for a transfer. DOJ, therefore, requested a certification list from the Department of Employment Relations (DER) of candidates eligible for interview by virtue of a general examination administered by DER. A position description (PD) for the vacancy was attached to DOJ's request. The duties of the position are summarized below using the PD format (Exh. R-2).

<u>Time %</u>	<u>Goals and Worker Activities</u>
55%	A. <u>Provision of program assistance for computing services automated systems for budget, departmental computing equipment acquisitions and departmental service request system.</u> Duties here included maintaining the computerized budget and expenditures systems through (for e.g.) data entry tasks; preparing requisitions by using the computer, charging appropriate divisions and monitoring deliveries; maintaining bureau service request system and performing inventory control and accounting by data entry of new purchases and handling surplus equipment disposition.
45%	B. <u>Provision of administrative support for the Bureau of Computing Services.</u> Duties here included providing assistance to the bureau director and bureau supervisors, handling mail, preparing updates and revisions to bureau procedures and DOJ's data processing plan, typing and performing other related tasks as needed.

3. DOJ received a certification list dated October 12, 1993 (Exh. R-3). Nineteen candidates were listed in alphabetical order without specific reference to their age or sex<sup>1</sup>. Nine candidates were uninterested in the positions, two failed to report for scheduled interviews and one was not available; leaving seven candidates who interviewed. Mr. Durfee was

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<sup>1</sup> Although the sex of the candidates was omitted from the certification list, the Commission agrees with Mr. Durfee that the sex may have been discernible by the candidates' first names.

one of the 7<sup>C</sup> interviewed candidates, as were Dena Sedlmayr and Christine Byars. After interviews, DOJ offered the position to Ms. Sedlmayr but she declined the offer. The position was then offered to and accepted by Ms. Byars.

4. The candidates were interviewed by Mr. Robert Joswiak, Director of DOJ's Computing Services Bureau. He received a list of potential interview questions (Exh. R-6) from Gary Martinelli, Director of DOJ's Human Resources Department. The questions he selected to ask candidates are circled on Exh. R-6, and are noted below.

Q1: In your last job, what were your basic responsibilities?

Q2: What were the most important projects you worked on?

Q3: What type of decisions did you make?

Q4: How did you feel about your workload?

Q5: How did you manage multiple or conflicting priorities?

Q6: What type of communication problems did you encounter and did you communicate more in writing or orally?

Q7: What is/was your boss like?

Q8: What are your strengths and weaknesses in relation to this vacancy?

Q9: What do you know about the Department?

Q10: How does this job fit into your long-term career goals and objectives?

Q11: Why should I hire you?

5. Mr. Joswiak asked each interviewed candidate the same set of questions. He used a form entitled "Applicant Interview" (Exh. R-7, e.g.) to grade each candidate on 10 separate factors, as shown below.

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<sup>C</sup> The number of interviewed candidates was corrected in par. 3 of the Findings of Fact.

#/Factor	Unsatisfactory	Below Average	Average	Above Average	Excellent
I. Appearance (APP)	APP unsuitable for this position.	Careless abt APP & dress. Less suitable than ave.	APP suitable for this pos.	Better than ave. APP; well suited to this pos.	Excelnt APP; neat, tidy. Highly suited to pos.
II. Friendliness (FR)	Un-FR. Dific to engage in conversation.	FR but reserved; approachable.	Suitably FR for this pos.	Outgoing, warm, very FR.	Extremely FR engages easily in conversation.
III. Bearing.	Nervous, ill at ease; wary & uncomfortable.	Tense, hesitant; displays discomfort occasionally.	As relaxed & poised as the ave app.	Relaxed & confident; comfortable in interview.	Very calm & in control; handles pressure of interview extmly well.
IV. Personality (PR)	PR is unsuitable for this pos.	PR is questionable for this pos., but may be suitable.	PR suitable for this position.	PR well suited & desirable for this position.	PR outstanding for this position; excellent fit.
V. Communication	Communicates (CS) thoughts poorly; spks only when spoken to.	CS freely, but has trbl expressing thoughts clearly & succinctly.	CS as well as the ave. app for this position.	CS well & succinctly. Has focused thoughts.	CS extremely well; direct & forceful.
VI. Attentiveness	Has difc understanding points discussed. Attention wanders.	Understds only after additional explanation. Short Atten span.	Attentive & understds w/average ability.	Very attentv & engaged; quick to understd.	Extremely Attentv & anticipates course of interview - alert.
VII. Knowledge of position (KOP)	Poor or no KOP.	Has some KOP.	Is as informed as ave app about pos.	Knows more than ave app; well informed about pos.	Excellent KOP.
VIII. Work Experience.	Has no exp relevant to this position. (RTTP)	Has limited exp RTTP.	Exp is adequate & RTTP.	More exp than the ave app for this pos.	Exp is directly related to this pos.
IX. Motivation	Not motivated (MV). Appears indifferent.	Appears somewhat MV but fails to set adeq goals.	MV & puts ave effort into achieving goals.	Very MV & works hard to achieve goals.	Sets high goals & is extmly MV to achieve them.
X. Suitability for this pos. (SFP)	Un-SFP.	SFP but below ave.	SFP; ave.	Well SFP.	Extremely well SFP; outstanding.

6. Mr. Durfee contested the grading criteria for factor 3, regarding bearing. He felt employers should expect a good candidate to be somewhat tense, alert and "going to bat" for themselves.
7. Mr. Joswiak rated Ms. Byars (Exh. R-7) and Mr. Durfee (Exh. R-8) on the 10 interview factors noted in the prior paragraph, as shown below.

<u>Factor</u>	<u>Ms. Byars</u>	<u>Mr. Durfee</u>	<u>Factor</u>	<u>Ms. Byars</u>	<u>Mr. Durfee</u>
# 1	Above ave.	Above ave.	# 6	Above ave.	Ave.
# 2	Above ave.	Ave.	# 7	Above ave.	Ave.
# 3	Above ave.	Ave.	# 8	Above ave.	Below ave.
# 4	Above ave.	Below ave.	# 9	Ave.	Below ave.
# 5	Above ave.	Below ave.	# 10	Above ave.	Below ave.

8. Mr. Durfee disagreed with the scores Mr. Joswiak assigned to Mr. Durfee for factors 4 and 5. Regarding the personality score (factor #4), he wondered what scoring criteria were used. Once the scoring criteria were presented at hearing, Mr. Durfee did not re-state a disagreement with the score given by Mr. Joswiak. Regarding the communication score (factor #5), Mr. Durfee felt the score was too low because he feels he is a good communicator. He may be a good communicator in most situations, but apparently was not at the interview.
9. Mr. Durfee cited the composition of DOJ's workforce as evidence of sex discrimination. Specifically, Exh. R-9, indicates that as of October 20, 1993 (when Mr. Durfee interviewed for the job), DOJ had 22 PA-2 positions all filled by females; and 39 PA-1 positions, filled by 38 females and 1 male.<sup>2</sup> Mr. Durfee had no knowledge of how the composition of DOJ's workforce compared with the available labor force.
10. Gary Martinelli, DOJ's Director of Human Resources since 1990, provided information regarding the sex composition of the available labor force for PA1 and PA2 positions. He contacted DER<sup>3</sup> to determine the

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<sup>2</sup> The following 4 positions were not included in this count because Exh. R-9 indicates the initial hires occurred after 10/20/93: Jean Banks, Abby Bredeson, Julie Newby and Chris Byars.

<sup>3</sup> DER is the state agency which maintains eligibility registers for civil service employment. The individuals included on the registers successfully completed a written test of general qualifications for the positions. See s. 230.25, Stats.

percentage of males on the PA1 and PA2 registers as of October 1994 (when the hearing was held). DER informed Mr. Martinelli that less than 14% of the current register of 1,009 candidates is composed of males. Mr. Martinelli did not know what rank those males achieved on the written test and, therefore, was unable to say whether they were ranked high enough to merit inclusion on a certification list.

Generally, the top five ranked candidates are referred to interviews on a certification list, pursuant to s. 230.25(1), Stats.

11. Mr. Martinelli opined that the current level of males on the PA registers is significantly higher than it had been in the past. Often there were no men certified to DOJ to interview for a PA vacancy. In DOJ's experience, the inclusion of males on the certification list for interview is a recent phenomenon.
  12. Mr. Martinelli knew of no discrimination complaints filed against DOJ claiming sex bias against males, with the exception of Mr. Durfee's complaint.
  13. Mr. Durfee had work experience with computers in a position with the University of Wisconsin (UW) which he had held for about 9 months prior to his interview. The resume Mr. Durfee provided at the interview was not updated to include the UW position. However, Mr. Durfee said he gave this information during his interview, but Mr. Joswiak disagreed. The examiner determined it is most likely that Mr. Durfee's recollection is correct. Consideration of Mr. Durfee's experience in the UW position would not change the hiring result because Ms. Byars' relevant work experience was significantly more extensive. Her resume (Exh. R4) reflects more than 10 years experience in computer operations. Even considering Mr. Durfee's UW work, Ms. Byars was the better qualified candidate.
  14. Comparison of candidate's qualifications for the PA2 position is difficult in this case because the scored benchmarks were not directly related to the interview questions. For example, one interview question asked what the candidate's basic responsibilities were in their last job. Typically, benchmarks are designed to measure the candidate's response to the question asked by, for example, giving higher points to the
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candidate with computer experience directly related to the DOJ PA2 position. In contrast, Mr. Joswiak scored the responses on more subjective benchmark factors, such as "friendliness". The method used by Mr. Joswiak left no paper trail for use by the examiner to determine what answers were given to the interview questions and whether the scoring reasonably reflected the answers given.

15. Mr. Joswiak has conducted about 50 interviews and has selected men for hire about as often as he has selected female candidates. The interview with Mr. Durfee was the only PA interview conducted by Mr. Joswiak.
16. Mr. Durfee thought DER kept specialized lists of PA candidates, such as PA-medical. He *speculated* there would be a greater percentage of males on the specialized list. However, he did not know of any specialized list appropriate to the requirements of the PA2 position for which Ms. Byars was hired.
17. Mr. Durfee agreed that DOJ did not intentionally discriminate against him because of his sex when he was not hired for the PA2 position.
18. Contrary to Mr. Durfee's contentions, he failed to show that DOJ has a history of "institutionalized bias" against hiring males in PA positions.

#### CONCLUSIONS OF LAW

1. Mr. Durfee is entitled to protection under the Fair Employment Act, by virtue of his sex.
2. Mr. Durfee had the burden to prove by a preponderance of the evidence that discrimination occurred as alleged.
3. Mr. Durfee failed to meet his burden.

#### DISCUSSION

The analytical framework for discrimination cases was laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. CT. 1817 (1973). Under this framework, the burden is first on the complainant to show a prima facie case; the burden then shifts to respondent to rebut the prima facie case by articulating a legitimate, non-discriminatory reason for its action; and the burden then shifts back to complainant to show that respondent's reason is a pretext for discrimination.

Mr. Durfee could establish a prima facie case by establishing the following factors: 1) he is a member of a group protected under the Fair Employment Act (FEA), 2) he was qualified for the PA2 position, and 3) he was not selected for the position under circumstances which give rise to an inference of discrimination. He established the first two elements. He is male and therefore a member of a group protected under the FEA. His qualification for the PA2 position was shown by his inclusion on the certification list as eligible to interview for the position.

Mr. Durfee failed to establish the third element of his prima facie case. The main evidence he presented to raise an inference of discrimination was the fact that DOJ's PA positions are filled almost exclusively by females. However, the makeup of DOJ's workforce without comparison to the available labor force is insufficient to establish a prima facie case.

The U.S. Supreme Court addressed the significance of statistics in relation to a prima facie case in Wards Cove Packing Co. v. Atonio, 490 US 642, 109 S Ct. 2115, 104 L Ed 2d 733 (1989). Also, see Thalhofer v. UW System, 79-PC-ER-22, p. 7 (9/23/81). The court in the Wards Cove case stated (Id., 104 L. Ed. 2d at 747) as follows:

Although statistical proof can alone make out a prima facie case [citations omitted], . . .

The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market". [Cite omitted.] It is such a comparison -- between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs -- that generally forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics--such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs -- are equally probative for this purpose. [Cites omitted.]

Applying the above-noted principles to Mr. Durfee's case, he was required to present some statistics of the sex composition of the PA jobs at DOJ (which he did) and the sex composition of the qualified population in the relevant labor market or some other measure indicating the sex composition of otherwise-qualified applicants (which he failed to do). The only statistics in the record regarding the sex composition of the qualified population were presented by

DOJ (as recited in par. 10 & 11 of the Findings of Fact) and are contrary to Mr. Durfee's claim. Accordingly, Mr. Durfee failed to establish a prima facie case of sex discrimination.

Even assuming arguendo that Mr. Durfee established a prima facie case, the record is insufficient to support his claim. DOJ articulated a legitimate, non-discriminatory reason for its decision to hire someone other than Mr. Durfee for the PA2 position. DOJ said the position was offered to Ms. Byars because she was more qualified than Mr. Durfee. Mr. Durfee did not show he was more qualified than Ms. Byars for the position or other sufficient evidence that DOJ's stated reason for hiring Ms. Byars was pretextual.

ORDER

This case is dismissed.

Dated December 14, 1994.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
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.)