STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,
Appellant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case No. 97-0012-PC-ER

FINAL DECISION AND ORDER

This matter is before the Commission following the promulgation of a proposed decision and order pursuant to §227.46(2), Stats. The Commission has considered the parties' objections and arguments with respect to the proposed decision and order and has consulted with the hearing examiner. At this time, the Commission incorporates by reference and adopts the attached proposed decision and order as its final decision of this case, subject to some minor revisions of an editorial and typographic nature, and to better reflect the record. The Commission has considered all of complainant's objections and arguments and has not found anything that would require any substantive changes in the proposed decision and order. However, the Commission adds the following discussion to address some of complainant's arguments.

The parties have disputed whether certain witnesses' testimony supports particular factual matters. Complainant asserts that personnel specialist Alison Scherer testified that complainant would have been certified for consideration for appointment if all four pages of his AHQ (Achievement History Questionnaire) had been considered by the rating panel. Respondent disputes this contention. The tape of Ms. Scherer's testimony has been reviewed, and the Commission has been unable to find anything therein which supports complainant's assertion. Ms. Scherer testified as follows:

> Q Do you have any idea, based on your knowledge of the total recruitment process, why complainant Balele did not survive the ratings panel and proceed to interview eligibility? . . .
>
> A From my knowledge again, no, I do not rate the materials. And part of my knowledge of this case would be that part of the low score may be attributed to the fact that he had two pages removed, that I removed them because he did not follow the application instructions, that are outlined in the job announcements, *that may have contributed to his low score*. . . . (Emphasis added)

The Commission can not perceive, under any reasonable interpretation of Ms. Scherer's testimony, how it supports complainant's characterization of it. Furthermore, even if complainant would have gotten a certifiable score if all of his materials had been submitted, the decision to remove two of the pages of complainant's AHQ was, as set forth in the proposed decision, a reasonable and nondiscriminatory action.

Another bone of contention involves the testimony of Dr. Dennis Huett, respondent's psychometrics expert. Complainant contends that Dr. Huett testified that the AHQ selection process used in this case had an adverse impact on minorities, which respondent denies. Dr. Huett testimony on this subject includes the following:

> Q To the extent there is data out there on the adverse impact of AHQ's, what is your understanding of that?
>
> A It would be less, that adverse impact would be reduced in comparison to written ability tests for example. . . .
>
> Q Can you, with your experience and background, come to any kind of conclusion with respect to adverse impact of the type of screening or testing that's used for career executives? . . .
>
> A It's clear that ethnic minorities are being placed on career executive registers in a higher percentage than their availability in the workforce.
>
> Q And is there some kind of conclusion one can come to based on that?
>
> A It does not appear that the procedures being used in this case are working to the disadvantage of ethnic minorities.

Dr. Huett did testify that a resume screen *alone* was not a particularly valid or reliable selection device. In this case, resumes were given to the rating panel in addition to, and as an adjunct to, the AHQ's. Mr. Huett did not criticize the use of resumes in this limited context.

Complainant also characterizes Dr. Huett's testimony as supportive of complainant's exhibit 18. This document is a compilation of data that complainant asserts he gathered by telephoning representatives of the agencies enumerated thereon and inquiring about the total number of candidates who had applied for positions which required an AHQ/resume screen, the total number found eligible, and the number of each of these groups who were racial minorities. Complainant did not identify these representatives by name. Respondent's objection to this exhibit at the hearing was sustained because the exhibit is a compilation of unattributed hearsay statements to complainant and could not reasonably be relied on for the purpose for which it was offered. Complainant now argues that the information reflected on this exhibit was corroborated by Dr. Huett's testimony:

> Dr. Huett, the DER/DMRS/DOC's own witness, who is also a white individual, testified that the AHQ as a whole had disparate impact on Blacks and other racial minority job applicants. Therefore, there was no prejudice to respondents as to the data on exhibit 18 because their own witness agreed with data on exhibit 18. (Complainant's objections to proposed decision and order, p. 16)

As discussed above, this assertion is unsupported by the hearing record.

Complainant has requested that the hearing record be reopened for a number of reasons, all of which the Commission finds groundless.

The proposed decision rejected complainant's contention that "typical" AHQ processes do not limit the number of pages to be submitted by applicants: "In support of this proposition, he [complainant] cites to three exhibits. Two of these relate to a selection process for a position in the Department of Natural Resources (DNR). This does not establish a 'typical' process." Proposed decision and order, p. 10. Complainant now has submitted a copy of a May 11, 1998, announcement of a selection process

for the position of Corrections Security Chief, Madison area. This process appears to use an AHQ that does not limit the response to two pages. Complainant argues that this demonstrates that "as soon [sic] Balele caught respondents using the illegal AHQ version, they reverted to the lawful AHQ method." Complainant's objections to the proposed decision and order, p. 20. In the Commission's opinion, this proposed evidence concerning a more recent staffing does little or nothing to demonstrate that respondent had a policy on the length of AHQ questionnaires which was changed. This is simply another selection process for a position that has not been shown to be comparable to the position in question.

Complainant also seeks to have Dr. Huett recalled as a witness to clarify his testimony. Dr. Huett testified at length on direct and cross-examination at the hearing. The only reason complainant now provides for reopening the hearing to elicit further testimony from this witness is that "[t]he Commission misstated Dr. Huett's testimony and evidence he produced at the hearing which would inculpate respondents as parties who intended and actually discriminated [sic] complainant because of his race and national origin." Objections to proposed decision and order, p.3. Even if this were the case, Dr. Huett's testimony at the hearing remains of record, and there would be no reason to recall him now. Furthermore, complainant repeatedly has misstated Dr. Huett's testimony, and the proposed decision is not erroneous in its characterization of that testimony and its findings which rely on that testimony in whole or in part.

Complainant also seeks to reopen the hearing to elicit testimony from Al Spears, a former employe of DER who, while in that capacity, signed an affidavit associated with "DER'S RESPONSE TO APPELLANT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS." Both parties used this document as an exhibit. Complainant argues that Mr. Spears should testify with regard to his affidavit[1] and that "DER and DMRS were afraid of bringing Spears because he

[1] Complainant had asked the Commission to send Mr. Spears an appearance letter pursuant to §230.44(4)(b), Stats. The Commission sent such a letter using the address for Mr. Spears complainant provided. At the hearing, it was learned that Mr. Spears was no longer employed by DER.

would testify the data was a perjury." Objections to proposed decision, p. 18. The Commission rejects this request. This document came into the record without objection as complainant's exhibit 17. There is no support for complainant's argument that admitting this exhibit was inconsistent with the following part of the Commission's decision in *Balele v. DHSS & DMRS,* No. 91-0118-PC-ER, 4/30/93:

> Complainant argues that the appointees to the subject positions were not properly certified and therefore were ineligible for the position. He bases his argument on respondent DMRS's response to interrogatories in which DMRS states: "not all employes in the career executive program have taken exams, although a majority have . . . They may have to take exams to be considered for other career executive positions." Complainant presented no evidence regarding whether the successful candidates were properly certified. The only evidence of record is that the appointees had career executive status and were among those certified for the position. *Id.*, p. 7.

Complainant now asserts: "[t]he reason this Commission refused to admit [sic] into evidence was that affiant was not present at the hearing and therefore did not testify as to the truth of the statements in the affidavit. This same situation was before the Commission regarding Al Spears' affidavit. Surprising [sic] the Commission has taken opposite stand." Complainant's objections to proposed decision, p. 18. In the excerpt from complainant's earlier case cited above, the Commission pointed out that while complainant argued that the appointees had not been properly certified, he based his argument on respondent's answers to interrogatories which did not support that proposition, and he had presented no other evidence to support his argument. There is nothing inconsistent between the earlier case and the instant case.

In a related vein, complainant also seeks to reopen the hearing to take testimony from Commissioner Murphy, the hearing examiner in his earlier case: "Commissioner Murphy should be subpoenaed to testify, on behalf of the Commission's the [sic] ruling in *Balele v. DMRS & DHSS* case No. 91-0118-PC-ER which binds this Commission." Complainant's objections to proposed decision and order, p. 3. Complainant has cited no authority in support of calling as a witness a hearing examiner to testify about the meaning or significance of a Commission decision, and the Commission is aware of

none. The Commission's decision speaks for itself, and there is no precedent or other basis for calling the examiner as a witness at a hearing to provide his or her interpretation of the decision.

Finally, after the oral arguments complainant filed a motion for a "judgment on admitted claim." Complainant contends that respondents failed to "refute" his contention that the use of the career executive program has a disparate impact on racial minorities, and therefore in legal effect admitted this point. In support of this proposition, complainant cites *Charolais Breeding Ranches v. FPC Securities,* 90 Wis. 2d 97, 109, 279 N. W. 2d 493 (Ct. App. 1979). In that case, the trial court had overruled a demurrer on three grounds. On appeal, the plaintiff made no arguments in opposition to the defendants' position attacking one ground for the trial court's decision. The Court held:

> Consequently, we reject this ground as a theory upon which to support the trial court's order overruling the demurrer. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." (citation omitted)

The Commission rejects this argument for two reasons. First, respondents have contested complainant's argument that the use of the career executive program has an adverse impact on racial minorities. At the oral argument, respondents referred to Dr. Huett's testimony[2] that the AHQ process (which is the type of selection device used most frequently to determine career executive status) does not have an adverse impact on racial minorities, and that racial minorities appear in the career executive ranks in a greater proportion than they appear in the qualified, available work force. The second reason for rejecting this argument is that the holding from *Charolais Breeding Ranches,* which concerns judicial appellate procedure, can not fairly be applied to this de novo[3] administrative hearing. Complainant cites *Lindas v. Cady,* 183 Wis. 2d 547, 515 N. W. 2d 458 (1994) for the proposition that "[t]he rules and extensiveness of proceedings in this Commission are similar to those in Circuit Court." Appellant's brief, p. 7. The

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[2] *See* page 2, above.
[3] *See, e. g., Ratchman v. UW-Oshkosh,* 86-0219-PC, 11/18/87.

Court's holding was that "the [Commission's] administrative process in this case provided Lindas 'adequate' opportunity to litigate the issue of sexual discrimination." 183 Wis. 2d at 557. While there are many similarities between an administrative adjudicative process such as the Commission's and the judicial process, there are also many differences. *See, e. g.*, §PC 5.03(1), Wis. Adm. Code: "The commission is not bound by the strict rules of procedure and the customary practices of courts of law." It certainly is not necessary that a party engaged in an oral argument concerning a proposed decision address explicitly every argument of the opposing party to avoid a conclusion of waiver or admission of that party's arguments.

ORDER

The proposed decision and order, a copy of which is attached hereto and incorporated by reference, is adopted as the Commission's final disposition of this case, and this complaint is dismissed.

Dated: October 9, 1998.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT:970012Cdec2.2

JUDY M. ROGERS, Commissioner

Commissioner Murphy did not participate in the consideration of this matter.

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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

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PASTORI BALELE,
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Secretary, DEPARTMENT OF CORRECTIONS;
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Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case No. 97-0012-PC-ER

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the bases of race and retaliation. The issues for hearing are as follows:

1. Whether respondents discriminated against complainant on the basis of race in violation of the WFEA in connection with having advised complainant he was ineligible for the Budget and Policy Officer 3 position for which he had applied.
   Subissues:
   a) Whether the use of an Achievement History Questionnaire (AHQ) and resume screen as part of the selection process for this position had an illegal adverse impact on racial minorities.
   b) Whether respondents intentionally used the AHQ and resume screen while aware that it had an adverse impact on racial minorities and was non-job related.

2. Whether respondents retaliated against complainant in violation of the WFEA in connection with having advised complainant he was ineligible for the Budget and Policy Officer 3 position for which he had applied. Ruling dated June 5, 1997.

FINDINGS OF FACT

1. Complainant is black and his nation of origin is Tanzania.

2. The position in question in this case is a Budget and Policy Officer 3 career executive position in the Department of Corrections (DOC), Division of Management Services (DMS).

3. DOC administered the examination process for this position on a delegated basis from the Division of Merit Recruitment and Selection (DMRS) pursuant to sec. 230.05(2), Stats.

4. DOC developed the exam plan for this position following customary procedures for such staffing processes within the state civil service. This included the completion of a high importance job questionnaire by a person (Pamela Brandon, the direct supervisor of the position) familiar with the position, and the development of rating criteria or benchmarks for rating the application materials. Ms. Brandon also recommended the members of the rating panel to the DOC personnel specialist responsible for the examination process.

5. The vacancy in this position was announced for competition in the Current Opportunities Bulletin (COB), which included the following:

> JOB DUTIES: This position is responsible for the development of the Department's biennial budget, annual review proposals, Joint Committee on Finance Requests, preparation of the Department's capital budget and major capital projects. This includes the development of budget guidelines, identification of issues of key importance to the Department, analysis of Divisional budget and capital requests and development of alternative proposals for the Secretary's consideration. In addition, this position is responsible for preparation of budget proposals, review and preparation of statutory language necessary to implement the budget proposals, and liaison with the Department of Administration and the Legislative Fiscal Bureau. This position develops and reviews legislative proposals/bills, reviews proposed position redeployments and reviews federal grant proposals in the institutional and administrative areas. This position is responsible for the administration of the Department's Facilities Management and Development Program. KNOWLEDGE AND SKILLS: Principles and techniques, state budget process; state capital budget process; effective management and supervisory techniques; principles of statistical analysis and Affirmative Action/Civil Rights Compliance laws.

4. This announcement included the following information on the selection process:

> **For candidates who do not have Career Executive status in the classified state service, apply with the Application for State Employment form (DER-MRS-38), a current resume, and a letter which does not exceed two pages, summarizing your years of experience, training and education in 1) budget development, analysis and preparation (e. g., operating budget and capital budget); 2) development and review of legislative program proposals/bills; 3) staff supervision and/or management (e. g., number of staff supervised, performance evaluation); and 4) policy analysis. Send application materials to . . . For candidates who have Career Executive status in the classified state service, submit to the same address, the Application for State Employment form (DER-MRS-38) and a current resume. . . .Completed application materials . . . will be evaluated and the most qualified applicants will be invited to participate in the next step of the application process.**

6. At the time he applied for the above position, complainant was employed in the Department of Administration (DOA) in the classified civil service, and did not have Career Executive status.

7. There are four "options" available for staffing a vacant career executive position. In summary, option 1 is limited to the movement of a career executive within the employing agency. Option 2 involves the movement of a career executive between different agencies. Option 3 involves certification from the register of career executives who are classified civil service employes, and Option 4 is open competitive. DOC utilized option 4 in this case.

8. DOC has admitted, in response to a request for admission, its workforce was not "balanced" for the job category (administrators-senior executives) which contained the position in question. DOC employed 3 minorities out of 54 employes (5.55%) in this job group as of December 1996. The "availability factor" for racial/ethnic minorities with respect to this job group in December 1996 was 6.7%. Use of option 4 was consistent with state policy for staffing underutilized career executive positions.

9. As set forth in the above vacancy announcement, and consistent with provisions of the civil service code and DMRS policies, career executives who applied for this position were not required to submit AHQ's and were deemed eligible for interviews without having to undergo the screening required for non-career executive candidates.

10. In response to the foregoing COB announcement, complainant submitted a completed application form, a resume, and a letter addressing the points set forth in the foregoing announcement. Complainant submitted a four page letter, rather than a two page letter as specified in the announcement. Complainant's reason for submitting a four page letter was his opinion that because of his background, he could not cover what he needed to say in two pages, and because he believed that the stated requirement of a two page letter was part of a plan by DER to limit blacks and other minorities from advancing in the civil service.

11. The rating panel consisted of two white state employes who were recommended by Ms. Brandon to the DOC personnel specialist (Alison Scherer) who administered the selection process. Ms. Scherer evaluated the recommended people to determine whether they were suitable raters.

12. Ms. Scherer, the personnel specialist, reviewed the application materials before transmitting them to the rating panel. As set forth above, complainant had submitted a four page letter instead of a two page letter as prescribed in the announcement. He was the only applicant to submit more than a two page letter. Ms. Scherer forwarded only the first two pages of complainant's letter to the rating panel, because complainant had not followed the instructions, and because she was of the opinion that it would be unfair to the other candidates to allow him to use four pages.

13. Complainant was the only black candidate of eleven candidates. There were four career executive candidates. As noted above, they were certified for consideration by the appointing authority without screening by the rating panel. Of the seven non-career executive applicants, the rating panel gave passing scores to two. The raters graded complainant's materials against the rating criteria that had been developed and

gave him a failing score. Therefore, complainant was not one of the six applicants certified to the appointing authority for interviews and consideration for appointment.

14. Ms. Brandon, who is white, appointed a white career executive from within DOC, whom Ms. Brandon had known, to the position in question.

15. When the rating panel reviewed the examination materials, it had available each applicant's two page response to the questionnaire (i.e., an AHQ [Achievement History Questionnaire]), identified only by candidate number, and each candidate's resume, which included each candidate's name.

16. DER's guidelines on the use of AHQ's dated April 1979 (Complainant's Exhibit 3) includes the following:

> Use "blind" scoring procedures whenever possible - each competitor's materials being identified by a code number (such as social security number or randomly assigned number) with identifier information (name, race, sex, etc.) being removed prior to being made available to the employe.

17. The Division of Affirmative Action (DAA) within DER promulgated a document entitled Affirmative Action Policy and Procedure Standards January 1994-December 1996 (Complainant's Exhibit 9), which includes the following provision:

> II.L. Each agency shall have a policy regarding including AA group members on oral boards, interview panels, search and screen committees, and as exam raters.

18. DER/DAA promulgated Bulletin No. AA-48 on December 1, 1994, (Complainant's Exhibit 10) which included the following:

> **AFFIRMATIVE ACTION GUIDELINES**
> **FOR ACHIEVING BALANCED EXAMINATION**
> **AND INTERVIEW PANELS**
>
> The Division of Affirmative Action is issuing these guidelines for agencies to use in the development of policies and procedures to achieve balanced examination and interview panels (this includes all panels, such as, examination and interview panels, search and screen committees and examination raters).
>
> . . .

Balanced Panel Use:

> Balanced examination and interview panels are strongly recommended when filling positions which are in underutilized job groups and the certification includes affirmative action group members (racial/ethnic minorities, women and persons with disabilities). The use of balanced examination and interview panels is also encouraged whenever certifications include members of affirmative action groups and the position is in a job group which is not underutilized.

19. A January 2, 1990, letter from the DMRS administrator to the DOC secretary concerning the extension of delegated staffing authority to DOC pursuant to §230.05(2)(a), Stats., includes the following provision:

> (5) STANDARDS APPLICABLE TO DELEGATED TRANSACTIONS
>
> All delegated actions under (3) shall comply with relevant provisions of subchapter II of Chapter 230, Stats.; Rules of Department of Employment Relations, Division of Merit Recruitment and Selection; Department of Employment Relations Bulletins issued by DMRS (MRS Bulletins) and the Wisconsin Personnel Manual – Staffing (WPM-S).

20. Over the years, complainant has pursued a number of discrimination claims, complaints, etc., under the WFEA and other similar provisions, against respondents. While knowledge of these proceedings can be attributed to respondents generally, neither the rating panel nor the effective appointing authority (Ms. Brandon), were aware of these activities of complainant's during the relevant time period.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondents discriminated against him on the basis of race and WFEA retaliation in connection with the rejection of him for the position in question.

3. Complainant has failed to establish that the alleged discrimination occurred.

4. Respondents did not discriminate against complainant as alleged.

OPINION

The first issue in this case is:

1. Whether respondents discriminated against complainant on the basis of race in violation of the WFEA in connection with having advised complainant he was ineligible for the Budget and Policy Officer 3 position for which he had applied.

Subissues:

a) Whether the use of an Achievement History Questionnaire (AHQ) and resume screen as part of the selection process for this position had an illegal adverse impact on racial minorities.

b) Whether respondents intentionally used the AHQ and resume screen while aware that it had an adverse impact on racial minorities and was non-job related.

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) he is a member of a group protected by the WFEA, (2) he applied and was qualified for a job which the employer was seeking to fill, (3) despite his qualifications he was rejected, and (4) the employer continued with its attempt to fill the position. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1917, 5 FEP Cases 965 (1973). Here, complainant is a black person who applied for the position in question. He was rejected due to his failure to have attained a passing grade from the rating panel. After his rejection, respondent DOC continued with the selection process and appointed a white person to fill the position. The

parties disagree about whether complainant was qualified for the position. However, since complainant clearly has established the other elements of a prima facie case of race discrimination, and this case was heard fully on the merits, the Commission will proceed directly to the issue of pretext, *see, e.g., United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d. 403, 103 S. Ct. 1478 (1983).

Respondent's articulated rationale for its decision to reject complainant involves complainant's failure to have followed the explicit exam instructions provided in the announcement. The announcement instructed non-career executive applicants to submit a two page AHQ addressing the four factors enumerated in the announcement. Complainant, alone among those applicants, failed to adhere to this specific directive, and submitted a four page AHQ. The DOC personnel specialist who was administering the selection process decided that it would be inappropriate, and unfair to the other applicants, to allow complainant's qualifications to be evaluated on the basis of a four page AHQ. Therefore, she removed two of the four pages from complainant's AHQ before submitting it and complainant's resume to the rating panel. When the panel evaluated complainant's application materials against the rating benchmarks, they assigned him a score below the passing level. Complainant has not provided any significant showing that based on the application materials before the rating panel, their evaluation was incorrect. For example, with regard to the second rating factor (development and review of legislative program proposals/bills) one rater assigned him a score of one (on a scale of zero to three) and the other rater gave him a zero. There does not appear to be anything in the complainant's materials that addresses this element, and there is no basis for a finding that there was anything erroneous about their rating of complainant in this regard.

While there is no basis for a conclusion that there was anything questionable about the rating panels evaluation of complainant, he contends that the decision to submit only two of the four pages in his AHQ to the rating panel was itself improper: "Respondents and their agents intentionally discriminated against the complainant when they failed to forward some of his responses to exam raters under the pretext that he

had over done his responses." Complainant's posthearing brief, p. 3. Complainant goes on in his brief as follows:

> [C]omplainant had the burden of providing evidence that respondents' reason was pretext of discrimination. Complainant can do so by providing evidence that as a matter of fact or law 1) The two page letter was not required or useless in selection process; 2) Respondent's criterion for length of the letter was contrary to sound employment practice, (3) Respondents' knew the act of truncating complainant's exam materials was contrary to fundamental and well-defined sound employment practice and therefore against public policy. Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 141, 396 N.W.2d 167 (1986).[1]

Complainant goes on to contend that his criticism of the two page letter policy was supported by the testimony of respondents' expert witness, Dr. Dennis Huett.[2] Complainant has not cited to any particular part of Dr. Huett's testimony, and the Commission has not found in his testimony any criticism or disapproval of the two page AHQ used in this case. In fact, he testified that in his opinion the entire selection process did not involve anything improper.

Complainant next quotes a passage from one of respondent's exhibits, a 1994 publication of the Assessment Council of the International Personnel Management Association entitled "The Rating of Experience and Training: A Review of the Literature and Recommendations on the Use of Alternative E & T Procedures, p. 21:

> [T]hey [AHQ processes] require candidates to possess and use considerable analytic ability as well as writing skills to identify relevant past accomplishments and to provide narrative description of these accomplishments on which the ratings are based. Several researchers report that the return rates of Behavioral Consistency questionnaires are low. This phenomenon may result from the comparatively heavy burden Behavioral Consistency E & T place on candidates. The low return rates may indicate that completing a Behavioral Consistency questionnaire requires more effort than candidates are willing to expend or that it simply requires skills which are beyond the candidate's ability. . . . Some of these

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[1] The court in *Bushko* held that an action for wrongful discharge may be had for a discharge for refusing the employer's command to violate public policy as established by a statutory or constitutional provision, but not for activity merely consistent with public policy.

[2] He has a Ph.D degree in industrial psychology with an emphasis on personnel assessment, testing, measurement and staffing.

> problems may be partially overcome by modification, although modifications present their own set of difficulties . . .

There is nothing in this quote or this exhibit that lends any apparent support to complainant's contention that the restriction of the AHQ's to a two page letter was incorrect or contrary to sound employment practice.

Complainant also asserts that "typical" AHQ processes do not limit the number of pages that can be submitted by examinees. In support of this proposition he cites to three exhibits. Two of these relate to a selection process for a position in the Department of Natural Resources (DNR). This does not establish a "typical" process. Complainant also cites to the DER staffing manual chapter on the AHQ (Complainant's Exhibit 3). Complainant does not cite to any specific section of this document, and there does not appear to be anything in this document which supports his contention.

Complainant also contends Dr. Huett testified "that DER and DMRS and therefore DOC knew about the AHQ practice and that restricting pages was not sound practice." Complainant's post-hearing brief, pp. 21-22. Again, there is nothing in Dr. Huett's testimony to this effect.

Complainant goes on to assert the following:

> Second, the letter actually was not required in the selection process. Candidates with career executive status were found eligible without the two page letter. Therefore, as a whole, only the resume was required in the selection process. However the resume, as testified by Dr. Huett; was inappropriate for the position at issue and had disparate impact on racial minorities as pointed above [sic] and respondent knew it. *Id*, p. 22.

The selection process for this position was conducted on an Option IV basis under the career executive program. Option IV is open competitive. However, it is in keeping with the civil service code and all evidence of record that existing career executives would be certified for consideration by the appointing authority without having to go through an examination process (here, the AHQ screen). A central concept of the career executive program is the establishment of a pool of highly qualified upper level executives who can move or be moved when needed without having to go through the

examination process used for non career executives. In this case, competition was not limited solely to career executives because of affirmative action considerations (as will be discussed further below), and the AHQ screen was used to evaluate non career executives to determine which ones would be considered qualified for consideration by the appointing authority. Therefore, the AHQ screen did play a significant role in the overall selection process notwithstanding that existing career executives did not go through the process.

Complainant also asserts the following in support of his contention:

> Complainant testified that, when responding to the advertisement, he was aware, as a person with Master of Science in Agri-Business Management, that limiting AHQ response to two pages was not a sound employment practice for the position and that there was no state policy to that effect. In fact, at all time complainant knew that if he limited his responses to an arbitrary number of pages, in this case two pages, he would be breaking a sound employment practice. (Dr. Huett's testimony). An employer may not require an employee to violate a proven sound employment practice with impunity. If an employee refuses to act in an unlawful manner, the employer would be violating public policy by punishing the employee for such behavior. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573-574, 335 N.W.2d 834 (1983). Specifically, the law provides that an employer may not penalize an employee for refusing a command to violate a fundamental and well-defined employment practice. Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 141, 396 N.W.2d 167 (1986). Respondents practice of limiting pages for a such high management position was a violation of sound employment practice. (Dr. Huett's testimony). Further by punishing complainant because he refused to break public policy, respondents were breaking the law and therefore should compensate the complainant for his suffering. Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 141, 396 N.W.2d 167 (1986). Complainant's posthearing brief, pp. 22-23.

This argument starts out on two unfounded premises. First, there is nothing in the record to establish that complainant had any expertise in personnel management or psychometrics that would be necessary to attribute any weight to his opinion on this point. Second, there is nothing in Dr. Huett's testimony that would support complainant's characterization of it. Also, the cases complainant cites concern the wrongful discharge exception to the employment at will doctrine, a common law concept, and are

inappropriate here. Finally, *Bushko* does not support the principle claimed by complaint, that "an employer may not penalize an employe for refusing a command to violate a fundamental and well-defined employment practice." *Bushko* held specifically that it is required for a claim for wrongful discharge "that the discharge be for refusing a command to violate a public policy as established by a statutory or constitutional provision."[3]

Complainant also contends that the fact that DOC did not delete the candidates' names from their resumes before providing them to the rating panel was contrary to established civil service policy, and is evidence of pretext. Chapter 220 of the DER staffing manual (Complainant's Exhibit 3) includes the following provision:

> Use "blind" scoring procedures whenever possible - each competitor's materials being identified by a code number (such as social security number or randomly assigned number) with identifier information (name, race, sex, etc.) being removed prior to being made available to raters.

According to Dr. Huett, the AHQ's were identified solely by numbers, although the applicants' names were on the resumes. He further testified that evaluations are based primarily on the AHQ's, with the resumes being available to consult if needed.

In general, an employer's failure to follow its own policies can be probative of pretext. Since the staffing manual called for the use of "blind" scoring procedures whenever possible, and there was no apparent reason why DOC could not have used the same procedure for numbering the resumes as they did for numbering the AHQ, this could constitute some evidence of pretext. However, the weight, if any, to be given to this evidence depends on whether there is any potential connection between the procedure not followed and the type of discrimination alleged.

The issue under discussion is one involving deliberate race discrimination. While the raters might have made an inference about complainant's race from his name, the information on his AHQ and resume relating to his Tanzanian origin would have provided the raters more of an indication of complainant's race. To the extent that

[3] 134 Wis. 2d at 141. (emphasis added)

DOC arguably intended to discriminate on the basis of race, the provision of applicants' names to the raters would be of limited significance to that end.

Complainant also contends that a conclusion of pretext is supported by the fact that DOC did not utilize a balanced rating panel[4]:

> Since respondents and their agents knew that it was mandatory to include a racial minority among the exam raters but did not, the inference is respondents intended and prepared to discriminate against racial minorities as a whole as soon as the position became vacant. Complainant's post-hearing brief, p. 25.

An initial premise of this argument is that a balanced panel is a requirement under the circumstances of this case. While the materials of record establish that a balanced panel was desirable under relevant civil service policies, they do not establish that this was a mandatory requirement.

The letter delegating staffing authority to DOC includes the requirement that DOC staffing actions comply with applicable statutes, rules, DER/DMRS bulletins, and DER/DMRS's staffing manual. Several of these documents address the subject of balanced panels. The Affirmative Action Policy and Procedure Standards promulgated by DER/DAA require that "[e]ach agency shall have a policy regarding including AA group members on oral boards, interview panels, search and screen committees, and as exam raters." (Complainant's Exhibit 9) While this provision requires agencies to have a policy on this subject, it does not mandate a particular policy. DOC's personnel specialist provided uncontradicted testimony that their agency's policy was to attempt to have balanced panels under all circumstances, but to require balanced panels only for oral exam panels and postcertification interview panels, in situations of underutilization. The panel conducting the resume screen did not fall into either of these mandatory categories.

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[4] "A 'balanced panel' means that the panel (usually 3 people) includes representatives from at least two different affirmative action groups, for example, a woman and a racial/ethnic minority or a woman and a person with a disability." DER Bulletin No. AA-48, Complainant's Exhibit 10.

DER/DAA Bulletin No. AA-48, Affirmative Action Guidelines for Achieving Balanced Examination and Interview Panels, includes the following: "Balanced examination and interview panels are strongly recommended when filling positions which are in underutilized job groups and the certification includes affirmative action group members." Again, this provision does not impose an absolute requirement for a balanced panel under the circumstances present in this case.

Notwithstanding that there is no civil service requirement per se for a balanced panel in a case like this, the policies and guidelines in the record establish that under the circumstances of this case, a balanced panel was desirable. In light of this, and in light of the fact that respondents did not provide an explicit explanation of why they did not have a balanced panel, the absence of a balanced panel could be considered to be probative of pretext. However, in evaluating this evidence with the other evidence of record, it must be concluded that complainant's case falls short of a showing that respondent's explanation for rejecting complainant for this position was a pretext for race discrimination.

It is clear that in submitting a four page AHQ, complainant failed to follow the instructions in the announcement. He was the only applicant to have done so, and as discussed above, he had no valid reason for having done so. The record supports a conclusion that respondent was completely justified in removing two pages from complainant's AHQ to ensure that all candidates are treated equally. It is also clear that on this record complainant did not measure up well against the benchmarks that had been established, and that the panel's low score for complainant was appropriate. Thus there is strong evidence that respondent's asserted rationale for rejecting complainant was not a pretext, and this is not overcome by respondent's failure to have a balanced panel.

Complainant also contends that DOC sought special delegation authority for this position because the appointing authority, Ms. Brandon, knew the ultimately successful candidate (who was white) and had formed an intent to exclude racial minorities and to appoint the "preselected" (white) candidate. However, there is no significant evidence to support this contention. The DOC request to DMRS for special delegation (Com-

plainant's Exhibit 8), signed by Ms. Nichols, sets forth this reason for requesting delegation for staffing this position: "In view of the unique issues and policies the Budget and Policy Officer 3 position deals with in the Department of Corrections, as well as a need to fill this position as quickly as possible, we are requesting one time delegation for staffing." Other than the facts that the successful candidate was white and had been known to Ms. Brandon before the selection process, there is no basis for a conclusion that DOC had preselected this white candidate, did not want to hire a minority candidate, and had requested a one-time staffing delegation as a means to this end. The evidence that can be considered consistent with complainant's theory of preselection is far short of what would be needed for complainant to prevail on this contested issue of fact.

The first sub-issue relating to the first issue in this matter reads as follows:

> a) Whether the use of an Achievement History Questionnaire (AHQ) and resume screen as part of the selection process for this position had an illegal adverse impact on racial minorities.

In order to establish an adverse impact, complainant "bears the burden of proving that the policy or practice complained of has a significantly exclusionary impact on the [complainant's] protective class." Sindemann & Grossman. *Employment Discrimination Law* (Third Ed., 1996), Vol. I, p. 89 (footnote omitted). Complainant has failed to sustain his burden.

There is no significant evidence of adverse impact in this case. The data in the record is that in 1994-1996, career executive registers contained 8.35% ethnic minorities, and that the availability factor for ethnic minorities in the job category in question was 6.7%. Although complainant in his brief repeatedly cited Dr. Huett's testimony as supporting complainant's theory of disparate impact, he did not so testify. This is an excerpt from his testimony:

> Q. In comparing the resulting percentage you mentioned, between interrogatory 12 and 13, which is 8.3 something [8.35%], I believe you said, and the percent given in answer to interrogatory #1, can you, with your experience and background, come to any kind of a conclusion with

> respect to adverse impact of the type of testing or screening that is used for career executives?
>
> A. Yes sir.
>
> Q. And what is that?
>
> A. It's clear that ethnic minorities are being placed on career exec registers on a higher percentage than their availability in the workforce.
>
> Q. And there is some kind of conclusion one can come to based on that?
>
> A. It does not appear that the procedures being used in this case are working to the disadvantage of ethnic minorities.
>
> Q. And by procedures you're referring to the assessment techniques to get them on the register.
>
> A. That is correct.

Dr. Huett also testifies that the AHQ process was predominantly used to select people for the career executive program, and that the AHQ process in general was a reliable and valid selection device with a low tendency toward adverse impact in comparison to other selection devices. Tara Ayers, the DOC Affirmative Action Officer, testified in a similar fashion.

Complainant cites a prior commission case, *Balele v. DHSS & DMRS*, 91-0118-PC-ER, 4/30/93. In that case, respondents stipulated that the use of Career Executive Option II (competition limited to the lateral, downward or upward voluntary movement of career executives between departments) had a disparate impact on minorities. However, the instant case involves an Option IV, or open competitive, selection process, in which non-career executives (such as complainant) had the opportunity to apply, in addition to career executives.

Complainant also cites *Caviale v. State of Wisconsin*, 744 F. 2d 1289, 35 FEP Cases 1642 (7th Cir. 1984). However, this sex discrimination case also involved a selection process which was limited to career executives, who at the time were all males.

Complainant repeatedly ignores the distinction between open competition and competition restricted to persons in career executive positions and career executive registers:

> In this case Option 3 of the career executive status or policy was used to segregate applicants, a practice which adversely impacted on complainant because of his race. That is candidates with career executive status, all whites candidates, were found eligible regardless whether they were qualified or not, whereas complainant, the black applicant was found ineligible despite informing respondent that he had been found eligible in career executive positions. (Complainant's letter exhibit 1). The career executive status segregated and classified applicants for employment depriving complainant of employment opportunity and adversely affected his status because of his race, color and national origin. Posthearing brief, p. 12.

Again, this was not an Option III process but was conducted on an open competitive basis, which was how complainant, a non-career executive, was able to compete. Complainant apparently contends that because career executives were allowed automatic certification, without the AHQ screen conducted on non-career executive applicants, this had an adverse impact on minorities. However, there is no evidence to support this contention. As discussed above, the data of record demonstrates that employes have been attaining eligibility on career executive registers, primarily through AHQ evaluations, in a percentage in excess of their representation in the availability pool. There is no evidence that the established procedure that was followed in this case, of certifying current career executives without the requirement of the AHQ screen used for non-career executives, had any adverse impact on minorities.

To address one related evidentiary issue that arose during the hearing, Complainant's Exhibit 18 was not received in the record after respondents objected to it. Complainant testified that this was a chart he had compiled to reflect a telephone survey he had made to state agencies inquiring about the total number of candidates who had applied for positions which required an AHQ/resume screen, the total number found eligible, and the number of each of those groups who were racial minorities. At the hearing, complainant could offer no supporting documentation concerning such things

as to whom he had spoken at each agency, and when. Thus this document was a compilation of summaries of hearsay statements to complainant and could not reasonably be relied on for the purpose complainant intended. While complainant argued that respondents' answers to his interrogatories similarly lacked foundation, the two situations are not comparable. The interrogatories concern information that is in the province and control of the party to whom the interrogatory is addressed. Furthermore, information a party provides in response to an interrogatory is not controlling as to that information. While the party propounding the interrogatory is free to rely on the information by offering the answer in evidence (or by not objecting to the answering party's offer), he also can dispute the information contained in the interrogatory answer.

The second sub-issue relating to the first issue in this matter reads as follows:

> b) Whether respondents intentionally used the AHQ and resume screen while aware that it had an adverse impact on racial minorities and was non-job related.

There is no basis for a finding either that use of the AHQ and resume screen had an adverse impact on racial minorities and was non-job related, or that respondent had any awareness of the same.

The second issue established in this matter reads:

> 2. Whether respondents retaliated against complainant in violation of the WFEA in connection with having advised complainant he was ineligible for the Budget and Policy Officer 3 position for which he had applied.

The framework for analysis of a charge of discrimination on the basis or retaliation is as follows:

> The plaintiff must first establish a prima facie case of retaliation by showing that she engaged in a protected activity, that she was thereafter subjected by her employer to adverse employment action, and that a causal link exists between the two . . . . To show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action . . . . Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.

> Once the plaintiff has established a prima facie case, the burden of production devolves upon the defendant to articulate some legitimate, non-retaliatory reason for the adverse action . . . . The defendant need not prove the absence of retaliatory intent or motive; it simply must produce evidence sufficient to dispel the inference or retaliation raised by the plaintiff . . . . If the defendant meets this burden, the plaintiff must then show that the asserted reason was a pretext for retaliation . . . . The ultimate burden of persuading the court that the defendant unlawfully retaliated against her remains at all times with the plaintiff. *Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89 (citation omitted).

Complainant has participated in a number of protected activities involving respondents, and respondents were aware of these activities.[5] As discussed above with respect to Issue No. 1, a prima facie case will be assumed. Respondent's rationale for its decision to reject complainant for this position has already been set forth. The sole remaining question is whether that rationale was a pretext for unlawful retaliation. In his post-hearing brief, complainant relies on the same contentions to attempt to establish pretext as he did with respect to Issue No. 1. The Commission has concluded under the first issue that complainant did not establish pretext, and there is no reason for a different conclusion here.

Sanctions

In their posthearing briefs, respondents have requested sanctions against complainant, primarily because in his posthearing brief he has relied on evidence not of record and has grossly misrepresented the testimony of some of the witnesses, particularly Dr. Huett. Without addressing separately each point in complainant's brief, the Commission agrees that complainant has cited Dr. Huett's testimony (and others) for a number of propositions that the testimony does not support. However, the Commission does not believe that within the parameters of this proceeding before this agency there are any meaningful sanctions. There is no authority under the WFEA to award attorneys' fees and costs in connection with the posthearing briefing. *See Tatum v. Labor*

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[5] As noted above in Finding #20, neither the members of the rating panel nor the effective appointing authority were aware of complainant's WFEA activities during the relevant time period.

and Industry Review Commission, 132 Wis. 2d 411, 422, 392 N.W.2d 840 (Ct. App. 1986) ("This section does not allow the agency to order any type of relief for a prevailing employer, much less specifically authorize an award of attorney fees.") Respondent DOC has specifically requested that complainant's brief be stricken. In the Commission's opinion, this approach would not be efficacious. Unlike an untimely brief, this brief would have to be read before it could be determined whether it should be stricken. Striking a brief that has been read and analyzed to determine how closely it adheres to the record would be a triumph of form over substance.

ORDER

This complaint is dismissed.

Dated: _____, 1998. STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

AJT:rjb:970012Cdec1

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DONALD R. MURPHY, Commissioner

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JUDY M. ROGERS, Commissioner