STATE OF WISCONSIN PERSONNEL COMMISSION

JAY H. C. VEST,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM (Green Bay),
Respondent.

Case No. 97-0042-PC-ER

RULING ON DISCOVERY DISPUTE and RULING ON TIMELINESS OBJECTION

The Commission received the above-noted discrimination complaint on April 9, 1997, wherein complainant alleged that respondent discriminated against him because of his race when respondent concluded on March 12, 1997, that he was insufficiently qualified to receive an interview for the position of Assistant Professor of American Indian Studies and when respondent later hired someone other than complainant for the job. On April 28, 1997, complainant filed a perfected complaint which added the following additional bases of alleged discrimination: age, color, national origin and ancestry.

Complainant sought discovery through written questions dated July 9, 1997, which he designated as a "Motion for Discovery." Respondent objected to the discovery request by cover letter dated July 16, 1997. Complainant's response was filed on August 5, 1997. The discovery dispute is now before the Commission for resolution.

A few background facts may aid in understanding the current dispute. Two hiring procedures were involved with filling the position complainant sought. An initial hiring procedure was abandoned on May 10, 1996, because (according to respondent) respondent was dissatisfied with the applicant pool. A second hiring procedure ultimately lead to respondent offering the position to Dr. Lisa Poupart. Four individuals were interviewed during the first hiring procedure but this did not include complainant or Ms. Poupart who also had applied during the initial hiring procedure. Complainant and Ms. Poupart again applied for the position during the second hiring procedure. Respondent again concluded that complainant was insufficiently qualified to interview for the position. Ms. Poupart was deemed qualified to interview and ultimately was hired. Respondent indicated that Ms. Poupart was a stronger candidate during the second hiring process because she had "completed her dissertation and her

Ph.D. was in hand, and she had teaching experience during the fall semester at Arizona State University." (See, page 4 of respondent's Answer to the complainant filed by cover letter dated 6/4/97.)

First Discovery Component and Respondent's Timeliness Objection

Complainant's discovery request is comprised of three topic areas (components). The introductory paragraph and first component of his discovery request is shown below.

> Pursuant to ch. 804, Wisc. Stats., Complainant, Dr. Jay Hansford C. Vest, files this discovery motion concerning information regarding *Vest v. UW-GB*, Case No. 97-0042-PC-ER, as filed with the State of Wisconsin, Personnel Commission.
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> I. UW-GB Search and Screen Committee for 1995-1996.
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> Although respondent's representative, Mr. Daniel J. Spielmann, Esq., supplied a response (dated 4 June 1997) to the questions asked by Ms. Rita Ruona (Wisconsin Personnel Commission) on April 30, 1997, there was no disclosure of like facts that occurred in the 1995-1996 initial search for the position as announced in December 1995. Given that the complainant originally applied for the position during this initial search period which was closed May 1996 and that the 1996-1997 search was in fact an extension of the original 1995-1996 search, Complainant seeks information regarding the initial search.
>
> 1. Identification of the 1995-1996 top contenders for the position by name, age, sex, race, color and national origin.
> 2. Copies of the top contenders - four who received interviews - application materials including curriculum vitae (c.v.) and transcripts.
> 3. An explanation of the top contenders rating and/or ranking during the 1995-1996 search including also the rating and ranking given to the complainant during this initial search.
> 4. Copies of all notes regarding the 1995-1996 search including references of the top contenders and complainant.

Respondent's objection is shown below.

> [T]he respondent would submit that any questions relating to the "initial search" for this position in 1995-96 are irrelevant and immaterial to the complaint of discrimination that the complainant has filed with the Personnel Commission.

> These searches were separate and distinct and the initial search was closed without an individual being offered a position or anyone being hired. As I indicated in my earlier responses, the decision was made to close the earlier search because Dean Pollis and the Search and Screen Committee were not happy with the candidates that had been interviewed and with the remaining pool. This search had occurred relatively late in the school year and the feeling was that a new search in the fall of 1996 would hopefully yield a stronger group of applicants. The applicants from the earlier search were informed of the new search and invited to apply. However, they had to re-apply and if they did not they were not considered in the second search.
>
> The names and vitas of those interviewed in the first search are irrelevant to the second search. I would also submit that any claim or charge relating to the first search is well beyond the 300 day statute of limitations that would apply if a claim were brought regarding this earlier search. Candidates were informed on May 10, 1996, that the search was being closed and that "we will notify you if the search is reopened." The Personnel Commission received Dr. Vest's complaint on April 9, 1997. The EEOC acknowledged receipt on April 7, 1997. This is clearly well beyond the 300 day period from May 10, 1996.
>
> I would also argue that the complainant would not be able to demonstrate a "prima facie" case of discrimination regarding the initial search because one of the elements of the *McDonnell Douglas* test is that someone else was hired or that the job remained open. Neither occurred in the initial search.

Complainant is entitled to the information requested. The test for discovery in Wisconsin is not whether the information sought would be considered admissible at hearing but whether the information sought "appears reasonably calculated to lead to the discovery of admissible evidence". (*See* §804.01(2)(a), Stats.) The criteria used to evaluate candidates in the first hiring procedure and the application of those criteria to complainant and the four candidates interviewed may be relevant to what occurred during the second hiring procedure. Such potential connection is sufficient to grant complainant's motion to compel respondent's answer to the first component of his discovery request.

Respondent's argument that the initial screening process was abandoned more than 300 days prior to the date this complaint was filed, in effect, is a claim that the matter should be dismissed because it was untimely filed. Complainant's response to this objection is noted below.

> The degree to which the searches were "separate and distinct" is not self-evident from the materials submitted by the Respondent. Indeed, both Complainant and the successful candidate applied for the position in

> 1996 ("1st search") and [were] declared unsuitable. Following a closure on 10 May 1996, the search was "re-opened" when in fact it was a continuation of the search begun in the Fall 1996 including essentially the same position description and employment announcement. At any rate, it was the identical position originally announced in the Fall 1996. Consequently, Complainant seeks to determine the extent to which Respondent violated U.S.C.A. 42 §2000e-2 n. 300 race discrimination as specified in *Subia v. Colorado & S.R. Co.*, C.A. 10 (Colo.) 1977, 565 F. 2d 659 and *Draper v. Smith Tool and Engineering Co.*, C.A. 6 (Mich.) 1984, 728 F.2d 256. The fact that candidates were to be notified when the search was "re-opened" constitutes a continuity between the "searches" and suspends the 300 day time limit until the final selection was announced in Spring 1997.

While a continuity of the sort noted by complainant may exist between the first and subsequent hiring procedures, it is undisputed that complainant had full notice more than 300 days prior to filing the present complaint that the first procedure was abandoned. The discontinuation of the first procedure was a discrete, separate decision by respondent and, as such, is not a decision appropriate for inclusion under the continuing violations doctrine. *See, Selan v. Kiley*, 59 FEP Cases 775 (7th Cir., 1992). Accordingly, the Commission agrees with respondent that the 300 day statute of limitations bars complainant from presenting the issue of whether respondent's decision to abandon the first hiring procedure was discriminatory. However, information relating to the first procedure may be relevant and admissible to the timely-filed claim of whether discrimination occurred with respect to the decisions made in the second hiring procedure.

Second Discovery Component

The text of the second component to complainant's discovery request is shown below.

> II. Qualifications of the Search and Screen Committee.
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> Respondent states that the Search and Screen Committee for both 1995-1996 and 1996-1997 were qualified with expertise in American Indian Studies, but other than stating titles, respondent gives no substantiation for this claim. In order to evaluate Respondent's claim to expertise, complainant requests copies of the resume (c v.) and transcripts of all search committee members including Professor Denise Sweet, Dr. Ruth Russell, Dr. Clifford Abbott, Dr. Peter Kellogg and Carol Pollis, Dean of Liberal Arts and Sciences.

Respondent's objection to the second component of complainant's discovery request is shown below.

> I would object to the questions that Dr. Vest posed regarding the qualifications of the Search and Screen Committee. It would be extremely burdensome to supply all the resumes and transcripts of the Search and Screen members as well as Dean Pollis. The issue is not whether Dr. Vest believes they are experts but whether UW-Green Bay, in good faith, believed they had the knowledge and expertise to make a hiring decision for the Indian Studies position.

Complainant's response to this objection noted that it was respondent who raised the issue of the qualifications of the committee members and of Dean Pollis by claiming that the cited individuals had sufficient pertinent expertise to make the hiring decision. He also contested respondent's statement that it would be "extremely burdensome" to supply the requested information. The Commission agrees with complainant.

It appears we are talking about only seven people including the Dean and individuals who were members of either the initial or final screening committee. It seems reasonable to assume that the transcripts for these seven individuals were solicited when they were hired by respondent and, accordingly, are likely to be part of the personnel file kept for the seven. Further, it seems likely that respondent would have a curriculum vitae for each individual or that each individual would have a current vitae for his/her own use. The Commission realizes that no party is under an obligation to create records for no charge in order to respond to a discovery request. The Commission further realizes that no party is under an obligation to obtain records from other entities (such as transcripts from non-UW schools) in order to respond to a discovery request. However, parties do have the obligation to at least check for existing records before claiming that an undue burden exists. It appears that respondent has not met this burden and, accordingly, the claim of undue burden is rejected.

Third Discovery Component

The text of the third component to complainant's discovery request is shown below.

> III. Professional Academic Association of Search and Screen Committees and the Dean.
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> Complainant seeks information regarding the Search and Screen Committee's professional academic association with the Association of American Indian and Alaska Native Professors.

1. Do any members of the Search and Screen Committees - i.e. Professor Denise Sweet, Dr. Ruth Russell, Dr. Clifford Abbott, Dr. Peter Kellogg and Dean Carol Pollis - have any knowledge or professional dealings or associations with the Association of American Indian and Alaska Native Professors (AAIANP)? If so have those individuals specify that knowledge and explain their individual association with AAIANP.

2. Have any of the aforesaid Search and Screen Committee (SSC) members ever been a member of AAIANP? If so, specify whom and duration of membership.

3. Have any of the aforesaid SSC members ever attended a meeting of AAIANP? Specify whom, when and where?

4. Have any of the aforesaid SSC members ever read any of the laws and bylaws and/or publications of the AAIANP? Specify whom, what and when.

5. Do any of the aforesaid SSC members have any knowledge of Grayson Noley, Associate Professor of Educational Leadership, Arizona State University? Specify that knowledge including character and manner of association with Professor Noley including issues, dates and places.

Respondent's objection to the third component of complainant's discovery request is shown below.

> I would also object to the relevancy of questions concerning whether members of the Search and Screen Committee were members of or affiliated with the [AAIANP]. I see no relationship to this and the allegation of discrimination.

Complainant's response is shown below.

> The Discovery Motion further requests disclosure of the professional associations of the . . . Committee and Dean Pollis in order to investigate third party involvement in employment discrimination. The relationship of discriminatory intent derived from third parties is well grounded in U.S.C.A. §1981 n. 256 citing *Vakharia v. Swedish Covenant Hospital*[1] where discriminatory interference by a third party is judged unlawful. There are additional grounds for this discovery in §1985 in the individual's right to be free of compulsory discrimination

[1] The complainant is not represented by an attorney However, he needs to provide a complete citation to cases he cites. *Vakharia v. Swedish Covenant Hospital* is the name of the case he cited, but he failed to state in what reporting series the case was published, the volume of the reporting series and page number. The Commission believes complainant is referring to: *Vakharia v. Swedish Covenant Hospital*, 61 FEP Cases 533 (DC Nill 1991)

> on account of race or color, etc. Consequently, in order for the Complainant to determine the degree to which a third party - AAIANP—has interfered, disclosure of the . . . Committee and Dean Pollis' association with that organization is necessary.

The Commission first notes that complainant frames his arguments under federal law whereas the Commission's jurisdiction emanates from state law. While federal courts may have jurisdiction in a Title VII case over AAIANP, the Commission's jurisdiction under state law does not extend that far. The Commission's jurisdiction in discrimination cases is governed by §111.375(2), Stats., as shown below in relevant part.

> (2) This subchapter applies to each agency of the state except that complaints of discrimination . . . against the agency as an employer shall be filed with and processed by the personnel commission . . .

The AAIANP is not an "agency of the state" and, accordingly, the Commission lacks jurisdiction to add the AAIANP as a party or to determine if the AAIANP discriminated against complainant. *See*, *Pellitteri v. DOR*, 90-0112-PC-ER, 9/8/93, affirmed *Pellitteri v. Personnel Commission*, 94 CV 3540, Dane Co. Cir. Ct., 7/19/95. Complainant's motion to compel respondent's answer to the third component of his discovery request is denied.

Respondent's Final Objection to All Components of Discovery

Respondent objected to the discovery request as failing to comply with statutory requirements noting that complainant "does not indicate which discovery method he is utilizing under Section 804," Stats. This argument is without merit. The nature of the discovery request is clear from the questions asked (interrogatories) and materials requested (request for production of documents).

ORDER

Complainant's motion to compel discovery is granted in part and denied in part as detailed in this ruling. Respondent's timeliness objection regarding the decision to abandon the initial hiring procedure is granted.

Dated: September 10, 1997.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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