STATE OF WISCONSIN PERSONNEL COMMISSION

JOHN KOVACIK,
Complainant,

v.

Secretary, DEPARTMENT OF HEALTH AND FAMILY SERVICES,
Respondent.

Case No. 97-0076-PC-ER

RULING
ON
ISSUE FOR
HEARING

This matter is before the Commission on a dispute as to the appropriate issue for hearing. Complainant proposes the following statement of issue for hearing:

> Whether respondent discriminated against complainant on the basis of sex, in the hiring process for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997, such that complainant **was not included among the final 5 candidates considered** for that position. Subissue: If so, what is the appropriate remedy? (Emphasis added.)

Respondent proposes the following statement of issue:

> Whether respondent discriminated against complainant on the basis of sex when he was **not hired** for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997. (Emphasis added.)

The parties have filed briefs and the following facts, made solely for the purpose of this ruling, appear to be undisputed:

FINDINGS OF FACT

1. The case relates to filling the vacant position of Personnel Manager 5 at respondent's Central Wisconsin Center (CWC) in 1997.

2. Complainant, employed by the Department of Regulation and Licensing, sought appointment to the position on a permissive transfer basis.

3. The hiring authority for the position was Theodore Bunck, Ph. D., Director of CWC.

4. A screening panel was convened on May 2 and 12, 1997. Mr. Bunck was not on the panel. The panel interviewed 11 candidates, including complainant.

5. The screening panel scored and ranked the 11 candidates and recommended 5 for final interviews with CWC's director. Complainant was ranked 4th of those 5 candidates, with a score of 88. The only female on the list (TR) was ranked 5th based on her score of 85.

6. Dr. Bunck rejected the results from the first screening panel and decided to re-interview all of the original candidates. Dr. Bunck chose to participate on the new panel.

7. As a consequence of the second set of interviews, the second panel placed the candidates into three groups: those they would select for the position without reservation, those they would select with reservation, and those they ruled out for further consideration. The third group included the complainant. After the second panel conducted its set of interviews, respondent offered the position to one of the three candidates in the first group, Barbara Bronte. Ms. Bronte had received a score of 45 from the first panel and was not on the first panel's list of five.

OPINION

The complainant explains his allegations as follows:

> The problem with the statement of the issue proposed by the Department is that it requires John Kovacik to prove that he was "not hired for the position of Personnel Manager 5" because of his gender. That, however, is not the issue that Kovacik has raised in this case and it is not a legal position that he has taken here. To put it another way, it is not Kovacik's position that he would have been hired for the position in question, but for the discrimination that occurred.
>
> Rather, the focus of Kovacik's Complaint is that the hiring process was tainted by discrimination on the basis of sex, as a consequence of which he and several other male applicants were not included among the final five candidates considered for the Personnel Manager 5 position. It is his position in this proceeding that each of the four male applicants who were recommended by the initial screening panel was qualified to fill the

> position in question and that, but for the unlawful discrimination that occurred, one of them would have been selected to do so. . . .
>
> Again, the issue in this case is whether the Department manipulated the hiring process for the position in question in order to insure that a female would be hired to fill the position, such that Kovacik and all but one of the other male applicants who had been among the five recommended by the initial screening panel were not included among the final candidates who, in the end, were considered for that position. Brief, pages 1-2.

Complainant's claim of sex discrimination clearly focuses on the respondent's action of rejecting the conclusions reached by the first interview panel rather than on the subsequent selection process employed by respondent. Complainant asserts that had the alleged discrimination not occurred, the selection decision would have been from among the five candidates recommended by the first panel. He does not assert that he necessarily would have been the person actually hired from that group.

As noted by respondent, the complainant's proposed statement of the issue is misleading in that it refers to the "final five candidates." In light of complainant's explanation of his sex discrimination allegation, a more accurate statement of issue (in terms of complainant's allegations) would be as follows:

> Whether respondent discriminated against complainant on the basis of sex, in the hiring process for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997, when it rejected the initial interview panel's recommendations.
> Subissue: If so, what is the appropriate remedy?

The Commission rejects respondent's argument that complainant's proposal would improperly "narrow the focus of the hearing to DHFS's actions with respect to the screening interview, while excluding from review what happened during and after the final interview." Brief, p. 5. The complainant is not alleging that the analysis conducted by the second panel discriminated against him based on his sex. Information relating to the second panel's analysis could, conceivably, have some relevance to the rejection of the first panel's recommendation or to the question of remedy. Nevertheless, it is appropriate to phrase the issue before the Commission in a manner

that accurately reflects the complainant's allegations. Adopting the respondent's proposal would not do so.

Respondent asserts that, in order to state a cause of action, complainant must allege that the employer committed one of the acts prohibited in §§111.322(1), Stats., i.e. "to refuse to hire, employ, admit or license any individual, to bar or terminate from employment. . . , or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment." According to respondent, the refusal to hire the complainant was not made until the second panel ruled him out from further consideration and, because complainant's case relates to an action taken before the decision of the second panel, the complainant's proposed issue does not relate to the refusal to hire.

Respondent's hiring process included both a decision by Dr. Bunck to reject the first panel's list of five, and the subsequent decision to select Ms. Bronte from original group of eleven certified candidates. The complainant contends the first decision was made in an effort to hire a female into the position. As a consequence of the first decision, complainant lost his status as one of five finalists for the vacancy. He became, again, one of the original pool of eleven.

The provisions of the Fair Employment Act are to be liberally construed[1] to accomplish the purpose of protecting "the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination . . . [and] to encourage employers to evaluate an employe or applicant for employment based upon the employe's or applicant's individual qualifications rather than upon a particular class to which the individual may belong." Section 111.31(2), Stats. "Refusal to hire," as that phrase is used in the Fair Employment Act, should be read liberally so as to include decisions that are part of the evaluation and hiring process, e.g., decisions as to the type of exam, the actions of an interview panel, a decision not to follow the recommendations of a panel, or the final selection decision. Respondent's argument

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[1] *Ray-O-Vac v. DILHR*, 70 Wis.2d 919, 931, 236 N W 2d 209 (1975)

would require a narrow, rather than a liberal construction of the phrase, "refusal to hire." Respondent's narrow reading of the statute would bar complaints arising from discriminatory examinations that weed out applicants before they can be interviewed by a selection committee.

The Commission's decision in *Paul v. DHSS & DMRS*, 82-PC-ER-69, 3/30/93, is relevant to this conclusion. In *Paul,* the Commission found race discrimination with respect to a selection process. There, the complainant, a non-minority, was certified for the position in question. The person who ultimately was appointed, Mr. Young, was a minority who became eligible on the basis of an expanded certification that concededly was illegal because a valid workforce analysis had not been conducted in accordance with §230.03(4m), Stats. The Commission held:

> Respondent DMRS argues that the only effect of expanded certification "was [to] make the complainant compete with three additional people for the position he sought." . . . [E]xpanded certification was used in this case after the completion of the competitive examination process, whereby all those eligible to compete had been examined. As a result of this process, complainant's exam score had qualified him for further consideration for final appointment. At this point, the civil service code provided that the appointing authority had the right to make an appointment from among complainant, the four other highest-scoring candidates who had been certified on that basis, and those other candidates who lawfully could be considered on the basis of transfer/reinstatement eligibility or a *lawfully conducted* expanded certification. However, what actually occurred was that there was an expanded certification on the basis of race of the ultimately successful candidate. The parties have stipulated that this certification "was illegal because it was not effected in accordance with s. 230.03(4m), Stats.," stipulated finding #22, and the commission also has concluded that it was in violation of the FEA. The appointing authority's decisional process came down to a choice between complainant and Mr. Young, and he chose Mr. Young. Since clearly Mr. Young would not have been in the running at this point but for the facts that he had minority status and he had been certified in a manner that was illegal under both the civil service code and the Fair Employment Act, the conclusion that complainant was discriminated against on the basis of race when he was not hired for this position ineluctably follows.

> These facts parallel a hypothetical situation where, after an examination, the five highest-scoring candidates are minorities. The appointing authority then decides he or she does not want to have to make an appointment decision from a pool made up completely of minority candidates, and arranges to have a non-minority considered on the basis of transfer, notwithstanding that the candidate is technically ineligible for transfer. If that non-minority candidate is then correctly determined to be the best qualified, and receives the appointment to the position in question, it seems apparent that the five minority candidates would have a basis for a claim of race discrimination under the FEA. They are not merely being forced to "compete" in the broad sense against a larger field. Rather, they are being deprived of a status they achieved through competition -- that of being among the five legally-qualified finalists -- based solely on race.

Here, the complainant contends that the respondent's decision to reject the results of the first panel was motivated by a desire to not hire a male to the vacant position, and that as a consequence of that rejection, respondent imposed another analysis.

Respondent also contends complainant "lacks standing to prosecute a claim based solely upon DHFS's decision to set aside the screening panel's recommendations and to allow all the candidates for the CWC personnel manager position to participate in final interviews." Reply brief, p. 3. Complainant's injury was due to the fact that he became one of eleven candidates and lost his status as one of only five candidates. This is an actual injury, even though he was still considered for the position. Rejection of the first panel's results was an actual injury to the complainant and the situation can be readily distinguished from that in *Wood v. DER*, 85-0008-PC-ER, 7/1/86. In *Wood*, the complainant sought to obtain review of the visual acuity standard for Conservation Wardens, but his exam score was too low to be on the certification list. The Commission concluded his "contention that he would have been rejected due to the visual acuity standard is conjectural." While the complainant in *Wood* had not been certified and had not even reached the visual acuity test, the complainant in the present case was actually evaluated by the first panel, was ranked in the top 5 by that panel

and, when the panel's results were rejected, he lost that elevated status and returned to the status of being just one of eleven certified candidates.

ORDER

The issue for hearing shall read as follows:

> Whether respondent discriminated against complainant on the basis of sex, in the hiring process for the position of Personnel Manager 5 at Central Wisconsin Center in June of 1997, when it rejected the initial interview panel's recommendations.
> Subissue: If so, what is the appropriate remedy?

The Commission will schedule another conference with the parties to determine the status of any discovery disputes and to address any other preliminary matters.

Dated: January 19, 2000 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner