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
MOTION FOR
RECONSIDERATION
OR CLARIFICATION

In a ruling signed on January 19, 2000, the Commission established the following issue for hearing in this matter:

> 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?

Respondent subsequently asked the Commission to reconsider that ruling or, in the alternative, to clarify it. The parties have filed briefs.

In summary, complainant was one of 5 candidates, from an initial list of 11, whose name was forwarded by an initial interview panel to the hiring authority, Dr. Bunck, for filling a Personnel Manager 5 vacancy. Dr. Bunck rejected the first panel's results and convened a second panel that re-interviewed all 11 candidates, ultimately selecting a female candidate who was not one of the five names forwarded by the initial panel.

As was noted in the Commission's January 19th ruling:

> 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. . . .
>
> 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. . . .
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> The provisions of the Fair Employment Act are to be liberally construed 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 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. (Footnote omitted.)

Respondent raises three issues in its motion to reconsider/clarify the January 19th ruling: 1) respondent questions whether complainant has stated a cause of action and contends complainant's loss of status conferred by the first panel was not a "tangible employment action"; 2) respondent contends the only potentially appropriate remedy in this matter would be to issue a cease and desist order, rather than to re-institute the selection process with the list of five names supplied by the initial panel; and 3) respondent should be able to obtain discovery of information relating to the complainant's work performance while he was employed at other state agencies.

Both the second and third issues extend beyond the scope of the Commission's January 19th ruling that resolved a dispute between the parties as to the appropriate issue for hearing. The question of appropriate remedy is specifically identified as a sub-issue in this case. Absent an agreement of the parties, they will have an opportunity to present relevant evidence on the question of remedy at a hearing. It would be premature for the Commission to address that topic at this point in the proceedings.

The discovery issue raised by respondent also is premature. There is no indication that respondent has sought and been denied discovery of materials relating to complainant's work performance with other state agencies. It would be inappropriate for the Commission to rule on this topic at this juncture.

The remaining question is whether the issue for hearing established in the January 19th ruling reflects a cause of action under the Fair Employment Act, subch. II, ch. 111, Stats. The Commission addressed this contention as indicated in the portion of the January 19th ruling that is set forth above. The Commission concluded that an allegation contending respondent's decision to reject the first interview panel's results was motivated by a desire to hire a female for the vacancy states a cause of action under the FEA, even though the complainant does not allege the decision of the second panel was discriminatory.

This result is consistent with the decision in *Gillin v. Federal Paper Board Co.*, 5 FEP Cases 1094 (2nd Circuit, 1973). The appellant in *Gillin* contended that the employer's refusal to consider her for a promotion to the position of New England Traffic Manager constituted sex discrimination. The trial court found that the person selected (Mr. Sweeszey) for the vacancy was "clearly better qualified for the job than Gillin" and the reviewing court agreed. However, the Court of Appeal went further and held:

> We have no quarrel either with the finding below that Gillin was not qualified. While Gillin was in charge of the traffic operation when her superiors were absent, her experience was primarily administrative and clerical and not operational. Her intermittent supervisory responsibility did not preclude Federal from selecting an obviously superior applicant to assume the permanent and expanding responsibility which the employer envisioned. But it does not follow that although the company

> violated no law in hiring Sweezey, it was not guilty of sex discrimination against Gillin. . . .
>
> Gillin was entitled to be treated as any other applicant for the position without any regard whatever to sex. She was not given equal treatment and the record establishes that Federal's refusal to consider her for the position was not due simply to her lack of qualification but her sex as well. . . .
>
> [Gillin's supervisor advised her] when she expressed her interest in the position that it was not suited to a woman and was more suitable to a man. . . .
>
> While the ultimate prize was won by the male who had superior qualifications, this in our view does not purge Federal of its prior discriminatory act of refusing to consider her at all not *solely* because of lack of qualification but because she was a woman. While Gillin did not have all of the qualifications for the position, she fell clearly within the group entitled to initial consideration especially in a company which purported to have a policy of promoting from within. Having had some familiarity with and experience in most if not all the facets of the position, the refusal of [the supervisor] to consider her because she was a woman, is clearly a mischief which the statute was designed to prevent. We hold therefore that the court below was in error in not considering this point and in assuming that Sweezey's superior qualifications presumably cured the previous act of discrimination. In sum we find no wrong in hiring Sweezey instead of Gillin but we hold that Federal did transgress by failing to consider Gillin not simply because she was not qualified but also because she was a woman. 5 FEP Cases 1094, 97-98

The fact that the complainant in the present case was considered by the second panel does not overcome the complainant's contention that the decision to do away with the first panel's conclusions was discriminatory. It is illustrative to consider the following hypothetical. Assume there were 20 eligible candidates for a vacancy, 10 males and 10 females, and the (first) interview panel decided to advance 5 names, selected after an interview but entirely by random, to the appointing authority. All 5 candidates whose names were advanced were female but the appointing authority only wanted to hire a male into the vacant position. The appointing authority rejected the results of the first panel and then assigned another set of random numbers to the original group of 20 in order to come up with a second group of 5. Only males made it into this second

group of 5 finalists. The fact that the male who was ultimately selected for the position was better qualified than the complainant, who was one of the 5 female candidates advanced by the first panel, still would not overcome the discriminatory decision to reject the first group of 5. A female candidate in the first group of 5 would be entitled to a finding of discrimination, even though she was not as qualified as the male who was selected.

For these reasons, respondent's motion to dismiss must be denied.

Clarification request

Respondent also seeks clarification of the following language in the January 19th ruling: "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."

Complainant's position is that the first panel's results were rejected due to sex discrimination. Respondent contends the first panel did a bad job, and that the results it reached were flawed to the extent respondent opted to start over again. Respondent may be able to support its view by examining the second panel's analysis and establishing why, in contrast, those results were reliable. As a general matter, respondent will be allowed to present evidence tending to support its position that the initial process was faulty, and complainant will be allowed to present evidence tending to support his view that the decision to reject the conclusions of the first panel constituted discrimination based on sex.

ORDER

Respondent's motion for reconsideration is denied. 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: April 19, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:970076Crul3

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner