

STATE OF WISCONSIN

PERSONNEL COMMISSION

JUDITH K. WITT,
Complainant,

v.

**Secretary, DEPARTMENT OF
ADMINISTRATION,**
Respondent.

Case No. 97-0139-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This case is before the Commission on the issue of whether there is probable cause to believe that respondent, Office of Justice Assistance, Department of Administration, discriminated against complainant because of complainant's age, in violation of the Fair Employment Act, Subchapter II, Ch. 111, Stats., when it failed to hire her for a Community Services Specialist 2 position in 1997.

FINDINGS OF FACT

1. In the Current Opportunities Bulletin (COB) dated June 30, 1997, the Office of Justice Assistance (OJA) sought applicants for a Community Services Specialist 2 (CSS 2) position. OJA is a state agency attached to the Department of Administration (DOA) for administrative and other purposes. The vacant CSS 2 position at issue here functions as an anti-drug abuse program specialist. The COB announcement (Respondent's Exhibit 2) included the following:

JOB DUTIES: Conduct research, data collection and analysis; plan and coordinate the state's multi-year anti-drug strategy and related criminal justice improvement plans and related criminal justice system initiatives; provide consultation, technical assistance and training to state and local governmental units and criminal justice agencies; establish and maintain a criminal justice resource development and clearinghouse center; review grant applications and participate in formulating funding recommendations; make presentations at various meetings,

including the Governor's Law Enforcement and Crime Commission; provide staff support services to the commission and represent the agency's interest/position; monitor and evaluate implementation of anti-drug abuse and criminal justice projects; and prepare various reports. KNOWLEDGES AND SKILLS REQUIRED: State criminal justice system and specifically anti-drug programs; the planning process and the application of that process to the criminal justice system; local law enforcement practices and procedures; statistics and statistical analysis techniques; micro computers for word processing, spreadsheets and other presentation applications; federal, state and local government operations, practices and relationships; monitoring and evaluation methods and techniques; grant development and the critical review of grant proposals; oral and written communication skills; ability to prioritize and meet competing deadlines; the ability to handle diverse assignments simultaneously.

2. Those interested in applying for the vacant CSS 2 position were required to submit an Achievement History Questionnaire (AHQ) describing the candidate's experience in: the planning, development, implementation, and management of program initiatives on an annual or multi-year basis, particularly in the criminal justice system; grant preparation, review, or management, program monitoring, or budget/policy analysis that may be related to this activity; and working with drug programs, law enforcement agencies, and personnel throughout the criminal justice system.

3. The following three candidates submitted AHQ applications:

Laurel Mattoon	DOB 3/8/58
Kathleen Speltz	DOB 7/23/51
Judith Witt	DOB 11/24/39

4. Based on a review of the AHQ responses, the DOA Bureau of Personnel concluded that all three applicants met the requirements established for the AHQ screen, and certified the names of all three applicants to OJA.

5. OJA selected the following individuals as members of the interview panel for the CSS 2 position:

Martha Kerner (DOB 3/11/62)—a DOA employee with expertise in the area of the federal grant process

Beth Lewis (DOB 12/13/59)—a state employee who had worked closely with OJA in regard to various youth-related issues in her employment with the De-

partment of Public Instruction and with the Division of Youth Corrections, Department of Corrections

Craig Klyve (DOB 7/10/57)—deputy administrator of the Division of Narcotics Enforcement, Department of Justice, who had worked directly with the same task forces as did the unit to which the CSS 2 position was assigned at OJA, and who had participated in various OJA focus and planning groups

6. Raymond Luick (DOB 1/26/50), the first-line supervisor of the CSS 2 position, attended the interviews and asked some of the interview questions, but did not participate in the scoring of the interviews.

7. The candidates' responses to the AHQ were not provided to the interviewers. The interviewers were not advised of the ages of the candidates. The interviewers did have available to them copies of the candidates' resumes.

8. The following questions/observations were scored by the interviewers for each candidate:

- (1). Please describe your academic and work experience related to the position of Drug Program Specialist. Please pay special attention to your experience in coordinating and conducting surveys, needs assessments, public hearing, and preparing written documents based on those experiences.
- (2). The collection and analysis of data is critical to this position. Please describe your academic and work experience related to those items. In your response, identify specific work products that you have produced and your level of responsibility in their production.
- (3). Hypothetical Situation: You are the Drug Program Specialist and responsible for the development of a Comprehensive, Multi-Year Strategy to address the issues surrounding drug use and abuse. What steps would you employ to conduct the planning process? What steps would you employ to implement the strategy?
- (4). Overall knowledge of drug programs and law enforcement management and operations is very important to this position in order to provide a broad level of technical assistance to local and state agencies. Please describe your academic and work experience that would enable you to effectively carry out this responsibility (that is, to provide technical assistance to criminal justice agencies).

- (5). Small agencies, such as this, depend on the willingness of all staff to be flexible in their work assignments and creative in working with others to complete a specific assignment or, in general, to accomplish a broad agency goal. Please describe your work experience within this kind of work environment.
 - (6). The ability to communicate effectively is critical to this position. Please describe your experience in meetings, conferences, telephone and written communications that would demonstrate your level of experience and effectiveness in communicating with colleagues as well as federal, state and local officials.
 - (7). This position requires occasional travel outside of Madison and Dane County. Please indicate whether travel may cause a problem or scheduling conflicts for you.
 - (8). What do you feel are major strengths that you would contribute to this position as it has been described to you?
 - (9). Please describe your experience in working with computers and software applications; please be specific with regard to applications with which you are familiar.
 - (11). Oral Communication Skills
 - (12). Applicant's Overall Performance/Qualifications
9. The following question was asked of each candidate but not scored:
- (10). If you are offered this position, would you accept it, and, if so, when would you be available to start?

Complainant's response to the first part of this question (relating to whether she would accept the position if it were offered to her) was a "conditional yes." Complainant further explained to the interviewers that her "conditional yes" stemmed from her desire to continue with a project she had just begun if she were the successful candidate.

10. Mr. Luick then asked complainant a question asking her, in the context of her answer to the prior question (relating to whether she would accept the position if it were offered to her), a question to the effect of how long she would stay in the job if appointed.

Complainant asked Mr. Luick why he was asking the question, and he replied to the effect that he was asking the question of all the candidates to determine if they would be leaving in three weeks, six weeks, or four months; and complainant responded that she had no plans to leave the position if she were hired. Mr. Luick also asked a similar question of Ms. Speltz.

11. The raw interview scores of the candidates were as follows:

Speltz – Average Total Score=77

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(11)	(12)	TOTAL 1-12
Kerner	8	8	9	4	9	8	9	8	4	6	7	80
Lewis	8	6	3	4	8	8	9	6	6	6	4	68
Klyve	8	7	6	5	7	8	8	6	5	7	6	73
Totals	24	21	18	13	24	24	26	20	15	19	17	221

Mattoon – Average Total Score=79.3

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(11)	(12)	TOTAL 1-12
Kerner	8	8	9	7	9	9	9	8	7	9	8	91
Lewis	8	6	8	8	7	8	9	8	6	8	8	84
Klyve	4	5	5	4	7	5	8	6	7	7	5	63
Totals	20	19	22	19	23	22	26	22	20	24	21	238

Witt – Average Total Score=64.3

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(11)	(12)	TOTAL 1-12
Kerner	6	6	7	4	6	5	9	8	5	4	5	65
Lewis	4	8	5	5	4	5	9	5	5	3	4	57
Klyve	7	5	4	7	8	7	8	7	7	5	6	71
Totals	17	19	16	16	18	17	26	20	17	12	15	193

12. The scores for factors 1-9 and for factors 1-11 for each candidate are as follows:

Speltz

	TOTAL 1-9	TOTAL 1-11
Kerner	67	73
Lewis	58	64
Klyve	60	67
Totals	185	204

Mattoon

	TOTAL 1-9	TOTAL 1-11
Kerner	74	83
Lewis	68	76
Klyve	51	58
Totals	193	217

Witt

	TOTAL 1-9	TOTAL 1-11
Kerner	56	60
Lewis	50	53
Klyve	60	65
Totals	166	178

13. The relative rankings of each of the candidates was as follows:

Rankings – Total

	Speltz	Mattoon	Witt
Kerner	2	1	3
Lewis	2	1	3
Klyve	1	3	2

Rankings – Factors 1-9

	Speltz	Mattoon	Witt
Kerner	2	1	3
Lewis	2	1	3
Klyve	1-2	3	1-2

Rankings – Factors 1-11

	Speltz	Mattoon	Witt
Kerner	2	1	3
Lewis	2	1	3
Klyve	1	3	2

14. During the interviews complainant did not do a good job of relating her knowledge, skills, training and experience to the specific requirements of the CSS 2 position. She also demonstrated a defensive or hostile demeanor with regard to Mr. Luick.

15. Ms. Witt had a consistent record of capable performance during her employment at OJA.

16. After the interviews were completed and scored, the references provided by candidates Speltz and Mattoon were contacted. Complainant's references were not contacted since she had been an employee of OJA for the prior three years.

17. The interviewers' consensus was that candidate Speltz be offered the position. The interviewers' rationale was that, even though her overall interview score was not as high as that of candidate Mattoon, the scores were close, and, as argued by Mr. Klyve, candidate Speltz had performed comparable duties and responsibilities for a similar program in another state and had demonstrated superior interview skills. Fred Falk, OJA's Executive Director and the agency's appointing authority, subsequently met with Mr. Luick, who summarized the panel's point of view with regard to the candidates. Mr. Falk decided to offer the position to candidate Speltz. Candidate Speltz was offered the position but declined it.

18. Mr. Luick then recommended to Fred Falk that candidate Mattoon, who had the highest interview scores, be offered the position. Luick told Falk that this appointment would be consistent with civil service procedures because Mattoon had scored higher than complainant in the oral interviews.

19. At no time during his interactions with Falk concerning this selection process did Luick voice any concerns about complainant's poor interpersonal relationship skills.

20. At some time prior to the interviews, Mr. Luick approached complainant's then supervisor, Stephen Grohmann, a program manager, grants coordinator, and the director of OJA Statistical Analysis Center, who had supervised complainant for three years prior to this time, and asked him if he saw any problems with complainant being able to do the CSS 2 job in question. Luick indicated he had concerns about complainant's ability to get along with co-workers and others she would have to deal with in this position. Grohmann said she could do the job, that she certainly had the program knowledge, and that he had never seen her have any working difficulties with anyone outside the agency or any interpersonal problems that would suggest she would have any problems with that position.

21. Candidate Mattoon was offered and accepted the position. She remained in the position from September 14, 1997, through September 22, 1997, at which time she submitted her resignation.

22. The position was then offered to complainant who accepted and was appointed to the position effective September 28, 1997.

23. Candidate Mattoon has an M.S. in social work. She was employed from September of 1979 through August of 1980 as a social worker: preparing reports, providing client services, and performing program evaluation at a federally funded residential treatment facility for persons with chronic mental illness, alcohol or drug addiction, or developmental disabilities, some of whom had been previously incarcerated in a correctional setting; from September of 1980 through August of 1981 as a program assistant with the Wisconsin Association of Community Human Services Programs: developing requests for proposals for training providers in the area of human services and drug and alcohol abuse programming, developing needs assessment tools to determine training needs, developing training programs to meet those needs, writing reports, evaluating program effectiveness, and giving written and oral presentations to groups; and from 1985 forward, as a disability specialist for the State of Wisconsin: analyzing and granting or denying disability claims, including those involving drug related offenses or addiction disorders.

24. Candidate Speltz has an M.A. in counseling psychology and an M.P.A. in public affairs. From March of 1981 through August of 1986, she was employed as the executive director of a private nonprofit community corrections agency serving women involved in the criminal justice system; from March of 1990 through June of 1991, as the grants administrator for the Office of Drug Policy of the Minnesota Department of Public Safety, administering the U.S. Bureau of Justice Assistance Drug Control and System Improvement Grant Program; from June of 1991 forward as a private consultant providing criminal justice expertise to state and local units of government, including preparing the Criminal Justice Resource Management Plan for the fourth judicial district of Hennepin County, Minnesota, coordinating the Juvenile Detention Alternatives Initiative for Hennepin County, and administering the Intensive Probation for Repeat DWI Offenders Grant Program for the Minnesota Department of Public Safety.

25. Complainant has a Master's degree in sociology. Since 1994, she had been employed as the research analyst for OJA's anti-drug abuse program: evaluating 28 local multi-jurisdictional anti-drug law enforcement task forces and eight demonstration grant projects in the areas of drug abuse prevention, gang resistance education, pharmaceutical diversion control, jail inmate employment and job skills training, and jail inmate alcohol and drug abuse

education and treatment; and from 1980 through 1988 as the staff coordinator for the Madison/Dane County Committee on Sexual Assault and its successor, the Dane County Commission on Sensitive Crimes: tracking sexual assault cases through the criminal justice system, preparing statistical reports, designing study methodologies, providing training to law enforcement and other public employees, preparing educational materials, monitoring legislation, and establishing a reference library.

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 that there is probable cause to believe that respondent discriminated against complainant on the basis of age when it failed to hire her for the CSS 2 position in question.
3. Complainant has satisfied her burden of proof.
4. There is probable cause to believe that respondent discriminated against complainant on the basis of age, in violation of the WFEA (Subch. II, Ch. 111, Stats.) when it failed to hire her for the CSS 2 position in question.

DISCUSSION

This is a probable cause determination. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. § PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Here, complainant is protected on the basis of her age; as the result of her certification for the position, is presumed to be qualified for it; and, due to her rejection in favor of two substantially younger candidates, has presented circumstances which give rise to an inference of unlawful age discrimination.

Respondent must now present a non-discriminatory reason for its hiring decision. Respondent explained that candidates Speltz and Mattoon were rated as more qualified for the position by the interview panel, and that Mr. Luick had concerns about complainant's abilities in the area of inter personal relationships. This reason is legitimate and non-discriminatory on its face.

After respondent presents a legitimate, non-discriminatory explanation for its hiring decision, the complainant may present evidence of why the respondent's explanation is a pretext for discrimination. Complainant has a number of contentions regarding the issue of pretext.

Complainant's primary and strongest argument is that as a result of a decisional process essentially in the hands of four people significantly younger than her (the three panelists and Mr. Luick) she was rated least qualified and was passed over in favor of a considerably younger candidate who had virtually no specific training and experience that would prepare her for this job, as compared to complainant's very specialized training and successful experience in a closely related position in the same agency¹. The CSS 2 position in question requires significant acumen and technical skills. As set forth in the position announcement (Finding #1), the position's duties include: "plan and coordinate the state's multi-year anti-drug strategy and related criminal justice improvement plans and related criminal justice system initiatives; provide consultation, technical assistance and training to state and local governmental units and criminal justice agencies." The required knowledges and skills statement in the announcement includes the following: "State criminal justice system and specifically anti-drug programs; the planning process and the application of that process to the criminal justice system; local law enforcement practices and procedures. . . ." The first three "knowledges and skills required by the position" as set forth in the position description (PD) (Respondents Exhibit #1) are:

1. Professional knowledge of the criminal justice system and specifically anti-drug program activities.
2. Professional knowledge of the planning process and the application of that process to the criminal justice system.
3. Knowledge of local, state, and federal criminal justice programs, particularly local law enforcement practices and procedures.

The record before the Commission strongly supports complainant's contention that this is not a generalist position, but requires specialized knowledges and skills, and that Ms. Mattoon did simply not have this background. She had spent the 12 years prior to the appointment as a disability specialist deciding disability claims. She had never been employed by a criminal justice agency, and the closest thing she had to criminal justice experience was a

year's experience working with a client population consisting partly of former or current correctional clients. As noted above (Finding #26), complainant had extensive experience working with law enforcement agencies and in a job within OJA itself that was closely related to the job in question: "Since 1994, she had been employed as the research analyst for OJA's anti-drug abuse program, evaluating 28 local multi-jurisdictional anti-drug law enforcement task forces and eight demonstration grant projects in the area of drug abuse prevention, gang resistance education, pharmaceutical diversion control, jail inmate employment and job skills training, and jail inmate alcohol and drug abuse education and treatment . . . "

Respondent argues that Ms. Mattoon was presumptively qualified for this position by the fact that she was certified as an eligible candidate², and that she had a good interview while complainant did not. The first point is correct from the standpoint of the civil service code. As to the second point, verbal communications and other interview-related qualities certainly are legitimate considerations, and the evidentiary record supports respondent's contention about complainant's performance, respondent did not rely simply on the presumption of eligibility associated with the candidates' certification, and the relative performance in the interviews. If it had done that, respondent would have offered the job to Ms. Mattoon first, instead of Ms. Speltz, on the basis of Ms. Mattoon's overall highest ranking on the interview. However, respondent decided to offer the position to Ms. Speltz on the basis of her better experience. Then, once Ms. Speltz declined the offer, respondent decided to make the offer to Ms. Mattoon, notwithstanding that although Ms. Speltz had a more suitable background than Ms. Mattoon, complainant had a much more suitable background than Ms. Mattoon.

The disparity in qualifications is reinforced by the fact that Ms. Mattoon resigned after a week on the job. The parties dispute how much of that decision should be attributed to her realization that she did not have the background to be able to perform the job, versus being frozen out by complainant. Ms. Mattoon did not testify, and on the basis of the record before the Commission, it appears that her departure was primarily attributable to the former factor.

¹ Although not specified in the statement of issue, only the decision to pass over complainant to hire Ms. Mattoon is in controversy in this case.

² Only three candidates applied and submitted AHQ's; DOA personnel certified all three as eligible.

A related indication of pretext is respondent's shifting rationale for its decision, and conflicts in the evidence related to that rationale. At the hearing, Mr. Luick testified that one of his concerns about complainant's suitability for this position concerned her history within the agency of poor interpersonal relationship abilities. However, it does not appear this was ever broached as part of the discussion of the selection process with Mr. Falk, the agency's appointing authority, who did not mention this factor in his affidavit. Mr. Grohmann, who had supervised complainant for several years at the OJA, testified that complainant had the ability to do the job and had no problems with interpersonal relations. There was nothing in complainant's performance evaluations indicative of a problem with interpersonal relationships. The two staffers who allegedly had interpersonal problems with complainant did not testify.

Also, Mr. Falk states in his affidavit submitted in lieu of testimony³, that after Ms. Speltz declined the offer to her:

I met again with Mr. Luick and I indicated that it might be best to take "the path of least resistance" and offer the position to Ms. Witt. However, Mr. Luick impressed upon me that the civil service procedures and process, once implemented, should be followed in order to make the decision fair and equitable and to avoid the potential of arbitrary abuse of discretion. Ms. Mattoon, the highest scoring candidate, was offered the job. . . .

It is not the case that at that point in the selection process there was any reason under the civil service code that Ms. Mattoon should have been offered the job on the basis of her higher scores on the interviews. As Mr. Luick had testified when he described the process, there was no requirement under the civil service code to have based the hiring on the candidate's ranking on either the AHQ evaluations or the oral interviews. Rather, the appointing authority (Mr. Falk) could consider all the available relevant information on the certified candidates in exercising his discretion on the appointment. *See, e. g., Postler v. Wis. Personnel Commission*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, 96-3350, 1/27/989. Also, as discussed above, the initial job offer to Ms. Speltz did not follow the precept of making the offer to the candidate with the highest interview scores.

³ Mr. Falk was out of the country when the hearing was held.

Another, related indication of pretext is the conflict between Mr. Falk's and Mr. Luick's recollections of what occurred after Ms. Speltz declined the offer. As set forth in Mr. Falk's affidavit quoted above, he was leaning toward appointing complainant, but Mr. Luick convinced him to appoint Ms. Mattoon. At the hearing, Mr. Luick testified to a different recollection of what had occurred: "I would argue that it's my recollection that it went the other way, that I was looking for some real positive and strong motivations to recommend to him that we go with your [complainant's] hire as the first choice."

It should be noted that the Commission gives little weight to complainant's statistical evidence. Complainant has pointed out that the raters rated the candidates in inverse order of their ages. She also presented statistics for three earlier selection processes that showed a tendency for Mr. Luick to hire younger, less experienced candidates from outside the agency rather than older, more experienced candidates from inside the agency. While these statistics are at least consistent with complainant's case, respondent presented uncontradicted expert opinion that the size of these groups is too small to be able to attach any statistical significance to them.

Another matter the parties have commented on in post-hearing briefs is the issue of Mr. Luick's body language during the panel's interview of the complainant. However, complainant did not testify about this during her testimony at the hearing, and there is no basis for any finding that Mr. Luick exhibited improper body language during the interviews.

It is also noted that complainant submitted two work samples with her reply brief. Because these documents were not offered into the record during the hearing, they have not been considered in the decisional process.

As a final matter, the Commission denies the respondent's motion to dismiss for failure to state a claim which was made at the close of the complainant's case at the hearing, and on which the examiner reserved a ruling.

ORDER

This case is remanded to the Commission staff for conciliation and/or scheduling a hearing on the merits.

Dated: July 20, 1999.

AJT:970139Cdec2.doc

STATE PERSONNEL COMMISSION


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

DISSENTING OPINION

The following comprise the basis for my opinion that the record here does not support a conclusion that probable cause exists to believe that age discrimination occurred as alleged:

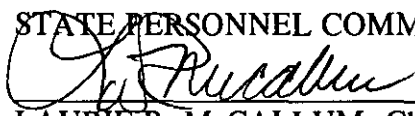
1) The interview scores of the top two candidates were close (Speltz average=77; Mattoon average=79.3) whereas complainant's score (average=64.3) was significantly lower. Complainant failed to show that these scores did not accurately reflect the results of the interview both in terms of the content of the candidates' answers as well as the manner in which they communicated their answers. The record does not, as a result, support a conclusion that the panel members engaged in age discrimination in scoring the candidates' interviews.

2) In resolving the question of which of the two closely ranked top candidates should be offered the position, respondent resorted to a comparison of the relevant background and experience of the two. The majority opinion implies that this same process should have been used after Ms. Speltz declined the position and complainant and Mr. Mattoon were the remaining candidates. However, although it would be a reasonable expectation that such a process would be utilized to select between comparably rated candidates, it would render the

interview process superfluous if such a process were utilized to nullify a substantial difference in interview rating scores such as existed between complainant and Mattoon. It would certainly have raised more suspicion and have been a more questionable personnel practice to rely on information outside the interview process to vault a candidate over another who had received a 23% higher score on the interview.

3) In selecting the top two candidates, respondent selected the older one even though her interview score had been slightly lower (Speltz=46 years; Mattoon=39 years). This also supports a conclusion that the interview panel members were not motivated by age discrimination here.

Dated: July 20, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson