

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICAH A. ORIEDO,
Complainant,

v.

**Superintendent, DEPARTMENT OF
PUBLIC INSTRUCTION,**
Respondent.

**RULING
ON
ISSUES
FOR HEARING**

Case No. 98-0042-PC-ER

This matter is before the Commission on a dispute between the parties as to the appropriate issues for hearing. The parties have filed written arguments.

In a ruling dated March 10, 1999, the Commission adopted a statement of issues as proposed by complainant at a February 9, 1999, conference "subject to further discussion of the parties on the topic of complainant's disparate impact allegations." The February 9th conference report refers to the following hearing issues:

1. Whether DPI discriminated against complainant based on color or race with respect to the alleged failure to interview, select or appoint complainant to the position of Education Administrative Director, Title I Programs - Career Executive.
2. Whether DPI discriminated against complainant based on color or race with respect to the alleged failure to notify complainant that DPI had hired another candidate for the position in question.
3. Whether respondent retaliated against complainant for having engaged in Fair Employment activities by not hiring complainant for the vacancy in question.

The March 10th ruling also included the following discussion regarding a disparate impact theory:

Finally, the Commission calls the parties' attention to the following statements in complainant's response to the respondent's objections to the proposed issues:

Wisconsin recognizes two theories of employment discrimination: disparate impact and disparate treatment. . . . The disparate impact theory is used "to attack facially neutral policies that, although evenly applied, impact more heavily on a protected group." In order to prevail on this theory, Oriedo has to demonstrate that DPI such behavior was not an isolated incident, but was a pattern of behavior. [sic] Comparing the pleadings in the complaint and the Commission's proposed issues, a reasonable person will conclude that proposed issues are to the point. (citations omitted)

It appears that complainant is seeking to incorporate a disparate impact theory within the scope of the issues as proposed at the February 9th conference. While there are references in his initial complaint to disparate impact, it is difficult to get a handle on the specifics of those allegations. As a result, the Commission will reconvene the prehearing conference to determine whether the parties are in agreement in this additional area.

The prehearing conference was reconvened on April 6, 1999. Complainant confirmed it was his intent to pursue a disparate impact theory and proposed the following additional issue for hearing:

4. Whether the option 1 career executive selection process has a disparate impact on racial minorities, including complainant.

Respondent objected to the supplemental issue. The conference report also reflects the following:

The parties agreed to submit written arguments according to the following schedule:

- Initial briefs are due by April 27, 1999.
- Reply briefs are due by May 4, 1999.

The question now before the Commission is whether to grant complainant's request to supplement the statement of issues for hearing to include the above issue 4. .

Complainant argues that because respondent's brief was delivered to the Commission on April 28th rather than April 27th, the brief should be rejected as untimely and, consequently, the issue for hearing should be modified as requested. The respon-

dent's brief is dated April 27, 1999, but it bears a stamp indicating it was hand-delivered to the Commission on April 28th. Pursuant to §PC1.09, Wis. Adm. Code:

The hearing examiner or the commission may establish a briefing schedule on any issue or motion pending before it and may decline to consider any brief that is filed after the brief is due.

While the Commission clearly has the authority to refuse to consider the respondent's brief, the circumstances do not justify that result. The Commission received the brief just one day late. The delay had no effect on the Commission's ability to rule on the complainant's request to add an issue. There is also no indication from the complainant that he was adversely affected by the respondent's delay in getting its brief to the Commission. Under these circumstances, the Commission will consider the respondent's brief.

Respondent's sole contention is that the "'Option 1 Career Executive' program is a seniority based program" and falls within the exception to Title VII for a "bona fide seniority system." (Respondent's Brief, pp. 1-2) However, the present case was filed with the Commission under the Wisconsin Fair Employment Act, not under Title VII. There also has been no showing that "Option 1" is a "bona fide seniority system." Given this, respondent's argument is rejected.

The Commission notes that the wording used by complainant in his proposed issue could be interpreted as an attempt to raise issues on behalf of all racial minorities. The Commission has previously held that it lacks jurisdiction over class action claims filed under the Fair Employment Act (FEA). *Balele v. WTCSB et al.*, 97-0097-PC-ER, 9/24/97. Accordingly, while Mr. Oriedo is free to argue disparate impact, any reading of the present complaint which could be interpreted as including individuals other than complainant as the charging party is rejected. In light of this, the Commission will modify the language of complainant's proposal to read:

4. Whether the option 1 career executive selection process used to fill the vacancy in question had a disparate impact on the complainant on the basis of race.

ORDER

Complainant's request to add an issue for hearing is granted as noted above.

The issues for hearing now read as follows:

1. Whether DPI discriminated against complainant based on color or race with respect to the alleged failure to interview, select or appoint complainant to the position of Education Administrative Director, Title I Programs - Career Executive.
2. Whether DPI discriminated against complainant based on color or race with respect to the alleged failure to notify complainant that DPI had hired another candidate for the position in question.
3. Whether respondent retaliated against complainant for having engaged in Fair Employment activities by not hiring complainant for the vacancy in question.
4. Whether the option 1 career executive selection process used to fill the vacancy in question had a disparate impact on the complainant on the basis of race.

Dated: June 2, 1999 STATE PERSONNEL COMMISSION

Laurie R. McCallum
LAURIE R. McCALLUM, Chairperson

KMS: 980042Cru14

Judy M. Rogers
JUDY M. ROGERS, Commissioner

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