STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF TRANSPORTATION,
Respondent.

Case No. 98-0104-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of race and national origin, and of retaliation for engaging in protected fair employment activities. A hearing was held on April 29 and May 7, 1999, before Laurie R. McCallum, Chairperson. The schedule established for filing briefs was concluded on July 26, 1999.

FINDINGS OF FACT

1. Some time in 1998, complainant applied for the position of Planning and Analysis Administrator (Section Chief) with respondent Department of Transportation (DOT). Complainant was scheduled to attend an interview for this position on May 14, 1998.

2. The interview panel consisted of Sandra Beaupre, Director of respondent's Office of Planning and Budget, who was the appointing authority for the subject position; and Sharon Persich, a Planning and Scheduling Manager for the Madison Metropolitan Transit System. Both Ms. Beaupre and Ms. Persich are white females. Neither Ms. Beaupre nor Ms. Persich was acquainted with complainant or aware of his race, color, or national origin prior to the scheduled interview. Neither Ms. Beaupre nor Ms. Persich was aware prior to the scheduled interview that complainant had filed previous fair employment actions with the Commission or in any other forum.

3. After the complainant entered the interview room and was seated, he asked whether the entire interview panel was present. When he was advised that it was, he stated to the interviewers that it was illegal to utilize an all-white interview panel and he refused to participate further in the interview. Ms. Beaupre told complainant that she didn't believe the composition of the interview panel was illegal but that she would check with the human resources unit. Complainant indicated that he would come back for an interview if a legal interview panel, one which included a racial minority member, were set up. Ms. Beaupre did not tell complainant that affirmative action applies only to women, or that she would contact him to reschedule his interview with a different interview panel.

4. Because complainant had declined to participate in the interview, his qualifications were not reviewed by the interview panel, and his name was not forwarded for interview by the second interview panel.

5. The successful candidate for the subject position is a white female who was a planner by education and experience; who had significant recent work experience in the specific subject areas for which the position would be responsible; and who had directly relevant recent work experience in the section to which the subject position is assigned.

6. Complainant's planning experience was obtained when he was employed in Tanzania during and before 1976.

7. After the contact with complainant described in 3., above, Ms. Beaupre contacted James Thiel, respondent's general counsel, in regard to the question raised by complainant about the membership of the interview panel.

8. On May 28, 1998, complainant contacted Ms. Beaupre by e-mail and requested that he be hired into the subject position without interview in order to help respondent and the State of Wisconsin "achieve its diversity goal." Ms. Beaupre forwarded this e-mail message to Mr. Thiel.

9. As a result of the contacts described in 7. and 8., above, Mr. Thiel directed a letter to complainant on or around May 27, 1998. This letter stated as follows, in relevant part:

> Your request to be appointed to the position without interview is denied. I have advised WISDOT staff involved to proceed with the hiring process without scheduling you for any further or special interview. I have found nothing in the Wisconsin Statutes or the Wisconsin Administrative Code that requires a minority member on every final oral interviewing panel, nor any legal requirement that requires the final oral interviewing panel for this category of position to have a minority on the panel. I am advised that the position fits into a category that is considered underutilized for both minorities and females.

10. The subject position was underutilized for females and minorities.

11. The Division of Affirmative Action of the Department of Employment Relations (DER) has established and published a set of policy and procedure standards for equal employment opportunity in state agencies. Section I. L. (hereafter "I.L.") of these standards states as follows:

> **I. <u>Standards to Promote Equal Employment Opportunity</u>**
>
> The Standards in this section are designed to promote Equal Employment Opportunity (EEO) principles in an agency. All personnel transactions that occur within an agency shall be governed by the principles of EEO. Personnel representatives shall consider or include equal employment opportunity and affirmative goals in staffing. Documentation of compliance with these standards shall be made available for monitoring upon reasonable notice. . . .
>
> L. Each agency shall have a policy regarding including racial/ethnic minorities, women, and persons with disabilities on oral boards, interview panels, search and screen committees, and as exam raters. . .
> .

In 1994, DER developed guidelines for implementing I.L. These guidelines recommend that, when an interview panel consists of three individuals, two of these be members of a protected group; and that, when an interview panel consists of two individuals, one of these be a member of a protected group. These guidelines do not

state or suggest that interview panel members from protected groups be members of the same protected group for which the relevant position may be underutilized although this is encouraged by DER. These guidelines do not state or suggest that interview panel members from protected groups be members of the same protected group as one or more of the candidates certified for the position. DER does not require that the policy developed by state agencies pursuant to I.L. be in writing or be included in the agency's affirmative action plan.

12. The two-member interview panel described in 2., above, which included at least one member of a protected group (here, a female) complied with I.L. of DER's policy and procedure standards for equal employment opportunity in state agencies and the guidelines developed by DER for implementing I.L. The membership of this interview panel was also consistent with the policy encouraged but not required by DER, i.e., that at least one member of a two-person interview panel be a member of a protected group for which the position is underutilized. Here, the position was underutilized for females and minorities and at least one of the members was female.

13. Respondent, during the time period relevant here, had a policy which had been developed to satisfy the requirement of I.L. This policy stated, in pertinent part, that, if a position were underutilized for a particular protected group, an attempt would be made to include a member of this protected group on the interview panel if this individual also met certain other qualifications, including subject matter knowledge.

14. From January 1, 1995, through December 31, 1997, respondent filled nine positions in the Administrator-senior executive job group of which the subject position was a part. Of the 137 candidates certified for these nine positions, there were 116 candidates whose race was identified as white and nine candidates whose race was identified as non-white. The size of the sample here, i.e., 9 hires, is not large enough to serve as the basis for developing reliable statistical inferences from the data.

15. Dr. Micah Oriedo, a black male of Kenyan national origin, testified at hearing that he had applied for three positions at DOT in 1993, 1998, and 1999, and

there had been no racial minority member of any of the panels by which he had been interviewed.

16. Respondent's affirmative action officer, an African-American, noting that a member of a targeted group had been hired, approved the subject hiring decision since he did not see any evidence of discrimination in the hiring process or the outcome.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to 230.45(1)(b), Stats.

2. Complainant has the burden to show that he was discriminated against or retaliated against as alleged.

3. Complainant failed to sustain this burden.

OPINION

The statement of issue for hearing to which the parties agreed is as follows:

> Whether respondent discriminated against complainant on the bases of race, national origin or ancestry and/or FEA retaliation when in May 1998, respondent decided to select someone else to fill the position of Planning and Analysis Manager (Section Chief).

It was also noted in the report of the prehearing conference at which the parties agreed to the above statement of issue for hearing that, "[t]he parties understood that the statement of the hearing issue includes the question of whether respondent's use of an all-white interview panel constitutes discrimination on the bases of race, national origin or ancestry and/or FEA retaliation."

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, the record shows that complainant, as a black of Tanzanian national origin, is protected on the basis of his race and national origin; that he applied for the subject position and, as the result of his certification, is deemed to have been qualified for this position; and that, due to the fact that a white person whose national origin is presumed to be the United States was the successful candidate for the position, an inference of discrimination on the basis of race and national origin could be drawn.[1]

The burden then shifts to complainant to articulate a legitimate, non-discriminatory reason for not selecting complainant for the position. Here, respondent states that complainant voluntarily removed himself from the interview/selection process and, as a result, could not be considered for appointment. This reason is legitimate and non-discriminatory on its face.

The burden then shifts to complainant to demonstrate pretext. Complainant's primary theory of discrimination here is that Ms. Beaupre did not include a racial minority as a member of the interview panel in order to avoid appointing a racial minority to the position. Complainant contends that state law as well as DER and DOT policy require that a racial minority be a member of an interview panel when the position to be filled is underutilized for racial minorities and when there is a member of a racial minority who is a certified candidate for the position, and that respondent's failure to include a racial minority as a member of the interview panel here demonstrates pretext as a result. Respondent argues that complainant has advanced this contention in previous complaints he has filed with the Commission, that the

Commission has been consistent in ruling that complainant has failed to show that such a requirement exists and, as a result, that the principle of issue preclusion should be applied here. It should be noted that, although the Commission will proceed to address respondent's argument, a more appropriate time to advance it would have been prior to hearing and argument.

In *Balele v. DOC, DER & DMRS,* 97-0012-PC-ER, 10/9/98, the Commission held, as relevant here, that I.L. of the Affirmative Action Policy and Procedure Standards promulgated by DER/DAA (see Finding of Fact 11, above) requires state agencies to have a policy on balanced panels, but does not mandate a particular policy; that DER/DAA Bulletin AA-48 provides that balanced examination and interview panels are strongly recommended when filling positions which are in underutilized job groups and the certification includes affirmative action group members; and that a balanced panel means that the panel (of three members) includes representatives from at least two different affirmative action groups. In *Balele v. DOA & DMRS*, 88-0190-PC-ER, 1/24/92, the Commission held, as relevant here, that there existed no requirement that an ethnic/racial minority serve on an examination panel (Achievement History Questionnaire screening panel) even if the subject position was underutilized for racial/ethnic minorities. Under the doctrine of issue preclusion, a judgment on the merits in a prior litigation precludes litigation of issues actually litigated and determined in the prior suit, regardless of whether the judgment was based on the same cause of action as the second suit. *Heggy v. Grutzner*, 156 Wis. 2d 186, 192-3, 456 N.W.2d 845 (1990). Issue preclusion does not require an identity of parties in the two actions if it is raised defensively to prevent a party to both actions from relitigating an issue conclusively resolved against it in the former action. *Manu-Tronics v. Effective Management Syst.*, 163 Wis.2d 304, 471 N.W.2d 263 (Ct. App. 1991). The decisions in the *Balele* cases cited above concluded, as relevant here, that neither state law nor DER policy requires balanced panels, and that, although DER policy recommends

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[1] Arguably, complainant has failed to establish a prima facie case of discrimination since he was not actually rejected for the position by respondent but instead voluntarily removed himself from the selection

balanced panels when the subject position is in an underutilized affirmative action group and the certification includes affirmative action group members, this policy does not specify from which affirmative action group these panel members should be drawn. It is concluded that issue preclusion should operate here to prevent re-litigation of these issues.

However, complainant's arguments relating to the composition of the interview panel here are not totally subsumed by these precluded issues. Complainant also contends that the policy relating to balanced panels recommends that members of two different affirmative action groups be included on panels such as the one under consideration here; that DOT failed to have a policy relating to the composition of interview panels, as required by I.L.; and that the composition of the interview panel here was inconsistent with DOT's policy that an attempt would be made to include a member of the affirmative action group for which a position was underutilized on the interview panel for the position if this individual also met other qualifications such as subject matter knowledge.

The record here shows, however, that the definition of balanced panel (derived from DER Bulletin AA-48) which references representation from two affirmative action groups is not applicable to panels consisting of only two members, and that, in those instances, the definition would reference representation from one affirmative action group. Here, the interview panel consisted of two members and at least one member was a representative of an affirmative action group, i.e., female.

The record further shows that, contrary to complainant's contention, respondent did have a policy relating to the composition of interview panels in place as required by I.L.

Finally, Ms. Beaupre testified that she had considered requesting that a racial minority she had asked to be on several previous panels serve on the one under consideration here as well, but decided not to since she felt, in essence, that she would be taking unfair advantage of this person were she to request this favor again. The

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process.

record shows that Ms. Beaupre's concerns in this regard were sincere and not without merit, and it is concluded, as a result, that her efforts should be considered a cognizable "attempt" under respondent's policy.

Moreover, complainant's pretext argument that Ms. Beaupre intentionally excluded racial minorities from membership on the interview panel in order to avoid hiring complainant or any other racial minority requires that Ms. Beaupre be aware of complainant's race or national origin or that of the other certified candidates at the time she was putting the interview panel together. The record, however, fails to show that Ms. Beaupre was aware or had any reason to be aware of the race or national origin of complainant or of any of the candidates to be interviewed during the relevant time period.

Complainant has failed to demonstrate pretext in regard to the composition of the interview panel.

Complainant also points to respondent's record of hiring minorities as demonstrating pretext. The evidence which was received into the record in this regard reflects that, from January 1, 1995, through December 31, 1997, respondent filled nine positions in the Administrator-senior executive job group of which the subject position was a part; and that one of these nine positions was filled by a racial minority. This represents a hiring rate of 11.1% for racial minorities. However, the statistical expert called by complainant at hearing testified that this was too small a sample to permit reliable statistical analysis. Although respondent's affirmative action officer testified that he was concerned that respondent was not making greater progress in attracting and hiring racial minorities into Administrator-senior executive positions, he did not attribute this to intentional discrimination by respondent but instead to the relatively low number of racial minorities in the available applicant pool. Complainant has failed to demonstrate pretext in this regard.

In addition to the indirect evidence already discussed, complainant attempts to show that there was direct evidence of Ms. Beaupre's intent to discriminate against him on the basis of his race or national origin. Specifically, complainant points to his

testimony that Ms. Beaupre indicated to him, when he was present for the scheduled interview, that affirmative action applied only to women, not to racial minorities. However, both Ms. Beaupre and Ms. Persich testified that Ms. Beaupre did not say this to complainant. In addition, given Ms. Beaupre's history as a supervisor responsible for implementing respondent's affirmative action plan in her unit, and given the testimony of respondent's affirmative action officer that Ms. Beaupre had a good track record in terms of affirmative action/equal employment opportunity and had developed a program for minority interns for respondent, complainant's testimony is not credible in this regard.

Complainant has failed to show that he was discriminated against on the basis of his race or national origin.

Complainant also alleges retaliation for engaging in protected fair employment activities. To establish a prima facie case in the retaliation context, there must be evidence that 1) the complainant participated in a protected activity and the alleged retaliator was aware of that participation, 2) there was an adverse employment action, and 3) there is a causal connection between the first two elements. A "causal connection" is shown if there is evidence that a retaliatory motive played a part in the adverse employment action. The record here shows that complainant did engage in protected fair employment activities, i.e., the filing of previous equal rights complaints with the Commission, but does not show that Ms. Beaupre or Ms. Persich, two of the alleged retaliators, were aware of these complaints at the time of the scheduled interview. As a result, complainant has failed to make out a prima facie case of retaliation as to any alleged retaliation by Ms. Beaupre or Ms. Persich. Complainant also appears to allege that Mr. Thiel retaliated against him by concluding that the interview panel for the subject position was not required to have a racial minority member, and by failing to recommend that complainant be afforded an interview by a panel with a racial minority member or that complainant be appointed to the position without interview. It is presumed that Mr. Thiel, as the result of the nature of his position with respondent, was aware of complainant's prior complaints. However,

even if it were concluded that complainant had made out a prima facie case of fair employment retaliation, complainant has failed to show that Mr. Thiel's opinion relating to the composition of the interview panel was inconsistent with any legal or policy requirement and, as a result, the fact situation under consideration here fails to demonstrate any connection between complainant's protected fair employment activities and respondent's failure to consider complainant's candidacy for the subject position further after he withdrew from the interview phase. Complainant has failed to show that he was retaliated against as alleged.

Finally, complainant argues that respondent's practice of not including racial minorities on interview panels when the position at issue is underutilized for racial minorities and when one or more of the certified candidates is a member of a racial minority had a disparate impact on him as a racial minority. It is not clear what the basis for complainant's argument is. However, it will be presumed that complainant intends that the hiring data in the record is intended to support his contention in this regard. This data reveals, as discussed above, that respondent filled nine positions in the Administrator-senior executive job group between January 1, 1995, and December 1, 1997. Although this sample size is too small to permit reliable analysis, even if it were analyzed, it would not support complainant's theory here. Of the 137 candidates certified for the nine positions, there were 116 candidates whose race was identified as white and nine candidates whose race was identified as non-white. Since one out of nine racial minority candidates was selected for hire, this yields a selection rate of 11.1%. For white candidates, the selection rate was eight out of 116 candidates or 6.8%. Even assuming that all interview panels lacked racial minority members, which complainant has failed to show, the selection rate for racial minority candidates actually exceeded that of white candidates. Complainant has failed to show that respondent's practice relating to the racial composition of interview panels had a disparate impact on racial minority candidates.

As with any case in which a number of arguments are advanced, it is important not to lose sight of the essence of the case. Here, complainant, even though he knew

from certain of his previous cases that there was no legal requirement that a state agency include a member of a racial minority on an interview panel, refused to go forward with his interview because he viewed the lack of a racial minority member as "illegal." Complainant alone was responsible for his failure to be rated by the first interview panel or to be forwarded by this panel to the final interview panel, and no discrimination or retaliation is demonstrated by this situation which complainant created for himself.

ORDER

This complaint is dismissed.

Dated: September 22, 1999

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:980104Cdec1

JUDY M. ROGERS, Commissioner

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

Parties:

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after

service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)