STATE OF WISCONSIN PERSONNEL COMMISSION

MICAH A. ORIEDO,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,

Respondent.

Case No. 98-0124-PC-ER

RULING
ON MOTIONS

This matter is before the Commission on various motions by the parties.

The underlying complaint of discrimination, based on color, national origin or ancestry and race, was filed on July 2, 1998. The complaint states, in relevant part:

> 1. Sometime in February 1998, DOC, DER and DMRS jointly advertised the position of Correctional Services Manager - Regional Chief, a career executive position, which was to serve in DOC. Complainant completed the AHQ exam and submitted it timely to DOC. Because complainant has taken numerous such AHQ career executive exams and been certified, complainant should have been certified as eligible to be selected or appointed into the position. While those certified are usually invited for an interview and, in fact, [are] eligible for appointment, DOC did not invite complainant for an interview as required and therefore denied him the position. Instead, respondents sent complainant a letter telling him that they had used career executive status selection process to appoint an individual. Complainant alleges that the career executive selection policy has [a] disparate impact on blacks and other racial minorities seeking career executive positions or administrative managerial positions.
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> 2. About March 12, 1998, complainant submitted completed AHQ exam to DOC for the position of Correctional Services Manager - Regional Chief, a career executive position, which was to serve in DOC. On March 18, 1998 complainant received a letter from DOC/Alison Scherer informing him that recruitment for the position had been cancelled and that DOC had used career executive status to appoint an individual from within DOC. Complainant wrote to DOC, DER and DMRS complaining that respondents had acted arbitrarily for using the career

> executive status, with full knowledge that the position group was underutilized for racial minorities and blacks, and because of this respondents had disadvantaged complainant in the selection process, given that he had taken [the] trouble to respond to the Achievement History Questionnaire (AHQ). Complainant alleges that respondents did not act or respond because of [complainant's] black race. . . .
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> 4. In this particular case complainant asked DER, DMRS and DOC, to investigate why DOC used the career executive option to fill the position. DER and DMRS did not respond, obviously because complainant happened to be black. Complainant alleges that respondents DER and DMRS did not respond intentionally and with disregard of complainant's civil rights to deny him the position because of his black race.

The case was initially denominated as *Oriedo v. DOC, DER & DMRS.* Complainant waived the investigation of his complaint and a prehearing conference was held on September 10, 1998. Respondents DER and DMRS raised a jurisdictional objection and a schedule was established for filing briefs on that objection. That schedule ran until October 15th. The conference report also provided:

> Respondent DOC may decide to file a motion for summary judgment. Once the Commission rules on the jurisdictional issue, the Commission will delay scheduling another prehearing conference in this matter for a period of two weeks. That delay will permit DOC to file a motion for summary judgment, should it decide to do so. The parties agreed to this schedule.

Complainant filed a motion for judgment on the pleadings on October 5, 1998, along with supporting arguments. Three days later, respondent DOC filed a motion for summary judgment, dated October 8th, with an accompanying brief in support of the motion. Respondent's motion made no mention of the complainant's motion for judgment on the pleadings. The parties were notified that ruling on these last two motions was being deferred until the Commission addressed the previous motion to dismiss DER and DMRS as parties. The Commission dismissed DER and DMRS by ruling dated November 4, 1998. By letter dated November 9th, the Commission established a briefing schedule on the motion for judgment on the pleadings and on the motion for summary judgment. The letter provided:

> Now that the Commission has issued its ruling on the motion to dismiss DER and DMRS, I am establishing the following schedule for the parties to file any additional arguments regarding complainant's motion for judgment on pleadings and respondent's motion for summary judgment:
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> > Respondent's arguments are due by December 1, 1998.
> > Complainant's response is due by December 11, 1998.

Respondent did not submit any additional materials by December 1st. On December 2nd, complainant moved for judgment by default due to respondent's failure to submit materials regarding his motion for judgment on the pleadings.

In a letter dated December 2nd and filed on December 4th, respondent offered the following arguments in opposition to the complainant's motion for "judgment by default":

> This date I have received Complainant's Motion for Default in the above-named matter. There appears to be some confusion about the posture of this matter. Perhaps the confusion is mine. . . .
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> Evidently, further opportunity was provided for briefing by Complainant and by Respondent DOC on the two pending motions. Respondent DOC did not calendar any deadline for such responsive briefing and it is unclear whether or not [DOC] received any notice from the Commission offering further opportunity for briefing.
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> In effect, the two pending motions are two sides of the same coin. . . .
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> Of course, Respondent DOC opposes Complainant's motion for judgment on the Pleadings. Respondent DOC was of the belief that its Motion for Summary Judgment was its response to Complainant's Motion for Judgment on the Pleadings, and this Motion was filed several months ago. For this reason Respondent DOC did not believe further briefing on Complainant's Motion was necessary. . . .
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> P.S. A file review has unearthed the Commission's letter dated November 9, 1998, offering the parties an opportunity to make additional arguments. Please consider this letter to be Respondent DOC's submission in this regard. If Complainant wishes an extended response time because this letter was filed a day late, Respondent DOC has no objection.

The Personnel Commission agrees that the complainant's motion for judgment on the pleadings and respondent's motion for summary judgment are the equivalent of opposing motions for summary judgment. This conclusion is supported by the following language in §802.06(3), Stats:

> After issue is joined between all parties but within time so as to not delay the trial, any party may move for judgment on the pleadings. . . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

Respondent's own motion for summary judgment of October 8th was a clear indication that respondent opposed complainant's motion for judgment on the pleadings filed 3 days earlier, even though it failed to specifically reference that motion. Once the Commission had ruled on the request to dismiss DER and DMRS as parties, the briefing schedule on DOC's and complainant's competing motions was restored to the extent the parties were given an opportunity to submit additional arguments regarding the two motions. Respondent did not submit any additional arguments by December 1st, but did file arguments 3 days later. In that submission, respondent stated that it believed "that its Motion for Summary Judgment was its response to Complainant's Motion for Judgment on the Pleadings." Because respondent's motion for summary judgment was filed 3 days after complainant's motion for judgment on the pleadings and because they are competing motions, there is no basis for granting complainant a default judgment and his motion for judgment by default is denied.[1]

The Commission now proceeds to consider what amounts to opposing motions for summary judgment. In its decision in *Starck v. UW(Oshkosh)*, 97-0057-PC-ER, 11/7/97, the Commission summarized the analysis to apply to a motion for summary judgment, as follows:

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[1] In his motion for judgment by default, complainant states, in part. "During time DER and DMRS motion to dismiss was before the Commission, parties exchanged of briefs concerning

The method of analysis for respondent's motion for summary judgment was outlined in *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (citations omitted):

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
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> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

The Commission has also previously noted that in the context of a fair employment claim in which complainant appears *pro se*, "particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for judicial proceedings." *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92.

This holding was endorsed by the Court of Appeals in *Balele v. Wis. Pers. Comm., et al.*, 98-1432, 12/23/98.

Based upon the submissions of the parties, the Commission identifies the following facts for purposes of analyzing these motions:

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complainant's motion for judgment on pleadings in his favor." This statement is simply incorrect.

> Respondent announced a career executive vacancy for the position of Correctional Services Manager -- Regional Chief, in the Division of Juvenile Corrections, on February 23, 1998. Complainant submitted an application for the position. Before a certification list was established and before interviews were conducted, respondent received an expression of interest in being reassigned to the position from Tom Van den Boom, a career executive already employed by respondent. Respondent approved Mr. Van den Boom's request for reassignment, and cancelled the recruitment. Complainant and other applicants were notified of the action by letter dated March 18, 1998. Respondent did not interview complainant for the vacancy and did not hire him to fill the vacancy.

Complainant contends that respondent's decision was made "with full knowledge that the position group was underutilized for minorities and blacks" and constituted discrimination based on color, national origin or ancestry and race.

I Complainant's October 5th motion

In his October 5, 1998 motion and supporting brief, complainant raises the arguments numbered below.

1. Complainant states that respondent "admitted or failed to dispute that the career executive practice has disparate impact on racial minorities seeking career executive positions." However, respondent clearly does dispute this statement in its December 4th submission.

2. Complainant states that respondent does not dispute "that Blacks and other racial minorities were underutilized both at DOC and statewide at the time [complainant] was not certified and denied the position." However, even if complainant's contention is true, this is not sufficient to result in a decision for complainant. *See Balele v. DHSS & DMRS,* 91-0118-PC-ER, 4/30/93, where even though respondent stipulated that limiting recruitment for two career executive positions had a disparate impact on minorities, the complainant still failed to meet his burden of proving he had been discriminated against by respondent in regard to the failure to interview him for the positions and to the failure to appoint him to either position.

3. Complainant argues that respondent is estopped from changing its position in *Balele v. DHSS & DMRS*, 91-0118-PC-ER. The Commission understands complainant to be referring to the Commission's decision issued on April 30, 1993. That decision described the following stipulation in Case No. 91-0118-PC-ER: "Respondent stipulated, *for the purpose of this case only*, that its decision to use Option 2 to recruit for the Career Executive positions in issue had a disparate impact on minorities, which included complainant." The terms of the stipulation clearly limited it to that particular case and complainant's estoppel theory is inapplicable.

II. Respondent's October 8th motion

In its October 8th motion for summary judgment, respondent includes the following arguments as numbered below.

1. Respondent contends that it acted pursuant to §§ER-MRS 30.07(1), (2) and 30.08, Wis. Adm. Code, when it reassigned Mr. Van den Boom, already a career executive, to the position in question. Those rules permit an appointing authority to reassign an employe in one career executive position within the agency to another career executive position, "provided it is reasonable and proper." The relevant administrative rules read:

> ER-MRS 30.07 Career executive reassignment. (1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.
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> (2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employe in a career executive position within the agency to another career executive position in the same or lower classification level for which the employe is qualified, the appointing authority may make such reassignment, provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employe, with the reasons stated therein.
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> ER-MRS 30.08 Career executive voluntary movement. Any career executive shall be eligible to voluntarily move to any vacant career execu-

> tive position. If the appointing authority is considering the voluntary movement of a career executive employe to a position allocated to a higher class, all career executive employes shall be so notified and provided an opportunity for appointment consideration, as follows:
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> (1) Intra-agency movement: all career executive employes in the agency.
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> (2) Inter-agency movement: all career executive employes in state service.

There is nothing in complainant's submissions suggesting that complainant concedes the reassignment of Mr. Van den Boom was "reasonable and proper." The Commission understands complainant to contend that respondent's discretionary decision was discriminatory because respondent knew that the reassignment had a disparate impact on minorities and because respondent knew that complainant, who is black, was an applicant for the vacancy. Complainant is entitled to a hearing on that theory and summary judgment is inappropriate.

2. Respondent also notes that the Commission lacks the authority "to determine the validity or constitutionality of any statute or administrative regulation," citing *McSweeney v. DOJ & DMRS*, 84-0243-PC, 3/13/85, and *Smith v. DMRS*, 90-0032-PC, 1/5/96.[2] This argument is inapposite if the question is whether the decision to reassign Mr. Van den Boom was discriminatory.

In his October 13th brief, complainant suggests the Commission has the power to invalidate discriminatory rules. Also, at page 17 of the same brief, complainant writes: "Per *Griggs v. Duke Power Co.*, 401 US 424 (1971) the referenced administrative code is illegal." Complainant contends that §§ER-MRS 30.07 and .08 are invalid because they conflict with §230.24, Stats. The goals of the career executive program are set forth in §230.24(1), Stats:

> [T]o provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employes a broad opportunity for career advancement and to provide for the mobility of such employes among the agencies and units of state government for the most

[2] The decision in *McSweeney* dealt with the question of the constitutionality of a statute and in *Smith* with the failure to enforce a statute, so neither case supports respondent's argument.

> advantageous use of their managerial and administrative skills. To accomplish the purpose of this program, the administrator [of DMRS] may provide policies and standard for recruitment, examination . . . [and] transfer.

Subsection (2) goes on to provide substantial discretion to the appointing authority in deciding how to fill a vacancy in a career executive position:

> A vacancy in a career executive position may be filled through an open competitive examination, a competitive promotional examination or by restricting competition to employes in career executive positions. . . . The *appointing authority* shall consider the guidelines under s. 230.19 *when deciding how to fill a vacancy* under this paragraph. (Emphasis added.)

Section 230.19(1), provides:

> The administrator shall provide employes with reasonable opportunities for career advancement, within a classified service structure designed to achieve and maintain a highly competent work force, with due consideration given to affirmative action.

In *Paul v. DHSS & DMRS*, 82-PC-ER-69, 82-156-PC, 10/14/84, the Commission concluded that in the context of an appeal under §230.44(1)(d), Stats., there was "reasonably clear authority for the Commission to consider the validity of the rule in question [which provided for expanded certification when necessary to achieve a balanced work force]." The Commission's conclusion was based, in part, on the language of §230.44(1)(d), Stats., which allows for certain appeals from personnel actions "alleged to be illegal." The instant case is filed with the Commission under the Fair Employment Act which, in §111.325, provides that "[i]t is unlawful for any employer . . . to discriminate against any employe or applicant for employment or licensing." Therefore, it appears the Commission is not barred from determining the validity of rules implementing the career executive program.

The question before the Commission is whether complainant has identified a conflict between the rules and statutory provisions so as to successfully defend against respondent's motion for summary judgment as to this argument. Inferences drawn from the underlying facts are viewed in the light most favorable to complainant. It is

undisputed that respondent approved Mr. Van den Boom's request for reassignment from one career executive position to the vacant Correctional Services Manager -- Regional Chief position. Section ER-MRS 30.07(2) merely permits such a reassignment "provided it is reasonable and proper." That rule does not establish any criteria nor specify the results to be obtained by an appointing authority when deciding whether or not to grant a reassignment request. Because this provision does not direct consideration of a certain factor nor does it direct a certain result, and because the complainant has not shown that any statutory language is inconsistent with this language, respondent is entitled to summary judgment with respect to complainant's contention that §ER-MRS 30.07(2) is invalid.

III. Complainant's October 13th brief

1. Complainant argues that the Commission "does not have the authority to entertain motions for summary judgment of the kind that are authorized by §802.08, Stats." However, in *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92, the Commission held it can issue a decision in what amounts functionally to a summary judgment proceeding if it can be determined that there are no disputed issues of material fact. *Accord, Balele v. Wis. Pers. Comm., et al.*, 98-1432, 12/23/98 (Court of Appeals).

2. At page 8 of his brief, complainant quotes the following language numbered paragraph 6 in his complaint:

> Complainant has sued the State, DER, DMRS and other agencies in the Personnel Commission. In all cases, complainant has alleged that respondents have used racially discriminatory practices to discriminate against blacks from being selected into career executive positions. Complainant therefore alleges that respondents retaliated against him when they denied him the position at issue because he has filed the said complaints.

This appears to be an allegation of FEA retaliation against respondent. However, complainant did not check that box for "activities protected by the Fair Employment Act" on the back of his complaint form. As a consequence, the Commission is processing this case solely on the basis of claims of discrimination based on age, national origin

and ancestry and color. If complainant intends to pursue a FEA retaliation claim, he must ask to amend his complaint and file an amended charge.

3. On page 13 of his October 13th brief, complainant contends the Commission has the authority to hear this matter under §230.44(1)(d), Stats. This case was clearly filed as a complaint and there was no reference on the complaint form to also filing an appeal under §230.44(1)(d). The Commission notes that appeals under §230.44(1)(d), are subject to a 30 day filing period as specified in §230.44(3), Stats.

ORDER

Complainant's motion for default judgment is denied. Complainant's motion for judgment on the pleadings is denied. Respondent's motion for summary judgment is denied in part and granted in part, as noted above.

Dated: February 2, 1999. STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

KMS:980124Crul2

JUDY M. ROGERS, Commissioner

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