

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

**RULING
ON
MOTION**

Case No. 98-0145-PC-ER

This matter is before the Commission on a dispute as to the proper issue for hearing. The parties have filed written arguments. The case arises from the failure of respondents to hire complainant for the career executive position of Executive Human Resource Manager-Centered Exam.

The complaint of discrimination, filed on August 6, 1998, states, in part:

1. The Department of Employment Relations and the Division of Merit Recruitment and Selection (DER/DMRS) had established a one-page five page [sic] questions version of Achievement History Questionnaire (AHQ) exam practice to screen candidates for further consideration in administrative manager or career executive positions. Complainant alleges this practice had disparate impact on qualified racial minorities seeking career executive positions and was used as practice to prevent the complainant and other racial minorities, otherwise qualified, from being certified and appointed into the position at issue and other career executive positions statewide.

2. On January 26, 1998, complainant responded to an advertisement for the position of Executive Human Resource Manager-Centered Exam, a career executive position which was to serve in DER and DMRS. However on March 14, 1998, complainant received a letter from DER and DMRS stating that he was ineligible for the position. Because he had been certified and interviewed in a similar positions [sic] before, complainant alleges that respondents used the AHQ version to deny him the position because of his race and national origin.

3. Complainant called five racial minorities whom he knew would apply and qualify for the position at issue and similar positions in DER/DMRS and statewide. Complainant discovered that they too had been screened out as ineligible for the position at issue and similar positions in DER/DMRS and other state agencies using the AHQ version. Complainant alleges that AHQ version had disparate impact on racial minorities seeking administrative manager positions or career executive positions.

4. Complainant has learned that at the time DER and DMRS refused to certify and denied him the position at issue, respondents were custodian of various statewide personnel reports. Therefore DER and DMRS knew that administrative manager positions were underutilized for blacks and other racial minorities both in DER/DMRS and statewide. Further DER and DMRS knew that the version of AHQ version [sic] had disparate impact on racial minorities. Therefore DER/DMRS and their agents used the AHQ version to ensure that no blacks and other racial minorities and therefore [sic] complainant were certified and selected into the position at issue to keep white people status quo in career executive in DER and DMRS and statewide. . . .

7. Further investigation revealed that DER/DMRS officials had manipulated state policy to exclude blacks and other racial minorities from certifying and selecting panels. Complainant alleges DER and DMRS officials had manipulated state policies to enable them to discriminate against blacks and other minorities to perpetuate discrimination against racial minorities. . . .

10. Further, since AHQ version had disparate impact on racial minorities and DER and DMRS knew about it, DER and DMRS used the AHQ version simply as a barrier to discriminate against complainant, otherwise qualified, from being selected into the position because of his race to stop inflow of blacks into DER and DMRS top management positions.

11. On the other hand respondents allowed people with career executive status, most of whom were white people, to proceed to the interview stage and have a chance to be selected regardless of their qualifications. Since racial minorities were underutilized in administrative manager position, complainant alleges that the career executive status had disparate impact on racial minorities and therefore complainant.

12. Complainant had filed legal actions against respondents, and the legal actions were still pending in the Personnel Commission at the time respondents denied him the position at issue. Because he had been certified and interviewed in similar positions before, complainant alleges that DER and DMRS retaliated against him because he had sued them.

While this language is subject to more than one interpretation, the Commission understands complainant to allege, *in his complaint*, that 1) the use of the AHQ to screen candidates had a disparate impact on minorities who sought appointment to career executive positions,¹ 2) that the AHQ discriminated against *him* because of his race and national origin and in retaliation for prior protected activities, 3) that it was the policy of respondents to exclude blacks and other minorities from certifying panels, and 4) that the rule permitting existing career executives to be considered at the interview stage without going through an evaluation (AHQ) of their qualifications also had a disparate impact on minorities and on complainant.

A prehearing conference was convened on February 5, 1999. The parties were provided a specified period to raise objections to the following statement of issue for hearing:

Whether respondents discriminated against complainant based on color, national origin/ancestry or race or retaliated against complainant for having engaged in Fair Employment Activities with respect to 1) respondents' use of particular questions for the Achievement History Questionnaire (AHQ) analysis for the Executive Human Resources Manager position, or 2) permitting persons who already had career executive status to proceed to the interview stage of that selection process without completing an AHQ.

The prehearing conference report also states that complainant indicated he might "seek to add issues he identifies during the course of carrying out discovery."

¹ It appears that complainant means that the specific AHQ questions had a disparate impact. However, it may be that this contention is really just a restatement of the complainant's fourth contention, i.e. that the persons already within the career executive system were not subjected to the AHQ analysis and this had a disparate impact on racial minorities

The Commission notes that there is no specific reference to a disparate impact theory in either of the issues identified in the conference report. However, in his brief in response to the respondent's objection to the issues, complainant makes it clear that he anticipates pursuing a disparate impact theory as to the effect of §ER-MRS 30.10(1), Wis. Adm. Code. Given that the hearing issue is already under review as a consequence of respondent's motion, it is appropriate for the Commission to conclude this ruling with a statement of the issue in an effort to eliminate any confusion on this point.

By letter dated February 10, 1999, respondent objected to the second part of the issue statement in the conference report. Respondent argued:

§ ER-MRS 30.10(1), Wis. Adm. Code, grants to employees who enjoy career executive status certain rights and privileges, including:

" . . . movement between positions within the program *without examination and additional competition.*" (Emphasis added).

Clearly this is an absolute right of an employe in the career executive program: the right to apply for a career executive position and proceed to the interview stage without having to participate in any competition like an AHQ. This right is automatic; it is not conditional in any way. It is the right of the employe, not subject to the decision of the appointing authority. As such, there is nothing to litigate on this point. There can be no discrimination by the employer because it does not make a decision; the law imposes the right.

The nature of respondent's argument is that the provisions of the rule provide an absolute defense to a discrimination complaint. In other words, respondent contends that because the rule exists, is valid, and provides for automatic movement to the interview stage for anyone already in the career executive program, complainant cannot prevail as to the second issue. Complainant does not appear to contest the respondent's reading of the rule but does contend that the rule is invalid when it is viewed in light of other statutory provisions. As noted above, complainant also attacks the *application* of the rule on a disparate impact theory.

Complainant argues that the rule conflicts with §230.18, Stats., which provides, in part:

No discrimination may be exercised in the recruitment, application, examination or hiring process against or in favor of any person because of the person's political or religious opinions or affiliations or because of age, sex, handicap, race, color, sexual orientation, national origin or ancestry except as otherwise provided.

Complainant argues that the rule conflicts with §230.19, Stats:

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.

The term "affirmative action" is defined in §230.03(2), Stats., as follows:

"Affirmative action" means specific actions in employment which are designed and taken for the purposes of all of the following:

- (a) Ensuring equal opportunities.
- (b) Eliminating a substantial disparity between the proportion of members of racial and ethnic, gender or handicap groups either in job groups within the classified civil service, or in similar functional groups in the unclassified service, and the proportion of members of racial and ethnic, gender or handicap groups in the relevant labor pool.

Is the rule contrary to any of the above statutes? Clearly the rule is not discriminatory on its face. It doesn't say that no blacks are eligible for career executive positions, nor does it say that blacks may not move between career executive positions in the same way as whites. The rule, on its face at least, treats everyone the same and is neutral. The rule is clearly not invalid as being contrary to §§230.18 or .19, Stats.

Complainant also argues that the rule has a disparate impact on minorities. In his brief, page 6, complainant states that the Commission "should assume that career executive positions were underutilized for racial minorities and therefore were overutilized for whites." Complainant goes on to state:

Under the Option 4 of career executive status, career executive eligible[s] entered the final selection pool merely by taking [a] few minutes to ask that they be considered for interview. Since asking requires a minimum investment of time and effort and their chances of reaching interview pool is 100 percent if they ask, "there is really no reason for an interested person not to ask." Complainant had to go through a major hurdle to submit an AHQ response and his chance of proceeding to [the]

interview stage was uncertain. Although some whites had to take the AHQ, this did not matter because the career executive positions were not underutilized for whites, but [were] grossly underutilized for blacks and other racial minorities in DER and DMRS and statewide. . . . [A]ll that complainant in this case is asking is to be given a chance for a hearing to prove that permitting [a] person who already [has] career executive status [to] proceed to the interview stage of that selection process without completing an AHQ was discriminatory against him.

Complainant's disparate impact theory cannot be decided on this record. The parties need to be provided an opportunity to offer evidence relating to such topics as the racial mix of persons certified for career executive positions, whether the results are causally related to the employment practice in question, whether the practice is job-related and consistent with business necessity, whether an alternative practice is available that is less discriminatory and whether that alternative should have been known to respondents. This result means that the second issue should be recast so that it is clearly limited to a disparate impact theory.

The net effect of this ruling is that respondents' objection to the second issue is granted in part and rejected in part.

ORDER

Respondent's objection to the second proposed issue is granted in part and rejected in part. The issue is rewritten as follows for purposes of clarification:

1. Whether respondents discriminated against complainant based on color, national origin/ancestry or race or retaliated against complainant for having engaged in Fair Employment Activities with respect to respondents' use of particular questions for the Achievement History Questionnaire (AHQ) analysis for the Executive Human Resources Manager position.
2. Whether the procedure of permitting persons who already have career executive status to proceed to the interview stage of the selection process without completing an AHQ constitutes illegal discrimination, based on race, under the Fair Employment Act on a disparate impact theory.

Dated: April 7, 1999

STATE PERSONNEL COMMISSION



LAURIE R. McCALLUM, Chairperson

KMS: 980145Cru11



JUDY M. ROGERS, Commissioner

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