STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

President, UNIVERSITY OF WISCONSIN SYSTEM,
Respondent.

RULING ON MOTIONS FOR SUMMARY JUDGMENT

Case No. 98-0159-PC-ER

This case is before the Commission to resolve the motion to dismiss filed by the University of Wisconsin System (UW) and Mr. Balele's cross motion for summary judgment. Both parties filed written arguments. The facts recited below are made solely for the purpose of resolving the present motions. Such facts appear to be undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. The parties agreed to the following statement of issue for hearing (see Conference Report dated February 8, 1999):

> Whether respondent discriminated against complainant on the basis of color, national origin or race, or WFEA retaliation in connection with its failure to certify or otherwise consider for further employment complainant for the position of Senior Vice President for Administration and Chief Operating Officer of the University of Wisconsin System.

2. On May 19, 1998, the Board of Regents for the UW System approved the UW's request to recruit for the position of Senior Vice President for Administration and Chief Operating Officer (hereafter, the Vacant Position). The Vacant Position was not a classified civil service position. Rather, it was an unclassified academic position. The position announcement is noted below in relevant part (with emphasis added):

> The position requires that the successful candidate be an experienced administrator with the demonstrated ability to work effectively and collaboratively in a complex higher education organization with a strong shared governance system; the ability to represent effectively the institution to its constituencies; a successful track record of identifying opportunities which advance higher education; and a demonstrated knowledge of fundraising and significant capital campaigns. An advanced degree with at least five years of successful senior level university experience is required . . .
>
> Applicants must submit: a narrative letter describing how the applicant's training and experience directly relate to the job responsibilities [and] a detailed professional resume . . .

For purposes of the present motion it is presumed that Mr. Balele had an advanced degree, as well as five years of successful senior level experience but not in a university setting. Mr. Balele has never worked or otherwise been employed by a college or university.

3. Twenty-three candidates, including Mr. Balele, applied for the Vacant Position. A nine-member search and screen committee reviewed the application materials. All committee members were white.

4. The panel first reviewed the application materials to determine if the applicant had an advanced degree as well as five years senior level university experience. Ten individuals, including Mr. Balele, were screened from further consideration for appointment to the Vacant Position because they failed to meet one or both of these qualifications. Of these 10 applicants, the race of 3 are unknown (as they did not follow the option to disclose their race in the application materials), two applicants were racial minorities (including Mr. Balele) and five were white.

5. Thirteen individuals survived the initial screening process, including 1 black applicant, 6 white applicants and 6 applicants who did not disclose their race or ethnicity. Ultimately, only three individuals were given the opportunity to interview. All three interviewed applicants were white. The UW hired Mr. Olien, a white person who had been performing the duties of the Vacant Position on an acting basis.

6. The Vacant Position is included in the UW's Executive Administrators job group, along with the following additional job titles (during the 1997-98 fiscal year): a) Secre-

tary of the Board of Regents, b) Assistant Vice President, c) Associate Vice President, d) Vice President, e) Senior Vice President for Academic Affairs, f) Senior Vice President for Administration and g) President. During the 1997-98 fiscal year, the UW had 15 employes in the Executive Administrators job group. UW employes have the option to self-report their race and ethnicity for use in establishing the UW's affirmative action plan (AA Plan). It is unknown how many of these employees voluntarily reported their race and ethnicity. However, of the unknown number that did self-report, no one identified him/herself as a racial minority.

8. The UW's AA Plan for fiscal year 1997-98 (AA Plan, p. 6) indicates that the Executive Administrator job group included no racial minorities, that a goal of 15.3% had been set and that three vacancies were filled in the job group but all individuals hired were white. This job group remained underutilized for minorities (AA Plan, p. 11). The availability analysis for this job group showed that racial minorities comprised 15.28% of the available labor force (AA Plan, Appendix A, p. 5).

CONCLUSIONS OF LAW

The party moving for summary judgment has the burden to establish entitlement to the same. The UW met this burden. Mr. Balele did not.

OPINION

Summary judgment should only be granted in clear cases. See *Grams v. Boss*, 97 Wis. 2d 332, 338-9, 294 N.W.2d 473 (1980), wherein the court stated:

> 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.

> 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 UW's basic argument in support of its motion for summary judgment is that Mr. Balele cannot show he was qualified for the position, an element of the prima facie case, because he did not meet the requirement of five years of successful senior level university experience. Mr. Balele concedes that he did not meet the cited requirement but contends his case remains viable under a disparate impact theory.

Mr. Balele's first argument of disparate impact is based on his incorrect reading of the UW's AA Plan. Specifically, page 13 of the AA Plan states as follows:

> IMPACT RATIO ANALYSES (41 CFR 60-2.13(d))
> Adverse Impact
> Impact ratio analyses are conducted on personnel transactions for each job group to determine if there is adverse impact. Adverse impact exists when a seemingly neutral employment policy or process has a disproportionate impact on a group of people because of their race, color, religion, sex, or national origin. The Uniform Guidelines on Employment Selection Procedures require that impact ratio analyses be conducted and records maintained on all personnel actions for which selection procedures are used. These include hires, promotions, and terminations.
>
> The impact ratio – or adverse impact – analyses are conducted using the 80 percent rule. This rule establishes adverse impact when the selection rate for a protected group is less than 80 percent of the selection rate for a non-protected group. For terminations, it is reversed.
>
> Results:
> No adverse impact was identified in hires, promotions, or terminations.

The cited excerpt from the AA Plan indicates that federal law requires the UW to keep records based on the 80 percent rule. Contrary to Mr. Balele's assertion, it does not stand for the

proposition that the 80% rule establishes discrimination without consideration of additional relevant factors.

The 80% rule is a "rule of thumb." It has been criticized as a statistical method because it fails to take into account the availability of qualified minorities in the labor force. See Sullivan, et al., *Employment Discrimination, 2d ed.*, §3.3.2 and §6.2 (labor force statistics in systemic disparate treatment cases, which may have relevance in individual disparate treatment claims). The 80% rule also has been criticized where (as here) the sample size is small. See Lindemann, et al., *Employment Discrimination Law 3rd ed.*, Ch. 39, p. 1731-1733.

Mr. Balele contends that use of the 80% rule supports an inference of discrimination in his case. One problem with his argument is that he "plugged" the wrong figures into the 80% formula. He complains that the requirement of five years of successful senior level university experience created a disparate impact on minorities. The correct figures to plug into the formula, accordingly, are the pass/fail rates resulting from the contested requirement. Instead, Mr. Balele used the pass/fail rates of the ultimate hiring decision. (See complainant's brief dated 6/4/99, pp. 12-13.)

The correct analysis under the 80% rule is shown below. As is appropriate in the context of a motion for summary judgment, an assumption was made that the candidates who did not voluntarily disclose their race were white. (The analysis shown below is based upon guidance found in Sullivan, Simmer, Richards, *Employment Discrimination 2d ed.*, §4.2.3.2.)

	Racial Minorities	Whites
Total applicants	3	20
Number Selected	1	12
Passing Rate	33%	60%

The resulting "ratio of rates" is 33/60 (or 55%), which is less than 4/5ths (or 80%) and, accordingly, could be viewed as raising an inference of disparate impact.

The results of applying the 80% rule are insufficient in this case to raise an inference of discrimination due to the small sample size involved. The Uniform Guidelines on Employment

Selection Procedures, 28 CFR §50.14,[1] contains the following pertinent discussion in section 4D (emphasis shown is in the original document):

> D. Adverse impact and the "four-fifths rule." A **selection** rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact . . . Greater differences in **selection** rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant . . .

Further guidance has been provided in "Q & As on Uniform Guidelines on Employee Selection Procedures" published in 44 Fed Reg 11,996, 3/2/79, the following relevant excerpts are shown below (emphasis shown is in the original document):

> **20.Q. Why is the 4/5ths rule called a rule of thumb?**
> A. Because it is not intended to be controlling in all circumstances . . .[A] difference of more than 20% . . . may not provide a basis for finding adverse impact if the number of persons selected is very small. For example, if the employer selected three males and one female from an applicant pool of 20 males and 10 females, the 4/5ths rule would indicate adverse impact . . . yet the number of selections is too small to warrant a determination of adverse impact. In these circumstances, the enforcement agency would not require validity evidence . . .
>
> **21. Q. Is evidence of adverse impact sufficient to warrant a validity study or an enforcement action where the numbers are so small that it is more likely than not that the difference could have occurred by chance?** . . .
> A. No. If the numbers of persons and the difference in selection rates are so small that is likely that the difference could have occurred by chance, the Federal agencies will not assume the existence of adverse impact, in the absence of other evidence . . . Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from an adverse impact against one

[1] The referenced uniform guidelines were issued initially in 29 CFR 1607, effective September 25, 1978, with clarification in question-and-answer format published in 44 Fed. Reg. 11,996, 3/2/79. No substantive changes occurred with respect to the discussion in this ruling.

> group to a situation in which that group has a higher selection rate than the other group.

The circumstances present in Mr. Balele's case are that a difference of one minority candidate in the passing rate would result in a higher passing rate for minorities than for whites. The total minority applicants would be 3 and the number selected 2, with a resulting passing rate of 66 percent for minorities as compared to the 60% passing rate for white candidates. Accordingly, use of the 80% rule in Mr. Balele's case is insufficient to demonstrate adverse impact.

Mr. Balele correctly pointed out that it is the UW's burden to show that the requirement of five years of successful senior level university experience is a job-related requirement (see complainant's brief dated 7/2/99, p. 5). This burden, however, arises only if the complainant establishes that a disparate impact occurred – a prerequisite not met in this case.

Mr. Balele's case fails because he is unable to show that he was qualified for the position due to the fact that he did not have the required five years of successful senior level university experience. His theory of disparate impact, as detailed above, is insufficient to defeat the UW's motion for summary judgment.

Mr. Balele's cross-motion for summary judgment is based on his contention that the required five years of successful senior level university experience had a disparate impact on minorities. As detailed above, the facts of this case do not support his disparate impact theory.

Mr. Balele's cross-motion also appears to be based on his perception that the UW was required to have hired one of the racial minority candidates (either himself or the other minority candidates) because there were no minorities in the pertinent job group. (See complainant's brief dated 6/4/99, pp. 24.) He failed to cite authority for this proposition. Nor is the Commission aware of any authority to support such a proposition under the circumstances presented in this case.

ORDER

Mr. Balele's cross-motion for summary judgment is denied. The UW's motion for summary judgment is granted and this case is dismissed.

Dated: October 20, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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

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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.)

2/3/95