

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

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

**RULING ON
STATEMENT OF
ISSUES FOR HEARING**

Case No. 98-0199-PC-ER

A prehearing conference was held at which time the parties requested and were granted an opportunity to file written arguments regarding the proposed statement of hearing issues. The final argument was due by March 29, 1999, as measured by post-mark date.

The facts recited below appear to be undisputed by the parties unless specifically noted to the contrary. The facts are made solely for the purpose of resolving the pending arguments.

FINDINGS OF FACT

1. On August 17 and on September 14, 1998, DATCP advertised that a career executive vacancy existed and invited participants to apply with a resume and a completed Achievement History Questionnaire (AHQ). DATCP had a 3-person panel evaluate the AHQs. Complainant's AHQ score was too low to be invited for an interview. He thereafter filed this discrimination case.

2. The pertinent **factual allegations** in this complaint are shown below using the same numbering system and emphasis as appears in the original document. (The words shown in brackets were added to the text.)

1. The Department of Employment Relations (DER) . . . and the Division of Merit Recruitment and Selection (DMRS) . . . had promulgated to agencies a version of Achievement History Questionnaire (AHQ), the three-page paper and Resume practice to screen candidates for further consideration in career executive positions. Complainant alleges this practice had [a] disparate impact on qualified racial minorities seeking career executive positions and was used as [a] barrier to deny Complainant, otherwise qualified, from being certified and appointed into the position at issue.

2. Sometime in September, 1998 respondents, DER, DMRS and DATCP, jointly advertised [the vacant position]. Complainant competed by responding to the version of the [AHQ] which was in a form of a three-page paper and resume . . . On October 28, 1998, respondents wrote a letter informing complainant that he was not eligible for the position. Because he had been certified for several career executive positions just a few weeks before, complainant alleges that respondents intentionally flunked the complainant because of his black race to pave way to select the white candidate.

3. Complainant has learned that at the time DER, DMRS and DATCP denied him the position at issue [they] knew or should have known that racial minorities were severely underutilized and that the AHQ version caused disparate impact on qualified racial minorities seeking positions statewide. However, DER and DMRS did not discontinue the use of AHQ version. Complainant therefore alleges that DER and DMRS had intentionally and with disregard of the complainant's and other racial minorities' civil rights continued to allow DATCP and other agencies to use the AHQ version to discriminate against blacks and other racial minorities.

4. On the other hand respondents allowed people with career executive status whether qualified or not and most of whom were white people who [were] over-utilized, to proceed to [the] interview stage and have [a] chance to be selected regardless of their qualifications. Complainant alleges the career executive status had a disparate impact on qualified racial minorities. Therefore respondents used [the] AHQ version as [a]

means to eliminate complainant and other racial minorities early from the selection process to keep [the] status quo of whites in the Department.

5. Complainant has learned that the selected individual was acting in the position at issue . . .

6. Complainant alleges that [the] practice of allowing people to act in [a] position has a disparate impact on racial minorities because the former get to learn about the positions even if they were initially unqualified for them.

7. Although State policy mandates [use of a] balanced exam rating panel whenever there are racial minority candidates among the applicants, DATCP did not have racial minorities among the raters . . . Complainant alleges that the all white screening panel practice has [a] disparate impact on racial minorities.

8. Complainant had found that the individual selected for the position at issue had been pre-selected for the position. Therefore, respondents made sure that complainant and other racial minorities were found not eligible in order [to] pave way to appoint the pre-selected individual Complainant alleges that pre-selection of people into the positions has [a] disparate impact on racial minorities (sic). This is because the exam rating panel are conditioned to flunk racial minorities because they are regarded as spoilers to defeat respondents' plot to appoint the pre-selected individuals . . .

3. A prehearing conference was held on January 7, 1999, at which time the Commission staff person conducting the conference proposed the following statement of the hearing issues (see Conference Report dated 1/8/99). The parties were asked to identify in their briefs which respondent(s) should be named for each of the sub-issues.

Whether respondents discriminated against complainant because of his color, race and/or national origin when in October 1998, complainant was notified that he was ineligible for the position of Administrative Manager, Assistant Administrator – Division of Animal Health.

Sub-issue #1: Whether respondents' use of an achievement history questionnaire (AHQ) was used as a pretext to disqualify complainant from consideration because of his color, race and/or national origin.

Sub-issue #2: Whether respondents' use of an all-white panel to evaluate the AHQs discriminated against complainant because of his color, race and/or national origin.

Sub-issue #3: Whether respondents' practice of allowing career executives to automatically interview discriminated against complainant because of his color, race and/or national origin.

Sub-issue #4: Whether respondents' practice of allowing someone to perform the position on an acting basis discriminated against complainant because of his color, race and/or national origin.

OPINION

As a preliminary matter, the Commission notes that the wording used by complainant in his discrimination complaint could be interpreted as an attempt to raise issues on behalf of all racial minorities. The Commission ruled in one of complainant's previous cases that it lacked 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, any reading of the present complaint which could be interpreted as including individuals other than complainant as the charging party is rejected.

Sub-Issue #1.

As the result of further examination of the language of the subject charge, it is concluded that sub-issue #1 as stated in the above-quoted conference report, actually consists of three sub-issues, to wit:

- a. Whether the AHQ procedure developed by respondents DER and DMRS had a disparate impact on complainant on the basis of race, color, or national origin, when it was utilized as part of the recruitment for the subject position.

b. Whether the decision by respondent DATCP to use an AHQ as part of the recruitment for the subject position discriminated against complainant on the basis of his color, race, or national origin.

c. Whether the scoring of the candidates' responses to the AHQ by respondent DATCP discriminated against complainant on the basis of his color, race, or national origin.

Although DER urged that the wording of sub-issue #1 be modified to recognize complainant's challenge to the questions presented by the AHQ at issue here, it is clear from complainant's filings that he is not alleging that the questions on the AHQ were discriminatory.

Complainant does allege, however, that the AHQ practice utilized by DATCP here was developed for and recommended to appointing authorities by DER and DMRS. It does not appear that DER and DMRS dispute this. It is concluded that DER and DMRS are necessary parties in regard to issue a. stated above.

DATCP does not appear to dispute that it made the decision to use an AHQ as part of the subject recruitment process and that it scored the responses to this AHQ. As a result, it is concluded that DATCP is a necessary party in regard to issues b. and c., stated above.

Sub-Issue #2.

The second sub-issue stated in the conference report quoted above relates to complainant's allegation that discrimination occurred because each member of the panel evaluating the AHQs is white. All parties appear to agree that the only appropriate respondent for this sub-issue is DATCP.

DATCP objected to inclusion of the second sub-issue contending that it was based upon an incorrect assumption of fact. In particular, DATCP points out that Hamdy Ezalarab was a member of the panel that graded the AHQs. DATCP contends that Mr. Ezalarab is "an ethnic-African black male over 40." Complainant indicates in response that the State of Wisconsin has a definition of a white person, which includes individuals from North Africa. Complainant further contends that Mr. Ezalarab is from

“Egypt, North Africa” and, as such, meets the definition of a white person that is used by the State of Wisconsin.

In view of this dispute of fact over the race of one of the interviewers, it would be inappropriate to eliminate this issue at this stage of these proceedings. However, in view of further clarification of the underlying charge from complainant, the phrasing of this sub-issue should be modified to read as follows:

Whether respondent DATCP used an all-white panel to evaluate the candidates’ responses to the AHQs and, if so, whether this practice had a disparate impact on complainant as a candidate for the subject position on the basis of race, color, or national origin.

Sub-issue #3

The third sub-issue relates to the practice of allowing individuals already in career executive positions to qualify for interview for other vacant career executive positions without examination or other competition.

DER and DMRS argue that the sub-issue itself is not properly before the Commission. Specifically, DER and DMRS first argue that the practice is required by §ER-MRS 30.10(1), Wis. Adm. Code; that, as a result, neither DER, DMRS, nor DATCP had the authority to exercise any discretion in this regard; and that, in order for an intent to discriminate to be found in the differential treatment context, the alleged discriminator must have had the authority to exercise some discretion in regard to the subject employment action. This result seems clear and in fact does not appear to be disputed. However, this does not address complainant’s disparate impact theory.

DER and DMRS then argue that, as a result of the foregoing, the only remaining challenge could be to the administrative rule itself; and that the language of the administrative rule is dictated by the language of the enabling statute. However, §230.24, Stats., merely provides that, if a career executive program were established by DER and DMRS, one goal of such a program should be to “provide for the mobility of such employes among the agencies and units of state government for the most advantageous

use of their managerial and administrative skills.” In implementing this statutory provision, §ER-MRS 30.10, Wis. Adm. Code, states as follows:

- (1) Career executive program employment grants to each employe thereunder rights and privileges of movement between positions within the program without examination and additional competition. . . .

Although §ER-MRS 30.10(1), Wis. Adm. Code, is not invalid as being contrary to §230.24, Stats., the right granted by the administrative rule is not specifically dictated by the statutory language. As a result, complainant is entitled to have the Commission resolve the issue of whether the rule had a disparate impact on an employee within a protected group when it was applied to a particular recruitment, and DER and DMRS are the proper parties to defend it. *See, Balele v. DER & DMRS, 98-0145-PC-ER, 4/7/99.*

The remaining question is whether DATCP should also be required to be a party to this sub-issue. Although, pursuant to §230.24, Stats., the appointing authority has the discretion to select the type of competition to be utilized in filling a career executive position in their agency, they would not have the authority to interfere with the right granted to current career executive employes by §ER-MRS 30.10(1), Wis. Adm. Code, to qualify for interview without examination or other competition, the practice challenged by complainant in this sub-issue. As a result, it is concluded that DATCP should not be required to be a party to sub-issue #3. However, in view of the above discussion, the phrasing of this sub-issue should be modified to read as follows:

- Whether the practice authorized by respondents DER and DMRS pursuant to which a current career executive employee qualifies for interview for another vacant career executive position without examination or other competition had a disparate impact on complainant as a candidate for the subject position on the basis of race, color, or national origin.

Sub-issue #4.

The fourth sub-issue relates to the appointing authority’s decision to allow someone to perform the duties of a vacant position on an acting basis. The parties appear to agree that if this issue is valid then DATCP is the only respondent. Such a conclusion is consistent with

§ER-MRS 32.02, Wis. Adm. Code. Accordingly, DER and DMRS will not be named respondents for the fourth sub-issue.

DATCP contends that the fourth sub-issue should be dismissed because no one was placed in the position on an acting basis. Complainant replied that he does not know whether anyone was appointed to the vacant position on an acting basis and that he will not know this until after he has had an opportunity for discovery.

The fourth sub-issue will be eliminated at this time due to complainant's lack of supporting facts. At a future status conference (see section V. below), a timetable will be established to allow complainant an opportunity to gain supporting facts through discovery. Also, a deadline will be established by which complainant may complete such discovery and file a request to revive the fourth sub-issue.

Further Proceedings

DATCP noted in its letter dated February 15, 1999, as shown below:

It is difficult to clearly articulate a motion for summary judgment on a specific issue until the issues have been set. Obviously, if the issues are approved as currently stated, the department will move for summary judgment on all issues. If the issues are revised, whether the department brings such motions depends on the nature of the revisions. In any event, the (DATCP) reserves its right to file summary motions at least until the issues are finally established.

Under commission rules, a complaint "should identify . . . the facts which constitute the alleged unlawful discrimination . . . and the basis . . . of the discrimination being alleged." PC 2.02(1), Wis. Adm. Code. We believe that, inherent in this requirement, is the requirement that there be some factual basis for the allegation.

We ask that, before the commission entertains the complainant's statement of the issues, it demand some factual basis for the allegation.

This ruling is not intended to foreclose the opportunity for filing future summary motions. A status conference will be scheduled by separate mailing to discuss a timetable for further motions and to establish a hearing date.

ORDER

The statement of the issues for hearing is as follows:

Whether respondents discriminated against complainant on the basis of his color, race, or national origin when, in October of 1998, he was not invited to interview for the position of Administrative Manager, Assistant Administrator-Division of Animal Health, a career executive position at the Department of Agriculture, Trade and Consumer Protection.

Sub-issue 1.a. Whether the AHQ procedure developed by respondents DER and DMRS had a disparate impact on complainant on the basis of race, color, or national origin when it was utilized as part of the recruitment for the subject position.

Sub-issue 1.b. Whether the decision by respondent DATCP to use an AHQ as part of the recruitment for the subject position discriminated against complainant on the basis of his color, race, or national origin.

Sub-issue 1.c. Whether the scoring of the candidates' responses to the AHQs by respondent DATCP discriminated against complainant on the basis of his color, race, or national origin.

Sub-issue 2. Whether respondent DATCP used an all-white panel to evaluate the candidates' responses to the AHQs and, if so, whether this practice had a disparate impact on complainant as a candidate for the subject position on the basis of race, color, or national origin.


Sub-issue 3. Whether the practice authorized by respondents DER and DMRS pursuant to which a current career executive employee qualifies for interview for another vacant career executive position without examination or other competition had a disparate impact on complainant as a candidate for the subject position on the basis of race, color, or national origin.

Dated: May 12, 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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