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.

Case No. 98-0199-PC-ER

RULING ON MOTIONS FOR SUMMARY JUDGMENT

On February 21, 2000, respondent DATCP filed a motion for summary judgment, and, on February 22, 2000, respondents DER/DMRS filed a motion for summary judgment. On March 29, 2000, complainant filed a cross motion for summary judgment. The parties were permitted to brief these motions, and the schedule for doing so was completed on April 18, 2000. The following findings are based on information provided by the parties, appear to be undisputed, and are made solely for the purpose of deciding these motions.

1. On August 17, 1998, and on September 14, 1998, respondent DATCP advertised that a career executive vacancy existed in the position of Administrative Manager, Assistant Administrator-Division of Animal Health, and invited candidates to apply with a resume and a completed Achievement History Questionnaire (AHQ).

2. The AHQ's were scored by a three-member panel based on benchmarks developed by respondent DATCP. Two of the three panel members are white. The third panel member was Hamdy Ezalarab, who is of Egyptian national origin and who identifies his race as black.

3. Fifty-one white candidates and 6 non-white candidates, including complainant, completed AHQ's for this position. Of these, 23 white candidates (45% of the white candidates) and 3 non-white candidates (50% of the non-white candidates) were certified for interview. Complainant was not one of the candidates certified for interview.

4. As of October of 1999, 6.5% of career executives in state service were members of a racial/ethnic minority.

5. As of January of 1997, the labor pool availability figure for racial ethnic minorities in the administrator/senior executive job group in Wisconsin was 7.5%.

6. As of January 4, 1997, 2 out of 24 DATCP administrators/senior executives (8.3%) were members of a racial/ethnic minority.

7. In applying for state positions, complainant has been certified for interview in 87% of those recruitments in which an AHQ was used as a screening tool.

8. The successful candidate for the subject position was selected through career executive option 1, i.e., a DATCP career executive reassignment.

9. The following interrogatories were directed to complainant by respondent and the following responses to these interrogatories were made by complainant:

> **Interrogatory #5:** Describe each and every fact which support the allegation that DATCP's use of an AHQ as part of the recruitment for the deputy administrator position discriminated against you on the basis of your color, race, or national origin. If you are not aware of any such facts, state so.
>
> Complainant's initial response: DATCP subjected me as individual and for my race to AHQ while allowing career executive applicants all whites to proceed to interview stage without being subjected to intermediary examination.
>
> Complainant's supplemental response: 5.1. DAT&CP subjected me as individual and for my race to AHQ while allowing career executive applicants, all whites, to proceed to interview stage without being subjected intermediary examination. DAT&CP records show that there were two racial minorities among the applicant pool, me and an American Indian. None of racial minorities were certified or proceeded to interview.

5.2. The job duties in the subject position were the same as those I was certified into before and after the subject position. There is no explanation for not certifying and interviewing and other than DATCP used the AHQ as practice to remove me from equal further equal consideration because of my race and national origin.

5.3. The AHQ as used in this position was biased against me because it exposed my name to raters. The name "Balele" does not sound American or that of a white person.

Interrogatory #6: Describe each and every fact which supports the allegation that DATCP's scoring of candidate responses to the AHQ's discriminated against you on the basis of your color, race or national origin. If you are not aware of any such facts, state so.

Complainant's initial response: The position at issue belonged to the career executive program. All positions in the career executive program are predominately administrative in nature (see Ch. 281 of Wis. Staffing Manual). You pass one you will definitely pass them all. Specifically as this was a deputy administrator position, this was relevant as the Commission's ruling in Balele v. DHSS, DER & DMRS, 91-0118-PC-ER, p. 6, which states among other as follows:

> "Although the complainant did not have career executive status, setting aside the question of whether he would have qualified for interview, the unambiguous evidence demonstrated that complainant met the basic qualifications for the position in issue. Previously, on more than one occasion, complainant had passed examinations which resulted in certification and interviews for Deputy Administrator positions. Finally, complainant was not selected for either of the subject positions, but instead appointments were made to white persons of US national origin. Therefore, complainant has met the McDonnell test for establishing a prima facie of discrimination in hiring.

Complainant's supplemental response dated December 9, 1999: 6.2. The date of Balele v. DHSS, DER, and DMRS Case No. 91-0118-PC-ER decided 4/30/93 page 6.

6.3. See also answer to interrogatory 5(1), 5(2)

6.4. Upon examination, I have found that there was not "blinding" the names of applicants when DATCP was scoring resumes. The name "Balele" would sound African to any white person.

10. Certain documents relating to the recruitment for the subject position were provided to respondent on or around March 9, 2000. These documents presumably included the scoring sheets of the members of the AHQ rating panel.

11. The discovery requests of both respondents and complainant include a reminder of the duty to correct any incorrect response when it is later learned that it is incorrect.

12. Complainant has not corrected his answers to respondent DATCP's interrogatories 5. and 6. since he made his supplemental response on December 9, 1999.

OPINION

Summary judgment is appropriate when no material facts are in dispute and inferences that may reasonably be drawn from those facts are not doubtful and lead to one conclusion. *Maynard v. Port Publications, Inc.*, 98 Wis.2d 55, 297 N.W. 2d 500 (1980). The authority of a quasi-judicial administrative agency such as the Commission to summarily dismiss a case on a motion such as the present one was upheld by the Wisconsin Court of Appeals in *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 589 N.W. 2d 418 (Ct. App. 1998).

In a ruling issued May 12, 1999, the Commission established the statement of issues for hearing in this matter. The primary issue established by this ruling 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.

Complainant's contentions in regard to this primary issue were addressed in this prior ruling through the creation of separate subissues. Each of these subissues is set forth below under the appropriate heading.

Subissue 1.a.

> 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.

Under a disparate impact theory, the burden on the complainant is to show that a facially neutral employment policy has a disproportionate impact on a protected group. *Griggs v. Duke Power Co.*, 40 U.S. 424, 3 FEP Cases 175 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 10 (1977). Here, the policy challenged by complainant is the use of the AHQ process to certify candidates for interview for the subject position. The standard for a finding of disparate impact, as articulated in *Caviale v. State of Wisconsin, Dept. of Health and Social Services*, 744 F.2d 1289, 35 FEP Cases 1642 (7th Cir. 1984), and *Dothard, supra,* and as applicable here, is that the policy have a significantly disproportionate effect on the opportunity for racial minorities to compete for the subject position. Neither complainant's experience with the AHQ process in general over a period of time, nor the experience of candidates with the AHQ process under consideration here, demonstrate such a significantly disproportionate effect. In complainant's experience with the AHQ process, he has been certified for interview 87% of the time. Even if it were assumed that white candidates were certified for interview 100% of the time, which is certainly unlikely given the experience of white candidates in regard to the subject recruitment/selection, these percentages are not significantly disproportionate. Moreover, in regard to the subject position, 50% of non-white candidates and only 45% of white candidates were certified for interview. Since a higher percentage of non-white candidates was certified for interview, disparate impact of the AHQ on complainant as a racial/ethnic minority is not demonstrated.

Subissue 1.b.

> 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.

If complainant were advancing a disparate treatment theory here, and that is not clear from his arguments, he would have to show that white and non-white candidates were treated differently by virtue of the use of the AHQ by respondent DATCP. Based on the undisputed facts that both white and non-white candidates were required to survive the AHQ process in order to be certified, and that certain white candidates were, like complainant, not certified for interview as the result of this AHQ process, complainant has not made such a showing.

If complainant is advancing a disparate impact theory in this regard, the analysis would parallel that for issue 1.a., above.

Subissue 1.c.

> 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.

Neither in his charge of discrimination nor in his answers to respondent's interrogatories (see, especially, DATCP interrogatories 5. and 6. and Finding 9. above), did complainant assert that the questions on the subject AHQ were not reasonably job-related, that the scoring benchmarks were inadequate, or that the scoring of the candidates' AHQ responses were inconsistent or contrary to the benchmarks. Complainant asserts for the first time in his brief on respondents' motions for summary judgment under consideration here that the scoring of his AHQ response was inconsistent with the scoring of other candidates' AHQ responses and contrary to the established benchmarks. Respondent argues in this regard that complainant should not be allowed at this point in these proceedings to offer this assertion, particularly in view of his failure to provide this information through discovery.

The Commission, by administrative rule, has adopted the discovery provisions of Ch. 804, Stats. §PC 4.03, Wis. Adm. Code. Section 804.12(4), Stats., permits the Commission to make such orders as it deems just when a party fails to fully answer an interrogatory. It would be consistent with this authority and with the Commission's practice to bar complainant from now offering the assertion that the scoring of his AHQ was inconsistent with the scoring of other candidates' AHQ's and contrary to the established benchmarks. This result is even more compelling here given the fact that respondents' interrogatories 5 and 6 specifically ask complainant for any assertions he had to offer relating to the scoring of his AHQ and those of the other candidates, and that complainant, even though ordered by the Commission on November 2, 1999, to supplement his answers to respondents' interrogatories 5 and 6, failed to advance, in his initial or his supplemental responses, the assertion he is now attempting to advance. Even though complainant may not have received until March 9, 2000, certain information relevant to this point, in particular copies of the AHQ panel members' scoring sheets (see Finding 10, above), complainant has not represented here that he modified his responses to DATCP interrogatories 5. and 6. despite a continuing obligation to do so if he felt that his earlier responses were incorrect. §804.01(5)(b), Stats. The Commission concludes that complainant is precluded, in regard to subissue 1.c., from advancing any factual basis for this aspect of his charge other than those he advanced in his initial and supplemental responses to respondent's interrogatories 5. and 6.

In his responses to respondents' interrogatory #6., complainant relies on a mistaken interpretation of *Balele v. DHSS, DER, and DMRS*, 91-0118-PC-ER, 4/30/93, and uses this same argument to oppose respondents' motions for summary judgment. Complainant argues that this earlier decision supports the proposition that, since complainant had passed other AHQ's for career executive positions and had been certified for interview, a necessary presumption is that complainant "will definitely pass them all," including the one under consideration here. In fact, this earlier decision reaches a contrary conclusion. The paragraph of the Opinion section of the decision

which complainant quotes (see Finding 9., above), specifically relates solely to the question of whether complainant established a prima facie case of discrimination and, in reaching the conclusion that he had, indicates that the question of whether he would have qualified for interview, i.e., qualified for certification, was not considered or resolved. In addition, the Commission went on to state on page 7, in relation to complainant's argument that he was more qualified than those selected for the subject positions, that complainant "presented no proof that his prior certifications would have been acceptable for the subject positions.", i.e., the Commission did not accept complainant's argument that certification for one career executive position creates a presumption that you qualify for certification for others.

Complainant also argues in regard to issue 1.c. that the practice in regard to the subject AHQ of permitting the scorers to see the candidates' names had a discriminatory effect on him since he has an "African sounding" name. Given the answers complainant provided to certain questions on the AHQ in which he highlighted his education and experience working in Africa prior to his emigration to the United States, the fact that the candidates' names were not "blinded" would certainly not have been the primary factor which led to any scorer's conclusion that complainant was of African national origin.

Subissue 2

> 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.[1]

In regard to this issue, even if Mr. Ezalarab were considered a white person, the data already cited show that the scoring of the AHQ's by the panel actually resulted in a

[1] In complainant's March 29, 2000, brief responding to respondents' motions for summary judgment under consideration here, complainant appears to reverse his earlier position in this regard and to assert for the first time his belief that Mr. Ezalarab is a black person. As a result, the Commission concludes that there no longer exists a factual issue as to Mr. Ezalarab's race and that complainant no longer asserts that the subject AHQ's were reviewed by an all-white panel

higher certification percentage for non-white candidates than for white candidates, and complainant's disparate impact argument, as a result, must necessarily fail.

Finally, in regard to subissues 1.a., 1.b., 1.c., and 2., the successful candidate was selected through career executive option 1, i.e., through a career executive reassignment within DATCP. As a result, the decision to use an AHQ, the use of the AHQ process developed by DER/DMRS, or the scoring of the AHQ resulted in no actual injury to complainant since the results of the AHQ did not have any impact on the selection of the successful candidate. This lack of standing also supports dismissal of these subissues.

Subissue 3.

> 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.

A similar fact situation was considered by the court in *Caviale, supra,* and by the Commission in *Oriedo v. DOC,* 98-0124-PC-ER, 2/11/00. In both of these cases, a comparison was drawn between the number of racial/ethnic minorities available for consideration in the pool of career executives or administrators/senior executives in the employer's work force and the availability of racial minorities for administrator/senior executive positions in the relevant labor pool, to determine whether there was a significantly disproportionate difference. Here, it is undisputed that the availability of racial/ethnic minorities in the relevant labor pool was 7.5% during the relevant time period. It is also undisputed that, as of January 1, 1997, 8.3% of DATCP's administrators/senior executives[2] were members of a racial/ethnic minority group. Since 8.3% exceeds 7.5%, the pool of available minorities within DATCP is actually

[2] Complainant does not dispute that this pool would parallel the pool of DATCP career executives.

larger than the pool in the labor market, which supports a conclusion that the use of option 1 for the subject hire did not have a disparate impact on racial/ethnic minorities.

It should also be noted, as the Commission did in *Oriedo, supra,* that the facially neutral policy which complainant challenges here, i.e., career executive reassignment within an agency (career executive recruitment option 1), does not have a different impact on minority career executives than it does on white career executives, i.e., both are eligible for reassignment; and does not have any actual impact on the number of racial minorities in the career executive program since it doesn't change the pool of career executives, it simply shifts one of them from one position to another.

Complainant offers his cross-motion for summary judgment in regard to subissue 3. as follows:

> DATCP's brief did not refute anywhere or even comment on that issue. There is a well grounded case law against party who does not refute a dispositive issue in its a case. It states that an unrefuted issue are deemed admitted ... In this case DATCP, DER and DMRS did not dispute that 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 disparate impact on complainant as a candidate for the subject position on the basis of race, color, or national origin. This commission should grant Balele judgment against respondents as matter of law.

First, subissue 3 relates to the challenge by complainant of actions of DER/DMRS, not DATCP, so it is not surprising that argument relating to this subissue was not a focus of respondent DATCP's briefs. The briefs of DER/DMRS did address this issue. More importantly, however, if respondents had failed to address a component of their motions in their written arguments, the proper result would be to deny that component of their motions, not to grant summary judgment in favor of complainant.

Finally, complainant offers further in support of his cross-motion for summary judgment the theory that the members of the AHQ panel other than Mr. Ezalarab retaliated against him based on his participation in protected fair employment activities.

However, fair employment retaliation is not a component of any of the issues noticed for hearing in this matter. Furthermore, as noted above, the decision to use an AHQ, the use of the AHQ process developed by DER/DMRS, or the scoring of the AHQ resulted in no actual injury to complainant since the results of the AHQ process did not have any impact on the selection of the successful candidate.

CONCLUSIONS OF LAW

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

2. Complainant has failed to show that he is entitled to judgment as a matter of law as to subissue 3.

3. Respondents have shown that they are entitled to judgment as a matter of law as to all issues.

ORDER

Complainant's motion for summary judgment is denied. Respondents' motions for summary judgment are granted and this complaint is dismissed.

Dated: April 19, 2000

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:980199Crul4

JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the decision 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