

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PASTORI BALELE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF HEALTH  
AND FAMILY SERVICES,**

*Respondent.*

**FINAL DECISION AND  
ORDER**

Case No. 99-0002-PC-ER

A proposed decision and order was mailed to the parties on April 24, 2000. Complainant filed objections by letter dated May 1, 2000. Respondent replied to the objections by letter dated May 9, 2000. Complainant filed additional arguments by letter dated May 15, 2000.

The Commission consulted with the hearing examiner and agrees with the examiner's credibility determinations. The Commission adopts the proposed decision and order as its final decision with changes to correct errors, to reflect the rationale of the Commission and to address the main arguments raised in complainant's objections. The changes are denoted by alpha footnotes.

The parties agreed to the following statement of the issues for hearing (see Conference Reports dated March 17, 1999 and July 16, 1999, as well as the Commission's letter dated October 22, 1999):

1. Whether respondent DHFS discriminated against complainant on the basis of race or national origin in violation of the WFEA with respect to his failure in 1998 to hire him for the following positions:
  - a) Quality Assurance Manager, Section Chief, Health Services;
  - b) Financial Supervisor, Chief, Institutions and Administrative Accounting Section, and/or
  - c) Human Services Manager, Bureau of Community Mental Health.
  
2. Sub-issue: Whether respondent discriminated against complainant on the basis of race in violation of the WFEA on a disparate impact theory with regard to the aforesaid positions (identified in 1.a), b) and c)).

The parties agreed at hearing that the Human Services Manager (HSM) position was the subject of a separate discrimination case and, accordingly, should not be resolved in this decision. The complainant, in his initial post-hearing brief (p. 12) withdrew his claim with regard to the Financial Supervisor (FS) position. He requested inclusion of background information about the HSM and FS positions in this decision “to show a pattern to deny Balele and other racial minorities high management positions in DHFS and statewide.” The Opinion section of this decision, however, addresses only the remaining Quality Assurance Manager (QAM) position.

#### FINDINGS OF FACT

1. Complainant is black. He was born in Tanzania, Africa.
2. Respondent had vacancies for the following positions: QAM, FS and HSM. Complainant competed for the vacancies. He was certified as eligible for each vacancy. He was interviewed for each vacancy. He was not hired for any of the positions because he was not the most qualified candidate nor was he as qualified as the individuals hired.

#### QAM Position

3. The job duties and background required for the Quality Assurance Manager (QAM) position were described in the job announcement (Exh. R-101), as noted below:

**Job Duties:** This position has administrative responsibility for the management of the state’s licensure/certification/registration of a variety of health and community-based providers (e.g., general and special hospitals, home health agencies, hospices, mental health, alcohol and other drug abuse programs, residential care apartment complexes, and corporate guardianships) and for federal Medicare/Medicaid certification surveys for providers/suppliers such as hospitals, home health agencies, hospices, Outpatient Rehabilitation Providers (occupational therapists/physical therapists in independent practice); prospective Payment Exemption for hospitals, End Stage Renal Disease centers or units and Rural Hospital Clinics. Directs the investigation of nurse aide abuse complaints and the maintenance of a Nurse Aide Registry as well as caregiver background checks and investigations of health and community workers with an allegation of abuse.

**Knowledge and Skills:** Federal Title XVIII (Medicare) and Title XIX (Medicaid) and state codes; state, federal and grant budget procedures and justification processes; information technology/system concepts and capability of using data for management and outcome measurement; supervisory principles and techniques; ability to develop, implement, manage, evaluate, and reengineer highly complex projects; establish and maintain effective working relationships with administrative officials, legislators, other agencies, provider groups, consumers and the general public; and plan, assign and review the work of large numbers of staff; and communicate effectively both orally and in writing.

4. This classification<sup>^</sup> was underutilized for minorities. Respondent undertook the widest possible recruitment to obtain qualified candidates. State employees currently in career executive positions in DHFS (Option I) and in other state agencies (Option II) were allowed to apply, as were state employees who were not in career executive positions (Option III) and individuals who were not civil service employees (Option IV). Respondent hired Beth Stellberg, an Option IV candidate who was required to go through the same testing and interview process as complainant – except she was invited for a second interview, whereas complainant was not. Ms. Stellberg is white.

5. The interview panel for the QAM position included Rita Prigioni, Deputy Director of respondent's Bureau of Quality Assurance who would have supervisory responsibility for the person hired. Also serving as interviewers were Judy Frybeck, Director of respondent's Bureau of Quality Assurance and David Klauser, a private-sector attorney. Ms. Prigioni and Ms. Frybeck are white. Mr. Klauser is an American Indian.

6. The first interviews involved asking each candidate pre-prepared interview questions and having each panelist measure each candidate's answers against pre-prepared benchmarks. The interview questions and benchmarks were related to the duties of the QAM position.

7. During the first interview, Ms. Stellberg told the panel that she had recent managerial experience in the health care field, including responsibility for licensure and survey of community health care providers. She was familiar with quality assurance measures. She also noted she had over 20 years experience as a health care professional in a large variety of

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<sup>^</sup> The word "position" was replaced by the word "classification" to correct an error.

health care settings. The interview panelists rated her as meriting further consideration on her answers to three of the four interview questions.

8. Complainant did not tell the interview panel that his experience in Tanzania included supervising people with licensure responsibilities similar to those noted in the QAM job announcement.<sup>1</sup> Attorney Klauser, who consistently rated candidates<sup>B</sup> lower than the other panelists, rated complainant as not meriting further consideration on any of his answers to the four interview questions. The remaining panelists rated complainant as meriting further consideration on two of the interview questions, but not on the remaining two questions. Ultimately, the panelists all felt that although complainant had management skills, his lack of experience in the health care field lead them to conclude that he would not be considered further for the QAM position.

#### FS Position

9. The job duties and background required for the Financial Supervisor (FS) position were described in the job announcement (Exh. R-118), as noted below (with same emphasis as in the original document):

**Job Duties:** Supervise the staff of the Institution and Administrative Accounting Section [within the Bureau of Fiscal Services in the Division of Management and Technology]; establish DHFS accounting procedures and systems and general business functions; and direct quarterly and annual reconciliation functions. Direct general business functions for DHFS units such as: payroll administration and reporting, judgement and settlement processing; and inventory management. **Well qualified candidates will have a four year or advanced degree supplemented by managerial accounting experience in a large, complex public sector organization or equivalent.**

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<sup>1</sup> Complainant initially testified he told the interviewers that his experience in Tanzania included supervising people with licensure responsibilities similar to those noted in the QAM job announcement. He previously, however, had verified that the interviewers' notes reflected what he said at his interview. He was referred to the fact that none of the interviewers' notes reflected his claimed statement that he supervised people with licensure responsibilities. Only then did complainant admit that he did not say this to the interviewers

<sup>B</sup> The word "candidates" was inserted to correct an error

**Knowledge Required:** Knowledge of GAAP and financial reporting standards; ability to manage the accounting and business functions for a large, multi-funded organization; familiarity with state accounting practices; knowledge of general business practices including payroll tax reporting and cash management; familiarity with computerized financial systems and personal computer software packages; demonstrated management and supervisory skills and excellent written and oral communication skills.

10. This position was underutilized for females. Respondent hired Amy Korpady for the FS position. She and complainant were Option III candidates, subject to the same testing and interview procedures for the FS vacancy – with the exception that Ms. Korpady was invited for a second interview whereas complainant was not. Ms. Korpady is white.

11. Cheryl Thompson, who was to supervise the vacant FS position, was one of the panelists for the first interview. She is white. The two other panelists were Ken Baldwin, Director of respondent's Bureau of Public Health and Don Warnke, Director of respondent's Bureau of Fiscal Services. Mr. Baldwin is an African-American. Mr. Warnke is white.

12. The first interviews involved asking each candidate pre-prepared interview questions and having each panelist measure each candidate's answers against pre-prepared benchmarks. The interview questions and benchmarks were related to the duties of the FS position.

13. Ms. Korpady's first interview went well. She had recent accounting experience in State agencies, as well as recent supervisory experience. From November 1994 and up to the interview, she worked at the Department of Transportation (DOT) as Assistant to the Administrator of the Division of Business Management, with responsibility for developing, preparing and monitoring the division's budget (of about \$63 million). Respondent felt that her following experience at DOT also would be valuable in the FS position: a) she served as a trainer in the "Seven habits of highly effective people," b) she directed some of the staff who needed to be motivated in new technologies, c) she had experience working through reorganizations and d) although not labeled as a "supervisor," she directed teams and functions comparable to what would be expected in the FS position. Ms. Korpady also worked at the Legislative Audit Bureau from August 1987 to July 1992, supervising field audit teams conducting financial audits of state agencies and the university.

14. Complainant's interview did not go well. His accounting experience was gained about 24 years prior to the interview. Due to changes in accounting systems over the past 24 years, the interviewers did not think his past experience was as relevant to the position as the more recent experience of other candidates. Nor was such deficiency viewed as "cured" by some accounting classes he took between January 1976 and May 1979, about 9-12 years prior to his interview. Complainant did have experience using WisMart in his current position, but WisMart was just a part of the accounting system used in the bureau where the FS position would function. Complainant also told the interviewers that he had experience in purchasing. The slight relevance his purchasing experience had to the FS position is that the accountants would review the accounting side of the purchasing transactions performed by a different section. Also, complainant's supervisory experience was old with his most recent experience having been about 13 years prior to his interview when he supervised 2-3 limited term employees.

15. After all the first interviews were completed, the panelists placed candidates into two groups; those meriting further consideration and those who did not. All the panelists placed complainant in the group which did not merit further consideration.

#### HSM Position

16. The job duties and background required for the Human Services Manager (HSM) position were described in the job announcement (Exh. R-136), as noted below:

**Job duties:** Provide leadership for, administer, and represent Wisconsin's community mental health delivery system throughout the state and nation and with the media; set policies, program directions and standards and develop funding mechanisms that foster the development of state of the art mental health service approaches; serve as the lead representative for the implementation of the recommendations of the Governor's Blue Ribbon commission on Mental Health, including the mental health/AODA managed care demonstration to integrate Medicaid funds with community aids and county dollars; collaborate with and educate elected officials and other state and federal agencies and educational institutions; administer the strategic plan, operating budget, and state annual and biennial budget processes.

**Knowledge and Skills:** Requirements of all state and federal programs and funding systems which impact on the state's mental health system including Wisconsin Statutes, Chapters 51, 55 48 and federal Titles XVIII, XIX, and XXI; current mental health and related professional issues affecting state and federal policy governing the mental health system; program and system components making up a modern community mental health system; interrelationship issues with other human service systems; evaluation techniques to assess the effectiveness of mental health systems; community-based care and treatment models especially for special needs populations within the community psychiatric system; leadership and management theory, principles and practices; private and public managed mental health programs, concepts and practices; program evaluation techniques; methods for involving consumer and family members at all levels of the mental health system; performance based outcome measures; specializations such as community psychiatry and forensic psychiatry including new concepts, medications and treatment methodologies; effective oral and written communication skills, and ability to lead and supervise multidisciplinary professional and support staff.

17. This position was underutilized for minorities. Respondent undertook the widest possible recruitment (as described in ¶4 above). Respondent hired Chris Hendrickson for the HSM position. Mr. Hendrickson is white. He was an Option III candidate, just like complainant, and was required to go through the same testing and interview process as complainant – with the exception that Mr. Hendrickson was invited for a second interview whereas complainant was not.

18. The first interview panel for the HSM position included John Bauer, Deputy Administrator of respondent's Division of Supportive Living. Mr. Bauer would be the supervisor of the person hired. Also serving on the interview panel were Isodore Knox, an Equal Opportunity Specialist in respondent's Affirmative Action/Civil Rights Compliance Office; Larry Schomer, Consumer Advocate at respondent's Winnebago Mental Health Institute and Bev Doherty, Director of respondent's Bureau of Developmental Disabilities Services. The only person on the panel who is not white is Isodore Knox who is an African American.

19. The first interviews involved asking each candidate pre-prepared interview questions and having each panelist measure each candidate's answers against pre-prepared benchmarks. The interview questions and benchmarks were related to the duties of the HSM position.

20. Mr. Hendrickson's first interview went well. He hit many of the benchmarks demonstrating experience in the mental-health field. His managerial/supervisory experience in the mental health field included: a) acting in the vacant position for about one year, b) serving as Chief of the Systems Design and Monitoring Section in respondent's Bureau of Community Mental Health since 1996, c) Acting Director of the Office of Mental Health in respondent's Bureau of Community Programs from March to December 1992, d) Acting Section Chief of the Policy Development Unit in the Office of Mental Health from August 1991 to August 1992, and e) Program Director of Vernon County Unified Services from August 1975 until April 1984. All of the interview panelists agreed that he should go forward to a second interview. Mr. Hendrickson also had served as respondent's lead representative on the Governor's Blue Ribbon Commission on Mental Health.

21. Complainant's interview did not go well. His responses to the interview questions were incomplete and unfocused. His responses generally did not hit the benchmarks. He had no background in the mental health field. Furthermore, his supervisory/management experience was gained 13-25 years prior to the interview.

22. After the first interviews were completed, the panelists placed candidates in one of the following three groups: a) those who merited further consideration, b) those not referred for further consideration at this time, and c) those who would be given no further consideration. All panelists rated complainant as insufficiently qualified to be given further consideration for the HSM position.

#### Ch. 202, DHFS Supervisors Manual

23. DHFS has a Supervisors Manual, consisting of multiple procedures detailed in over a hundred pages. Chapter 202 of the manual is entitled "Personnel and Employment Relations Directive" for the subject of "Permanent Employment" (Exh. C-5). Supervisors are expected to be aware of the policies covered in the manual and to follow them.

24. Section 202.3 of Ch. 202 of the Supervisors Manual covers the procedure for filling a permanent position. Of interest in this case is the second paragraph of §202.3 B4g(1). The entire text of that section is shown below (showing same emphasis as in the



original document). The second paragraph shown below is hereafter referred to as “Secretarial Review Procedure.”

202.3B4g     Other Considerations Prior to a Job Offer

202.3B4g(1) Appointment Recommendations Reviewed by Secretary’s Office

All division and institution supervisory, managerial and professional positions in pay range 18 and above (or equivalent) require the approval of the Secretary’s Office before an offer of employment can be made. The Department’s Affirmative Action and Equal Opportunity goals will be taken into consideration when reviewing hiring requests.

The Division Administrator forwards hiring information along with a resume and memorandum of explanation for the recommended hiring decision. When women and/or racial/ethnic minorities and/or people with disabilities are available for consideration but are not recommended for hire, their resumes must also be included. In these cases the transaction should be reviewed by the Department AA/CRC [Affirmative Action/Civil Rights Compliance] Office before it goes to the Secretary’s Office.

25. Respondent agrees that under the above-noted procedure, the Secretary’s Office should have been given complainant’s resume and that the AA/CRC should have reviewed the QAM and HSM hiring transactions before hiring information was forwarded to the Secretary’s Office. The procedure is not a law by virtue of its inclusion in the Supervisors Manual, nor is the procedure noted in the manual required by law.<sup>2</sup>

26. It was John Bauer who was responsible for following the Secretarial Review Procedure for the QAM and HSM positions. He had access to the Secretarial Review Procedure but had not read it until two weeks prior to the hearing.<sup>3</sup> He followed his usual procedure

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<sup>2</sup> Complainant raised several arguments in post-hearing briefs based on his mistaken assertion that the procedure had the same force as law. This assertion is incorrect as a matter of law. It also is unsupported by the hearing testimony. Specifically Ms. Benavides testified that the procedure was not a law and was not required by law.

<sup>3</sup> Complainant contends Mr. Bauer testified that he was aware of §202.3B4g(1). This is an incorrect characterization of Mr. Bauer’s testimony. At hearing, Mr. Bauer was shown Exh. C-5. In response

in sending hiring documents to the Secretary's Office which meant if any resume had been forwarded it would have been only the resume of the person hired. His usual procedure is inconsistent with the Secretarial Review Procedure. Accordingly, contrary to the policy noted in the ¶24 above, the resumes of female, minority and disabled candidates<sup>4</sup> who were not recommended for hire, were not shared with the Secretary's Office.

27. Mr. Bauer did not have the AA/CRC Office review the QAM and HSM hiring documents that went to the Secretary's Office. The AA/CRC Office, however, played a role in reviewing the interview questions and benchmarks, and in reviewing the hiring transactions.<sup>5</sup> Gladis Benavides is the Director of respondent's AA/CRC Office. Her review of the hiring decision made for the QAM Position and the HSM Position involved consultation with Terri Rankin. Mr. Bauer supervises Ms. Rankin and she is the AA designee for the Division. Ms. Benavides and Ms. Rankin discussed the hiring decisions and the justifications for the hires, without mentioning candidates by name.

#### Hiring Documents Reviewed by the Secretary's Office

28. For the HSM hire, Mr. Bauer shared with the Secretary's Office the documents marked as Exh. R-139. The first page of the exhibit is a form entitled "New Appointment – Executive Summary." The second page is a form entitled "Written Hiring Reason for Classified and Project Appointments" (hereafter referred to as the "Hiring Reasons Form"). The third page is an attachment to the Hiring Reasons Form.

29. Section IV of the Hiring Reasons Form addresses whether veterans, females or minorities were on the certification list and, if so, why they were not hired. Section IV (text

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to complainant's questions, Mr. Bauer admitted he had a copy of the Supervisors Manual in his office. He also said he had seen §202.3B4g(1) before. Complainant later (near the same point on the hearing tape) asked when Mr. Bauer first saw the cited section. Mr. Bauer replied that it was brought to his attention within 2 weeks before the hearing.

<sup>4</sup> Candidates included males and females. The record is unclear whether there were any disabled candidates.

<sup>5</sup> Complainant disputes this finding. He interpreted Mr. Bauer's testimony that Mr. Bauer had no discussion over the hiring decisions with the AA/CRC Office to mean that no review was done by that office. However, Ms. Benavides testified that she reviewed the hiring decisions. Her testimony was consistent with the information she gave respondent's attorney for answering complainant's discovery (Interrogatory #19, p. 7-8, Exh. C-4).

shown below) is comprised of five different statements and the hiring authority is expected to check the appropriate boxes for a particular hire.

Additional Information: Check all that apply.

- A.  There were no veterans on the certification list.
- B.  The position is in a job group that is underutilized for racial/ethnic minorities.
- C.  The position is in a job group that is underutilized for women. There were no women on the list.
- D.  There were no self-identified persons with disabilities on the list.
- E.  Persons from A, B, C or D above were on the list, but all either declined an offer, failed to report, were not available, were not located; or were not interested in, or eligible for, the position.

Box E of section IV is checked, for example, when a minority candidate is on the certification list and was interviewed but was not the person recommended for hire. Respondent considers that individuals not recommended for hire are not “eligible for” the position, as the term is used in Box E of the Reasons for Hire Form.<sup>6</sup>

30. For the HSM hire, section IV of the Hiring Reasons Form had boxes A and E checked. Box B also should have been checked but was not. The attachment to the Hiring Reasons Form contained a discussion of the qualifications of the person hired. The attachment did not indicate that the position was underutilized for minorities. It was noted, however, that two candidates were minorities and explained why they were not as qualified for the job as the person recommended for hire. Neither minority candidate was mentioned by name. Nor was the race of the minority candidates disclosed.

31. The same forms as discussed in the prior three paragraphs were completed for the QAM position (Exh. R-105) and were shared with the Secretary’s Office. Boxes A and E

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<sup>6</sup> The hearing examiner shared complainant’s concern at hearing that the wording of section IV of the Reasons for Hire Form was confusing. The examiner assisted complainant in his questioning of witnesses on this point. Ms. Rankin gave the explanation contained in this decision. Ms. Benavides gave the same explanation when she testified.

were checked on section IV of the Hiring Reasons Form. Box B should have been checked but was not. The attachment to the Hiring Reasons Form contained a discussion of qualifications for the candidate being recommended for hire. The attachment did not disclose that the position was underutilized for minorities, that minority candidates were interviewed or provide a justification for not hiring the minority candidates.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. It is complainant's burden of proof to show that respondent did not hire him for the Quality Assurance Manager (QAM) position because of his race and/or national origin. He failed to meet this burden.
3. It is complainant's burden of proof to show that the QAM hiring process somehow discriminated against him because of his race based on a disparate impact theory. He failed to meet this burden.

#### OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken, which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act (FEA), 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination. Complainant established a prima facie case of discrimination for the QAM position. He is protected under the FEA by virtue of his race and national origin. He applied for the position. He met the minimum qualifications as

evidenced by his inclusion on the certification list. The third element of the prima-facie case was established because respondent hired a candidate (Ms. Stellberg) who is of a different race and national origin than complainant.

The burden then shifts to respondent to articulate a legitimate, non-discriminatory reason for hiring someone other than complainant. Respondent met this burden by saying that Ms. Stellberg was hired because she was more qualified than complainant.

The burden shifts to complainant to attempt to establish that respondent's stated reason is a pretext for discrimination.<sup>c</sup> His arguments of pretext relate to information shared (or not shared) with the Secretary's Office. A problem did exist in that Mr. Bauer failed to share complainant's resume with the Secretary's Office as should have been done under §202.3 B4g(1) of respondent's Supervisors Manual. Additional problems existed in regard to the Hiring Reasons Form as noted in ¶31, FOF. These problems are probative of pretext. However, complainant failed to establish pretext here. The basic fact, established by a preponderance of the evidence, was that complainant was not hired and was not considered beyond the first round of interviews because his qualifications as compared to other candidates were markedly inferior. The cited errors, which thereafter occurred regarding information sent to the Secretary's Office, were insufficient to make this basic fact suspect.

#### I. Credibility Note

More than one factual dispute existed in this case. All but one main dispute has been explained in the Findings of Fact (see footnotes to ¶¶8, 26 and 27, FOF). The remaining dispute is addressed here.

Complainant testified that after his interview for the QAM position, Ms. Prigioni told him she was so impressed with him that if he did not get the QAM position she would call him for an upcoming position within about 2 months. He then asked to see the physical location of the QAM position and she complied with his request. It so happened that the person who had retired from the job was present working. Complainant testified that he discussed the job with

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<sup>c</sup> This paragraph combines two consecutive paragraphs of the proposed decision and order. Changes were made to reflect the rationale of the Commission.

the retiree, as well as complainant's qualifications for the job (although complainant did not provide details of these discussions). Complainant further indicated that the retiree said complainant would be a good person for the job. Upon questioning by the examiner, complainant conceded that he failed to tell the retiree how long ago the experience gained in Tanzania was.

Ms. Prigioni's testimony confirmed only that complainant requested to be shown the physical location of the QAM Position, that she complied with his request and that the retiree happened to be at work that day. She did not stay and so was not privy to what might have been said between complainant and the retiree. She did not recall making any statement to complainant at any time about his qualifications for the QAM Position.

The record contains indications that Ms. Prigioni's testimony was truthful and/or more reliable than complainant's was. First, complainant gave inconsistent testimony on a different important subject during the hearing (see footnote to ¶8, FOF). Second, complainant has demonstrated in this proceeding a tendency to present an incomplete (and thereby inaccurate) picture of what people say. For example, in post-hearing briefs he only mentioned a part of Mr. Bauer's testimony as noted in the footnote to ¶26, FOF, despite the fact that complainant had copies of the hearing tapes.

Another example of complainant's demonstrated tendency in this proceeding to present unreliable information stems from his inaccurate summary of *written* materials. Complainant stated in his initial post-hearing brief, as shown below in pertinent part (with same emphasis as shown in the brief):

**D. THE COMMISSION CAUTIONED DHFS ATTORNEY OF VIOLATION OF THE LAW  
IF DHFS AGENTS DID NOT FORWARD BALELE'S NAME AND RESUME TO THE  
SECRETARY OR DEPUTY SECRETARY.**

This case should have never gone to the hearing stage if [respondent's attorney] had listened to the Commission's advice at the status conference and in its order of October 22, 1999. DHFS should have come to a conference table with Balele for conciliation. The Commission warned DHFS and [its attorney] that if indeed DHFS did not forward Balele's name and resume to the DHFS Secretary in the three positions then that would be dispositive because DHFS would have

violated the law. The Commission's warning was pursuant to its proposed ruling in *Balele v. DHFS*, 98-0045-PC-ER, 8/27/99, page 13.<sup>7</sup>

Complainant also recited the language from the October 22, 1999 "order" upon which he based his argument.

The document referenced by complainant was not a Commission order. Rather, it was a letter ruling issued by the examiner in regard to complainant's request for witness appearance letters. The specific language from the letter that complainant relies upon is shown below:

Mr. Balele said he plans to call Richard Lorang and Joe Leann as witnesses for all three positions. He explained why he wished to call them. Attorney Harris proposed that he prepare affidavits for these two witnesses describing the extent (if any) to which they were involved in the hiring in all three positions and whether they were aware that Mr. Balele had been interviewed. I cautioned Attorney Harris that the information provided in the affidavits would be taken as fact and that if the hearing record showed that their degree of involvement was contrary to DHFS policy, respondent would be "stuck" with such finding. Attorney Harris understood and agreed.

It is patently unreasonable to interpret the above language as a Commission caution to respondent that the law would be considered violated if complainant's name and resume had not been forwarded to the Secretary's Office. Mr. Balele's unreasonable and incorrect interpretation of the *written* text recited above also sheds doubt on his ability to accurately recount what is told to him even when he is provided a written summary of the discussion.

Based on all the foregoing, complainant's testimony about what Ms. Prigioni told him after his interview was not found reliable. Ms. Prigioni denied that she ever spoke with him

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<sup>7</sup> Complainant is referencing language from the proposed decision in the other case (98-0045-PC-ER). The referenced language is recited below. The term "above-noted provision" is a reference to the same procedure quoted in this decision at ¶24, FOF.

Respondent's witnesses testified that only the *interviewed* candidates are subject to the above-noted provision and complainant's name and resume were not forwarded to the Secretary's Office or the Affirmative Action Office because he was not interviewed. Respondent's interpretation of its own manual was reasonable. Complainant did not establish that in any other hiring process names were forwarded to the Secretary's Office or the Affirmative Action Office except the names of interviewed candidates. In short, pretext has not been shown.

about his qualifications for the job. Her testimony at hearing was internally consistent. Furthermore, her demeanor raised no credibility problems. In short, she was a more reliable witness than complainant was.

## II. Objections to the Proposed Decision and Order<sup>D</sup>

In objecting to the Proposed Decision and Order (PDO), Mr. Balele first contends that certain facts recited in his post-hearing brief which were not specifically denied in respondent's post-hearing brief should be taken as true and, as a result, judgment should be entered in his favor. He based this contention on §806.03, Stats., which is inapplicable to Commission proceedings. Furthermore, as the following examples illustrate, the Commission already informed him in other cases that this argument lacks merit. In *Balele v. DOR*, 98-0002-PC-ER, 2/24/99, the Commission stated that failure to dispute pleadings does not entitle complainant automatically to a judgment by default. In *Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98, the Commission rejected complainant's argument that respondents' failure to refute his contention that the use of the career executive program has a disparate impact on racial minorities has the legal effect of an admission.

Mr. Balele's other main contention relates to the hearing examiner's discussion of his credibility (pp. 13-16, PDO). Mr. Balele, in his post-hearing brief<sup>8</sup>, contended that: "The Commission warned DHFS and its attorney, Paul Harris, that if indeed DHFS did not forward Balele's name and resume to the DHFS Secretary in the three positions then that would be dispositive because DHFS would have violated the law." He cited, as evidence of his contention, specific language from a letter ruling issued by the hearing examiner. As discussed in the PDO, his interpretation of the cited language was "patently unreasonable" (p. 15, PDO).

Mr. Balele changes his position in his objections to the PDO. Specifically, he abandons reliance on the written text of the hearing examiner's letter ruling as support for his argument.

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<sup>D</sup> This portion of the discussion section was added to address complainant's major objections to the proposed decision and order.

<sup>8</sup> This is a reference to Mr. Balele's post-hearing brief (pp 38-41) which he filed by cover letter dated January 31, 2000.



Instead, he maintains in an affidavit that Commissioner Rogers made the statement during the unrecorded conference on October 22, 1999:

Pastori M. Balele, being duly sworn, on oath, states that he heard Judy Rogers, during the Prehearing (sic) Conference of October 22, 1999 and as referenced in the Proposed Decision and Order in the above case page 14-15, state to the that (sic) if DHFS employees did not forward complainant's name and resume to the Secretary then that would constitute a violation of the law."

Commissioner Rogers does not recall making the statement that Mr. Balele attributes to her.<sup>9</sup> She does recall expressing concern that respondent's interpretation of §202.3 B4g(1) of Chapter 202 of its supervisory manual as expressed by respondent at the conference on October 22, 1999, appeared inconsistent with her recollection of evidence submitted in a different case in which she presided as hearing examiner and, on August 27, 1999, issued a proposed decision and order. (See final decision in *Balele v. DHFS*, 98-0045-PC-ER, 11/3/99.) The import of the discussion was to caution respondent that if an inconsistency developed at hearing, which was unexplained by the record, then respondent might wish to reconsider its plan to submit affidavits in lieu of a personal appearance at hearing by Secretary Leann and Deputy Secretary Lorang. Attorney Harris chose to proceed with the affidavits.

Mr. Balele, in arguments dated May 1, 2000, stated as shown below:

Before the rest of the case is appealed, and because there are no transcripts, Balele is attaching a document he drafted asking Commissioner Rogers and Paul Harris as a licensed attorneys (sic) to practice law in the State of Wisconsin to swear and sign before Wisconsin Notary Public as to the truth or untruth of what is stated in the document. Rogers and Harris will chose (sic) one answer between the two options. Given the Response to the document, Balele will decide whether or not to file a complaint with the Board of Attorneys. Failure to answer and sign the document may tempt Balele to do the same with the Board of Attorneys. Balele is strongly encouraging Commissioner Rogers and Attorney Harris to sign the document as directed.

The affidavit prepared by Mr. Balele for Attorney Harris' signature calls for Attorney Harris to verify one of the following two statements:

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<sup>9</sup> The conference of October 22, 1999, was not tape-recorded.

- He did not hear Commissioner Judy Rogers state, during at (sic) the Prehearing Conference of October 22, 1999 as referenced in the Proposed Decision and Order in the above case on pages 14-15, to the effect that if DHFS employees did not forward complainant's name and resume to the Secretary then that would constitute a violation of the law.
- He did hear Commissioner Judy Rogers state, during the Prehearing Conference on October 22, 1999, as referenced in the Proposed Decision and Order in the above case pages 14-15, to the effect that if DHFS employees did not forward complainant's name and resume to the Secretary then that would constitute a violation of the law.

Attorney Harris declined to sign the prepared affidavit stating (see written arguments dated 5/9/00, p. 2):

Regarding the request by Mr. Balele that the hearing examiner and I sign the affidavits that he drafted and have the affidavits notarized, I will not do so. The affidavit that Mr. Balele signed, apparently dated May 1<sup>st</sup>, is not correct regarding "a violation of law." Commissioner Rogers did not make the statement that Mr. Balele contends that she did. But the drafted affidavit for my signature is not correctly or accurately formatted; it is unclear how a choice is to be made between the two paragraphs. Furthermore, there is no requirement that I sign any affidavit. Mr. Balele's threat to file a complaint with the "Board of Attorneys" (an apparent reference to the Board of Attorneys Professional Responsibility) does not cause me concern, because I am confident that his factual claim about what was said on October 22, 1999 is untrue. The Proposed Decision correctly related the facts concerning that claim by Mr. Balele.

The wording of the affidavit Mr. Balele prepared for the hearing examiner's signature is similar to the language used in the affidavit prepared for Attorney Harris' signature. The hearing examiner also declines to sign the affidavit. Her best recollection of what was said at the conference has been explained in this decision.

ORDER<sup>E</sup>

This case is dismissed.

Dated: May 31, 2000.

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
JUDY M. ROGERS, Commissioner

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Commissioner Murphy did not participate in consideration of this matter.

Parties:

Pastor Balele  
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Madison, WI 53711

Joe Leann  
Secretary, DHFS  
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Madison, WI 53707-7850

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

<sup>E</sup> The ORDER section was added.

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