STATE OF WISCONSIN PERSONNEL COMMISSION

MICAH ORIEDO,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 00-0001-PC-ER

FINAL DECISION AND ORDER

This case is before the Commission following the promulgation of a proposed decision and order by the hearing examiner. The Commission has considered the parties' oral arguments and consulted with the examiner. It now adopts the proposed decision as the final disposition of this matter, with the following comments about some of the points raised in the argument.

Complainant argues that the Commission erred in its analysis of his attempt to show disparate impact. Complainant cites *Allen v. Seidman,* 881 F. 2d 375 (7th Cir. 1989), for the proposition that "the plaintiff must prove that the challenged practice is discriminatory because it has a disparate *impact on him as an individual*" Brief, p. 9 (emphasis added) The Commission is unable to find this point in that case. In that case the plaintiffs (black bank examiners) established a prima facie case of disparate impact by showing that only 39% of them passed the Program Evaluation test as opposed to 84% of the white candidates. *Id.,* 378. That case did not involve a situation where the defendant argued the point that there should not be liability in connection with the test because the "bottom line" of overall numbers of black applicants appointed did not show an adverse impact, notwithstanding that the test in question had an adverse impact.

The "bottom line" defense was advanced in *Connecticut v. Teal,* 457 U. S. 440, 29 FEP Cases 1, 1982 U. S. LEXIS 131 (1982), and this precipitated the court's lan-

guage about impact on the individual, relied on by complainant. There the court addressed the question of:

> [W]hether an employer . . may assert a "bottom line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotion--effected by an examination having disparate impact--would not render the employer liable for the racial discrimination suffered by employes barred from promotion if the "bottom line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case. .
>
> When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and *that barrier has a significant adverse impact on minorities or women*, (emphasis added) then the applicant has been deprived of an employment *opportunity* (emphasis in *Conn. V. Teal.*)"because of race, color, religion, sex or national origin." In other words §703(a)(2) prohibits discriminatory "artificial, arbitrary, and unnecessary barriers to employment," that limit or classify . applicants for employment . in any way which would deprive or tend to deprive any *individual* (emphasis added) of employment *opportunities."* (emphasis in *Conn. V. Teal.*) 457 U. S. at 442, 448.

There is no authority for the proposition that a complainant can establish a prima facie case of disparate impact without showing that the employer used a facially neutral employment practice which had a disparate impact on minorities or women as a group. *See, e. g., Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 595, 476 N.W.2d 707 (Ct. of App., 1991) ("The disparate impact theory is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group."); *Balele v. UW-Madison,* 99-0169-PC-ER, 2/26/01 (prima facie case of adverse impact when challenged practice or selection device has a substantial adverse effect on a protected group).

Complainant also asserts that if he advances an argument and respondent does not specifically disagree with it, it should be deemed admitted. This assertion attempts to rely on a principle that has some application in the appellate briefing process, *see Charolais Breeding Ranches v. FPC Securities,* 90 Wis. 2d 97, 108-09, 279 N. W 2d

493 (Ct. App. 1979), but which is of limited application in an oral argument before an administrative agency. Complainant has the burden of proof, and the burden of proceeding does not shift to respondent merely because complainant makes an argument as part of his oral argument.

Complainant has cited *Witkowski v. Weber,* 96-2749-FT96-2749-FT (Ct. App. 1997) (unpublished) for the argument that an agency can not disregard or violate an internal policy. However, the question raised by complainant is moot because the proposed decision found that complainant failed to establish that the policy in question, whether or not it should be considered to have the force of law,[1] was violated. Proposed decision, pp. 8-9.

Finally, the Commission rejects complainant's argument that Chairperson McCallum should not participate in this matter because of her relationship to the governor, her husband. This case was filed, and the underlying facts occurred, prior to February 1, 2001, which is when the governor was inaugurated.

While the Commission has considered all of complainant's arguments and finds them unpersuasive, it has not addressed all of them here.

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[1] Complainant cites *Gibson v. DOC,* 94-2484 (Ct. App. 1996) (unpublished), with regard to the question of whether an internal policy has the force and effect of law.

ORDER

The attached (unsigned and undated) proposed decision and order, with technical changes, is incorporated by reference and adopted as the Commission's final disposition of this matter, and this complaint is dismissed.

Dated: May 31, 2001

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

JUDY M. ROGERS, Commissioner

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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

STATE OF WISCONSIN PERSONNEL COMMISSION

MICAH ORIEDO,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 00-0001-PC-ER

PROPOSED DECISION AND ORDER

This case involves a charge of discrimination on the bases of race, color, national origin, and WFEA retaliation, with regard to failure to hire. At a prehearing conference held March 23, 2000, the parties agreed to the following statement of issue for hearing: "Whether respondent discriminated against complainant on the bases of race, color, national origin or WFEA retaliation in connection with its failure to hire him for the position of Correctional Services Manager-Director Office of Education, in December 1999." In a Commission ruling dated July 19, 2000, the Commission denied respondent's objection to a sub-issue proposed by complainant, i. e., "Whether any post-certification actions or decisions of respondent had a disparate impact on complainant based on his race, color, or national origin."

FINDINGS OF FACT

1. Complainant is a black person of Kenyan origin.

2. Respondent announced a vacancy in the August 30, 1999, Current Opportunities Bulletin (COB) (Complainant's Exhibit C 1) for the position of Correctional Services Manager—Director, Office of Education. This position is in Salary Range 15 in the Career Executive Program. The position's duties and responsibilities are as summarized in the COB:

> This position is responsible for providing statewide leadership and direction for adult and juvenile educational programs through the

> development and implementation of programs in coordination with the Department of Public Instruction and the Wisconsin Technical College System. Oversee the development of academic and vocational curricula; provide for interaction and development of professional relationships with state and national education agencies; provide professional direction and leadership in the preparation of grant proposals to fund education programs; supervise, coordinate and direct the work of professional and support staff in the Office of Education.

3. Complainant applied and was certified as eligible for this position.

4. The certified candidates were interviewed and ranked by a three member panel which consisted of two white persons (Cindy Schoenke and Phil Kingston) and one black person (Eurial Jordan). This panel rated complainant in the top six candidates. He was among four people tied for third place.

5. Schoenke was responsible for administering the appointment process, and was the effective appointing authority. She was the immediate supervisor of the position in question and the assistant administrator of the Division of Adult Institutions (DAI).

6. Schoenke had a subordinate check the references of the top six candidates. Each reference was asked the same questions, which included seven more or less open-ended questions—e. g., "can you comment on the person's ability to make decisions"—and then asked to rate each candidate on a scale of poor to excellent on six specific categories—judgment, quality of work, quantity of work, dependability, initiative, and labor management skills. The results of the reference checks for complainant and the person who ultimately was appointed to the position are set forth below in Findings of Fact 14 and 15.

7 After the top scoring candidate (who was black) was eliminated from consideration because of supplying false application materials, the second highest candidate (who also was black) accepted an offer and was appointed to the position but after a very brief period decided not to continue in the job and transferred out.

8. Schoenke then decided to appoint a white applicant (John Brueggeman) who was one of the four candidates (which included complainant) tied for third place in the numerical ratings.

9. Schoenke consulted with the DOC affirmative action officer, Jo Winston (white). They discussed the fact that DOC was underutilized for racial minorities in this job category. Winston approved the choice of Brueggeman.

10. Schoenke then consulted with Cindy O'Donnell (white), the DOC deputy secretary who had been delegated by the DOC secretary the authority to act for the secretary with regard to appointments of this nature. O'Donnell approved Brueggeman's appointment.

11. Schoenke then consulted with Dick Verhagen (white), the Administrator and appointing authority for the DAI. He also approved the appointment and signed Brueggeman's appointment letter on December 3, 1999.

12. At the time he applied for this position, complainant was employed as a program and planning analyst for the Department of Natural Resources (DNR), and his responsibilities included providing program planning and analytical support with regard to various DNR programs. He also served as the Health and Safety Training Coordinator Previous employment with DNR included serving as the Wisconsin Sesquicentennial Celebration Coordinator for DNR in 1998, as an Environmental Standards Strategic Planner (1982-1984), Budget and Fiscal Analyst (1984-1989), Legislative Liaison (1982-1984), member of the DNR affirmative action committee (1976-1980), and Air Pollution Research Specialist (1980). Prior to his employment with DNR, he had been employed as a professor and Chairman of the Environmental Science and Physics Departments at Shaw University in Raleigh, North Carolina (1976-1980). Prior to that he was a graduate teaching and research associate at the Ohio State University (1972-1976), which included assisting to plan and develop a cooperative college school project for in-service science teachers in Mansfield, Ohio, and supervising in-service and out-service physics student teachers. He also was a counselor for juvenile delinquents in Raleigh (1976-80). Before that he was an administrator and instructor at Chicago City

Colleges (1970-1972), and prior to that he was a Research Analyst for the Woodlawn Organization (1970-1971), which included writing proposals and guiding negotiations for renewal of a $3 million Title 1, Elementary and Secondary Education Act funds. His formal education includes a Ph. D., Science Education (1977), an MS, Physics and Educational Psychology (1969), a BS, Physics (1969), and a BS, General Science (1968).

13. At the time of his appointment to the position in question, Brueggeman had been employed by DOC since 1992 in a project director position involved in directing the implementation and ongoing development and operations of the Specialized Training and Employment Project (STE), an experimental project designed to reduce the rate of recidivism. He also had been an instructor at MATC (Madison Area Technical College) since 1996, teaching literacy to county jail inmates. He also had been employed by MATC from 1992-94 teaching literacy to community residents. He had been employed by DOC from 1988-92 as Academic Coordinator, providing state-wide coordination for the development, implementation and evaluation of academic education programs within DOC. Before that he had been an instructor at Columbia Correctional Institution from 1986-1988, an instructor at the Central Wisconsin Center for the Developmentally Disabled (1979-86), and a program consultant for the Cooperative Education Service Agency (1977-78), and the Department of Health and Family Services (1978-79), providing monitoring and advice on the utilization of federal funds to agencies for the handicapped. Brueggeman has an MA in Special Education for the Mentally Retarded, and a BA in Elementary Education.

14. The results of Brueggeman's two reference checks were recorded on a form used for that purpose (Respondent's Exhibit R 101). His references were excellent, e. g. "Very strong leadership skills excellent decision maker .one of the best innovative employes he has ever worked with . . strong ability to develop positive relationships with co-workers, peers and outside agencies strong leadership skills . not a snap decision maker but is decisive. John is a good team player and works well with a group of people organized around a common goal or issue

would do a great job as Director of the Office of Education." Both references evaluated Brueggeman as "excellent" (highest) in five of the six specific performance criteria (judgment, quality of work, quantity of work, dependability, initiative) which the references were asked to rate. Neither reference provided a rating on the sixth criterion (labor management skills).

15. The results of complainant's two reference checks were recorded on Respondent's Exhibit R 102. The first reference declined to respond to four areas of inquiry (including the last one which involved rating the candidate on six specific criteria)[1] due to lack of information, and said he had never supervised complainant but was more of a personal reference. This reference did provide, however, a number of positive comments—e. g., "has developed and can develop positive relationships with co-workers and peers inside and outside the department [DNR]. Has been assigned to Governor's commission and demonstrated the ability to work with a sizable group of peers and members of the public . Mr. Oriedo has never encountered a disciplinary action believes that Mr Oriedo's work ethics and related professionalism are top notch and Mr. Oriedo would be a good fit with corrections." Complainant's second reference was less positive, and included the following: "has demonstrated the ability to forge positive working relationships with co-workers and peers [h]as had appropriate training and has good idea of how to be a good leader. Has been a good leader in projects assigned in the past. But this reference feels that Mr Oriedo does not have the necessary background in the education field to be effective without a moderate level of guidance and instruction . [n]eeds a moderate level of direction and guidance in decision making. Must have interaction with supervisors when making decisions . . [n]o official disciplinary [action] taken with this employee—on occasion has had the need to be motivated all around good employee Mr. Oriedo lacks the appro-

[1] Complainant argued that the chart used to record ratings on the six specific criteria had not been completed because the person doing the reference checks did not ask the questions due to bias. Given the reference's expressed inability to comment on three of the other questions due to lack of familiarity with complainant's work, it is more reasonable to infer that the same rea-

priate background in education to fulfill the demands of this position." This reference responded to the six category rating criteria by evaluating complainant "good" in four areas, "average" in one area, and did not answer the sixth area.

16. Complainant has filed WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.) complaints against respondent.

17 Complainant has not established that anyone in DOC management who played a substantive role in the hiring decision knew about complainant's complaints against DOC, and the Commission finds that there was no such knowledge.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to show by a preponderance of the evidence the facts necessary to establish his claims.

3. Complainant has not satisfied his burden of proof.

4. Respondent did not discriminate against complainant on the basis of color, national origin or ancestry, or race, with respect to the decision not to hire him for the position of Correctional Services Manager--Director Office of Education.

5. Respondent did not retaliate against the complainant for having engaged in fair employment activities with respect to the decision not to hire him for the position in question.

6. The post-certification actions or decisions relating to this position did not have a disparate impact based on race, color or national origin.

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son was behind the absence of any entries on this chart. The Commission also notes that the same person recording the reference evaluations left part of Brueggeman's chart blank.

OPINION

ADVERSE TREATMENT—RACE, COLOR, NATIONAL ORIGIN

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) he is a member of a group protected by the WFEA, (2) he applied and was qualified for a job which the employer was seeking to fill, (3) despite his qualifications he was rejected, and (4) the employer continued with its attempt to fill the position. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1917, 5 FEP Cases 965 (1973). Here, complainant has established a prima facie case. He is a black person whose country of origin is Kenya. He applied, was certified for, and was interviewed by a screening panel for the position in question. His rank after the panel ratings was tied for third. Respondent did not hire him but appointed a white candidate who had been tied for third with complainant.

Respondent provided a legitimate, non-discriminatory rationale for the decision to hire Brueggeman rather than complainant. Respondent explained that Brueggeman had considerable, recent, very job-related experience with DOC, and overall his experience was better for the job in question than complainant's, who had never worked for DOC and who had not been involved in education since 1980. Brueggeman also had considerably better references than complainant.

Complainant makes several arguments in support of his attempt to show pretext. He points out that he has a Ph. D. in Science Education while Brueggeman does not have a Ph. D. The Commission attaches but little weight to this difference, because Brueggeman has an MA in Special Education for the Mentally Retarded, and a BA in Elementary Education. Complainant also tries to make out a case that respondent did

not follow the applicable affirmative action requirements. However, while respondent was underutilized as to racial minorities for the job group in question, it did comply with those requirements.

For example, the DER Equal Employment Opportunity/Affirmative Action (EEO/AA) policy and procedure standards (Complainant's Exhibit C12) provides that when there is a short term AA goal and a member of the target group is eligible for appointment but not recommended for hire, "an informal discussion will be held prior to any offer of appointment between the agency EEO/AA Officer and the highest level hiring official (e. g., division administrator and department head) who is responsible for the recommendation not to hire." *Id.*, p. 6. This in fact did happen in this case as Winston met with Schoenike, who had the effective authority to appoint Brueggeman. Therefore, respondent did comply with this standard. The only time that the standard requires consultation between the EEO/AA and the Secretary of the agency or his or her designee is when the EEO/AA officer does not agree with the recommendation of the hiring official. This was not the case here.

In his post-hearing briefs, complainant puts particular stress on the fact that in Schoenike's discussions with the affirmative action officer (Winston), the division administrator (Verhagen), and the deputy secretary (O'Donnell), Schoenike summarized the reasons for her hiring recommendation rather than having given those individuals the raw materials that went into that recommendation—i. e., the actual application materials, scoring sheets, and reference forms. However, the policies, procedures, and standards in this record do not require this. What is required is a hiring justification, and Schoenike provided this.[2]

Complainant also argues that respondent violated its own policy in the DOC Supervisor's Manual (Complainant's Exhibit C2), p. 35, §F, which provides:

> The Division Administrator's hiring recommendation to the Secretary should include a summary of the results of the justification proc-

[2] In light of the disparity in qualifications between the two candidates, there is no reason to think the decision would have been different if Schoenike had presented all the underlying documents to them.

> ess. No Range 15 or above hiring recommendation should be discussed with the Secretary before completing the hiring justification with the AA Officer

In the instant case, the Secretary was never consulted. The hiring recommendation was discussed with the Deputy Secretary. The record reflects that the Deputy Secretary had been delegated the full authority of the Secretary for personnel transactions of this nature. Complainant disputes the testimony that this delegation had in fact occurred. There is no evidence that this delegation had not occurred. Therefore, the complainant has not sustained his burden of proof on this issue.

Complainant has other contentions on pretext—e. g., the reference check forms were "fake" because they were typewritten rather than handwritten, references are inherently non-job related because none of the DOC witnesses knew about any research that has reached the conclusion that they *are* job-related, references are meaningless because respondent under the civil service code has the discretion to appoint any of the certified candidates[3], etc. While the Commission has considered all of complainant's arguments, suffice it to say that it did not find any of them convincing, and the Commission will not address all of them specifically

In conclusion on the issue of pretext, there is almost no evidence that supports a conclusion of pretext, and a great deal of evidence supporting respondent's hiring decision. Complainant certainly had a number of positive points in his resume, and was scored the same as Brueggeman by the initial panel. However, it remains that complainant had been out of education for 20 years and had no experience with DOC. By contrast, Brueggeman had a great deal of recent educational experience in DOC, including work as an education project director and coordinator Brueggeman also had much better references than complainant, who had one reference who provided the opinion that complainant did not have the necessary background in education for the

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[3] The long-established concept related to complainant's contention is that the appointing authority has the discretion whom to appoint among those certified, and is not constrained to hire the candidate who scored highest in the previous screening. *See, e. g., State ex rel Buell v. Frear,* 146 Wis. 201, 131 N. W 832 (1911).

position in question. Complainant's other reference did not have enough familiarity with complainant's work to provide an evaluation of complainant on many of the criteria for the job. While there was an affirmative action goal for racial minorities for this position, neither the affirmative action plan in question nor any of the policies and procedures in effect indicated that respondent should have appointed complainant in light of the wide disparity in qualifications. Also, the fact that respondent actually appointed a black person to this position[4] before Brueggeman is inconsistent with a finding of pretext.

ADVERSE TREATMENT—RETALIATION

Complainant has not created even a minimal prima facie case of WFEA retaliation, because he did not establish that anyone in a position of responsibility for the appointment in question knew that he had pursued previous WFEA claims against respondent. *See, e. g., Chandler v. UW-LaCrosse,* 87-0124-PC-ER, 8/24/89. While respondent's attorney had knowledge of complainant's prior complaints, there is no evidence that he informed anyone of this, and there is no other evidence to support this element of complainant's claim. Also, even if complainant had established this element of a prima facie case, the rest of the *McDonnell Douglas* analysis would track the discussion of the race, color and national origin claims discussed above, and would lead to the same result.

DISPARATE IMPACT

Under a disparate (or "adverse") impact theory, an employer's facially neutral policy or practice may be unlawful—even without a showing of discriminatory intent—because it has a significantly adverse impact on a protected group. Federal case law discussing the disparate impact theory is "relevant and persuasive" in analyzing a claim under Wisconsin's Fair Employment Act. *Racine Unified School Dist. v. LIRC,* 164 Wis. 2d 567, 595 n. 14, 476 N.W.2d 707 (Ct. of App., 1991). The allocation of the burden of proof in a disparate impact case is as follows:

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[4] This person withdrew after a short period in the position.

> (1) *The prima facie case:* A court will consider statistical evidence offered by both the plaintiff and the defendant to determine whether, on the basis of those statistics that are most probative, the challenged practice or selection device has a substantial adverse impact on a protected group. The burdens of production and persuasion at this stage are on the plaintiff.
>
> (2) *Business necessity:* If impact is established, the inquiry becomes whether the practice or selection device is "job-related for the position in question and consistent with business necessity." The burdens of production and persuasion at this stage are on the defendant.
>
> (3) *Alternatives with a lesser impact:* To rebut the employer's proof of business necessity, a plaintiff can show that the employer refused to implement an effective alternative practice or selection device that would have a lesser adverse impact. Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 87 (3d ed. 1996) (footnotes omitted)

In the instant case, complainant presents neither any relevant statistics[5] nor other evidence of disparate impact as defined above.[6] Complainant does not really have a case for disparate impact. In essence, he is arguing that since he did not get selected for the position in question, respondent's decisions during the selection process had an adverse effect on him. *See, e. g.,* Complainant's post-hearing reply brief, p. 1.

> In a disparate impact case, the plaintiff must prove that the challenged practice is discriminatory because it has a disparate impact on him as an individual applicant and is unjustified by the defendant's legitimate business needs. In this case it was established at the hearing that Dr Oriedo's name was not forwarded to the DOC Secretary for equal consideration. Therefore Oriedo identified that the DOC failure to forward his name for equal appointment consideration had direct impact on him for his race and national origin. (citation omitted)

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[5] Complainant refers to certain statistics relating to service-wide Career Executive staffing transactions for 1994-96 (Complainant's Exhibit C 21). As respondent points out, this data is not broken out for DOC, relates to a period three years prior to the appointment in question, does not compare minorities certified to minorities appointed, and otherwise is of little if any probative value.

[6] As the result of certain stipulations during the prehearing discovery process, complainant in effect conceded that his disparate impact theory was limited to the effect of the steps in the selection process on him.

Complainant's approach to the subject simply does not give rise to a viable adverse impact claim.

ORDER

The Commission having determined that respondent did not discriminate against complainant as he alleged, this complaint is dismissed.

Dated: _____, 2001 STATE PERSONNEL COMMISSION

_____
LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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