

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

**RULING ON
MOTIONS FOR
SUMMARY
JUDGMENT AND
FINAL ORDER**

Case No. 00-0044-PC-ER

This case is before the Commission to resolve respondent's motion for summary judgment and complainant's cross-motion for summary judgment. The parties have previously agreed to the following statement of issue for hearing:

Whether respondent discriminated against complainant based on color, race and national origin/ancestry or in retaliation for engaging in activities protected under the FEA with respect to the following hiring decisions:

1. DOT Manager, Bureau of Field Services,
2. DOT Manager, Bureau of Driver Services, and
3. Deputy Director, Bureau of Vehicle Services.

The parties understood that Mr. Balele intends to pursue a disparate impact theory of discrimination as part of the above-noted statement of the hearing issue.

The findings of fact below are made solely to resolve the present motions. The findings are undisputed unless specifically noted to the contrary.

FINDINGS OF FACT

1. Early in 2000, respondent's (hereafter DOT's) Division of Motor Vehicles had DOT Manager vacancies for the positions of Director of the Bureau of Driver Services and Director of the Bureau of Field Services.

2. The DOT Manager classification is in State Job Group 001 - Administrators and Senior Executives. During calendar year 1999, this job group was considered by the Department of Employment Relations (DER) to be underutilized for minorities. When this

determination was made by DER, an availability factor of 7.5% for qualified minorities in the relevant labor market was used.

3. Positions classified as DOT Manager are included in the Career Executive Program.

4. As of the payroll period ending December 18, 1999, there were 127 filled positions at DOT that were included in State Job Group 001 - Administrators-Senior Executives. Eight of those 127 positions, or 6.3% were occupied by persons who identify themselves as members of racial minority groups.

5. As of the payroll period ending December 18, 1999, there were 144 filled positions at DOT that are included in the Career Executive program. Ten of those 144 positions, or 6.9% were occupied by persons who identify themselves as members of racial minority groups.

6. During the three year period from January 1, 1997, to December 31, 1999, there were 24 Career Executive vacancies in DOT that were filled by competition where there were members of minority groups among the certified candidates. For those positions, there were 301 certified candidates. Of those candidates, 251 were white and 47 were members of racial minority groups. The race of 3 certified candidates is unknown by DOT. Of the candidates who were hired to fill the 24 vacancies filled during this period, 18 were white and 6, or 25%, were members of racial minority groups.

7. It is DOT's practice to use employment interviews as part of the post-certification selection process.

8. Roger Cross served as the Administrator of the Division of Motor Vehicles in DOT. Mr. Cross was the appointing authority for the positions at issue in this matter.

9. Jane Czeshinski was Deputy Administrator of the Division of Motor Vehicles. Ms. Czeshinski coordinated the filling of the two positions. Both Mr. Cross and Ms. Czeshinski are white.

10. The Current Opportunities Bulletin described the positions as follows:

Director, Bureau of Field Services Job Duties: Administer, direct, plan and coordinate complex multi-modal transportation programs, operations, and customer service delivery in 128 service center locations, in the following

program areas: driver examination and licensing; and vehicle registration and titling. Responsible for the development and administration of the bureau's \$23.5 million budget and the management of 360 staff. Director, Bureau of Driver Services Job Duties: Administer, direct, plan for and coordinate complex multi-modal transportation programs, operations and activities in the following program areas: driver license examination and licensing policies; driver license revocations or suspensions; safety responsibility; and, traffic accident reporting. Develop and administer the bureau's \$14.5 million budget and management of 245 staff. Additional Job Duties for both positions: Serve as legislative liaison dealing with extremely politically sensitive issues. Work with legislators to provide guidance and direction regarding the proposals of new legislation or amendments to current legislation and work with interest groups to develop proposals, refinements, and recommendations regarding legislation. KNOWLEDGE, SKILLS AND ABILITIES REQUIRED: Management principles and practices to include strategic and tactical planning; budget development and resource allocation; and, supervisory practices relating to the planning, implementation and delegation of work activities. Program analysis and evaluation methodologies. Oral and written communications including principles and techniques in public communications and effective human relations. Uses and application of information technology. Budget analysis methodologies and fiscal management principles. Human resource management including interpretation of labor agreements, employee development techniques and practices, affirmative action and employee assistance.

11. The certification for the two bureau director vacancies was also used to fill a later vacancy for the position of Deputy Director, Bureau of Vehicle Services.

12. Candidates were certified by one of four methods. Several persons applied who were already employed by respondent as career executives. These persons were certified under Option 1. A number of persons who were employed as career executives in other state agencies also applied and were certified under Option 2. Current state employees who were not employed in the career executive program and who passed the civil service examination were certified under Option 3. Persons who were not employed by the state and who passed the civil service examination were certified under Option 4.

13. Respondent's Affirmative Action Officer, Demitri Fisher, was one of the candidates certified under Option 3. Because Mr. Fisher was a candidate, Susan Christopher, Director of respondent's Bureau of Human Resource Services, acted as the Affirmative Action Officer for these appointments.

14. Complainant was also certified under Option 3.

15. Respondent had an Affirmative Action Plan at the time the positions in question were filled. For positions in classifications that are underutilized for minorities or women, the plan allowed special recruitment efforts and the use of expanded certification to increase the opportunity to consider qualified minorities and women. Both of these affirmative action tools were used with the vacancies in issue.

16. Complainant's exam score of 70.54 was identical to the score of a person included under Option 4 via expanded certification and both these scores were the lowest scores of those 19 persons on the register as well as of those who were certified. Alan Probst was 2nd on the civil service register with a score of 87.54 and Gary Guenther was 6th on the register with a score of 83.37

17 Ms. Czeshinski established the interview panel for the two positions. She arranged for Linda Lewis, Vice President for Government Affairs of the American Association of Motor Vehicle Administrators, from Arlington, Virginia, to serve on the panel. Ms. Lewis is black. Ms. Czeshinski and Mr Cross served as the other two members of the interview panel.

18. Ms. Czeshinski and Mr. Cross developed interview questions. These questions were reviewed by Susan Christopher in her role as Affirmative Action Officer for these appointments.

19. Each interviewer had a separate sheet for each candidate listing the 7 interview questions. There was room on the sheet for the interviewer to take notes after each question.

20. Ms. Czeshinski and Mr. Cross also developed a form for evaluating the candidates. The form referenced the following evaluation "dimensions":

a. Customer Service Orientation (internal and external)

b. Leadership. The evaluation form also referred to the following components of this dimension: Sees the big picture; Has vision; Plans ahead; Highly motivated to achieve success; Participation; Team Building.

c. Operations and Program Management. Components of this dimension were: Data driven; Results oriented; Gets the job done.

d. Management Experience. Components of this dimension were: Budgeting/Resource Management; Personnel Administration/Labor Agreements; Automation System Oversight; Strategic Planning; Depth/Brea[d]th/Relevance.

e. Problem Solving

f. Policy Development. Components of this dimension were: Involving Affected Stakeholders; Actually Doing Something; Administrator Concurrence; Innovation/Creativity.

g. Oral Communications Skills (including persuasiveness)

h. Enthusiasm for Position and Programs

i. General Overall Impression.

21. Although the "Customer Service Orientation" dimension appeared on the evaluation form, the interview panel did not apply it to any candidate.

22. The evaluation form included two columns for assigning points to each candidate. One column was entitled "Experience" while the other was entitled "Potential." The interviewers were to apply the following "Point Assignment Values":

0 = None

1 = Some

2 = Good

3 = Excellent

23. Because the "Customer Service Orientation" dimension was not used, the maximum number of points that an interviewer could award to a candidate was 48. The maximum total score by the 3-member panel was 144.

24. Before they conducted the interviews, Ms. Czeshinski reminded Mr. Cross and Ms. Lewis that respondent was committed to non-discrimination and to equal employment opportunity and that the candidates must be evaluated only on job-related criteria. Ms. Czeshinski also told them that the positions were in a classification which was underutilized for minorities and women and that the purpose of the interview process was to evaluate the candidates and select a smaller group of the most highly qualified candidates from whom the final selection would be made.

25. The panel interviewed 26 candidates on Thursday, March 23, 2000, and Friday, March 24. Of that total, 4 were Option 1 candidates (including Douglas Thompson, the successful candidate for the position of Director of the Bureau of Driver Services), 5 were Option 2 candidates, 7 were Option 3 candidates (including complainant as well as Gary Guenther, the successful candidate for the position of Director of the Bureau of Field Services), and 10 were Option 4 candidates (including Alan Probst, the successful candidate for the position of Deputy Director of the Bureau of Vehicle Services).

26. Complainant, who is black, speaks English with a foreign accent. He was not born in the United States. At some point prior to the interview, he had filed one or more complaints of discrimination against respondent.

27 Ms. Czeshinski was "tight-lipped" during complainant's interview.

28. Each interview lasted approximately 25 minutes. All candidates were asked the same prepared questions.

29. After each interview, the panelists independently rated the candidates.

30. After the interview sessions were completed, Ms. Czeshinski added the panelists' scores together.

31. All three panelists wrote notes on the interview sheets for complainant, Mr. Thompson, Mr. Guenther and Mr. Probst. The notes of the interviews were not identical but were not inconsistent. There were no statements in the notes indicating bias against complainant based on race, color, national origin/ancestry or for having engaged in protected Fair Employment activities.

32. Mr. Thompson's resume showed he 1) had been working as DOT's Human Resource Manager since January of 2000, where he was responsible for directing and managing respondent's "comprehensive classification, staffing, personnel services and labor relations program"; 2) was Executive Assistant in respondent's Division of Motor Vehicles from July of 1998 to January of 2000, where he was "responsible for program management, strategic planning, policy development and implementation, coordination and liaison for program and management issues for the bureaus"; 3) had been deputy director of the Bureau of Field Services from September of 1989 until July of 1998; and 4) had worked as chief of

various sections within DOT from 1984 to 1989, including a section in the Bureau of Field Services.

33. Mr. Guenther's resume showed he had been working as the district manager for one or more districts within the Bureau of Field Services since 1988. He began working with DOT in an entry level position in the Bureau of Field Services in 1977. As district manager, Mr. Guenther provided direct operational oversight for up to 10 full service facilities as well as other facilities and for nearly 100 employees. He represented the Bureau of Field Services on various committees and work groups and also represented the Division of Motor Vehicles on departmental work groups.

34. Mr. Probst's resume reflected that he was working as a lecturer with the University of Wisconsin-Platteville's Business Department at the time of his interview. He taught Management, Leadership, and Labor Relations. He had worked as the City Manager for Platteville for nearly 5 years, ending in October of 1999. In that capacity, he administered 14 city departments and an \$8.5 million annual budget, and oversaw 85 full-time employees as well as numerous part-time and seasonal employees. He also had a lengthy military service. For three years ending in 1990, he was the commanding officer for two active duty military units, both with more than 300 personnel. He also had stints of one year or less during the 1990s as chief of staff for a 1,600 person active duty military unit and as personnel officer for a 500 person reserve unit.

35. Complainant's resume showed that since 1985, he had been employed as a contractual services management assistant in the Department of Administration where he insured that contractual purchasing requests from state agencies and the Bureau of Procurement met federal and state laws, policies and procedures. This experience included periods when complainant coordinated a program to benefit purchases from sheltered workshops and served as a member of the Affirmative Action Advisory Committee for the Department of Administration. During the 1970s, the complainant spent 1) 2 years as administrative officer, assisting the County Executive for a county in Tanzania, 2) 2 years as supervising accountant over a staff of 12 for an association in Tanzania; and 3) one year as general manager for a cooperative association in Tanzania.

36. Complainant received scores of 25 from Ms. Lewis, 27 from Mr Cross and 24 from Ms. Czeshinski, for a total of 76 points. Nineteen candidates received scores higher than complainant, while 6 received lower scores.

37 At the time of the interview, Ms. Czeshinski was aware that complainant had filed complaints of discrimination against respondent but she was not aware of the nature of those complaints or when they were filed. She did not share that information with Mr. Cross or Ms. Lewis.

38. At the time of the interviews, Mr Cross and Ms. Czeshinski knew Mr Thompson and Mr Guenther because they were all employees of the Division of Motor Vehicles. However, Mr Cross and Ms. Czeshinski had never heard of Mr Probst prior to the interview.

39. Mr Thompson, who was ultimately selected for the position of Director of the Bureau of Driver Services, received 132 points at the interview. Mr. Guenther, hired for the Director of the Bureau of Field Services, had 134 points.

40. The panelists scored complainant, Mr Thompson and Mr Guenther as follows:

Panelist:	Lewis		Cross		Czeshinski	
Interviewee: Complainant	Experience	Potential	Experience	Potential	Experience	Potential
Customer Service Orientation	-	-	-	-	-	-
Leadership	1	2	1	2	1	2
Operations & Program Management	2	2	2	2	1	2
Management Experience	1	2	1	2	2	2
Problem Solving	1	1	1	2	1	2
Policy Development	1	2	1	2	1	2
Oral Communication skills	1.5	1.5	1	2	1	2
Enthusiasm for Position and Programs	2	2	2	2	1	1
General Overall Impression	1.5	1.5	2	2	1	2
TOTAL POINTS	11	14	11	16	9	15

	25	27	24
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Panelist:	Lewis		Cross		Czeshinski	
	Experience	Potential	Experience	Potential	Experience	Potential
Interviewee: Mr. Thompson						
Customer Service Orientation	-	-	-	-	-	-
Leadership	3	3	3	3	3	3
Operations & Program Management	1	3	3	3	3	3
Management Experience	2	3	3	3	2	3
Problem Solving	3	3	3	3	2	3
Policy Development	3	3	2	3	2	2
Oral Communication skills	3	3	2	2	3	3
Enthusiasm for Position and Programs	3	3	3	3	3	3
General Overall Impression	2	3	3	3	3	3
TOTAL POINTS	20	24	21	23	21	23
	44		44		44	

Panelist:	Lewis		Cross		Czeshinski	
	Experience	Potential	Experience	Potential	Experience	Potential
Interviewee: Mr. Guenther						
Customer Service Orientation	-	-	-	-	-	-
Leadership	3	3	3	3	3	3
Operations & Program Management	3	3	3	3	3	3
Management Experience	3	3	3	3	2	2
Problem Solving	3	3	3	3	3	3
Policy Development	2	2	2	3	2	3

Oral Communication skills	2	2	2	3	2	3
Enthusiasm for Position and Programs	3	3	3	3	3	3
General Overall Impression	3	3	3	3	3	3
TOTAL POINTS	22	22	22	24	21	23
	44		46		44	

41. Ms. Czeshinski and Mr. Cross decided that those candidates with a combined score of at least 125 would be finalists for the two bureau director positions. This decision generated a list of 8 candidates, with scores ranging from 125 through 134. Because of his score, complainant was not on this list.

42. Mr. Cross, as the appointing authority for the positions, conducted a second round of interviews for this group of 8 and also received input from other employees.

43. Before the final selections were made for the bureau director positions, a vacancy arose for the deputy director position in the Bureau of Vehicle Services. The position was also classified as DOT manager and respondent's Bureau of Human Resource Services certified the same list of candidates as for the director positions. Respondent polled all 8 of the candidates who had progressed to the second round to see which ones were also interested in being considered for the deputy director vacancy.

44. Three of the original 8 were interested in the deputy director vacancy, as were 2 of the next 3 highest scoring candidates.

45. Ms. Czeshinski and Mr. Cross decided that those interested candidates with a combined score from the panel of at least 118 would be considered further for the deputy director position. Mr. Probst, who was ultimately hired for the position, was one of those two persons who were added. As a consequence, there were 5 candidates who reached the second level in the selection process for the deputy director position. Complainant was not in this group.

46. The panelists scored Mr. Probst as follows:

Panelist:	Lewis	Cross	Czeshinski
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Interviewee: Mr. Probst	Experience	Potential	Experience	Potential	Experience	Potential
Customer Service Orientation	-	-	-	-	-	-
Leadership	2	3	2	3	2	3
Operations & Program Management	2	3	3	3	2	3
Management Experience	3	3	3	3	3	3
Problem Solving	3	3	2	2	2	2
Policy Development	3	3	3	3	2	3
Oral Communication skills	2	2	2	2	2	2
Enthusiasm for Position and Programs	2	2	2	2	2	2
General Overall Impression	2	2	3	3	2	2
TOTAL POINTS	19	21	20	21	17	20
	40		41		37	

47 The highest scores awarded by the interview panel for the candidates who were not considered further for the deputy director position were 110, 109 and 100.

48. The duties of the Deputy Director of the Bureau of Vehicle Services are summarized in the relevant position description as follows:

This position is accountable to the Director of the Bureau of Vehicle Services and is responsible for assisting the Bureau Director by providing strategic planning, programming, and evaluation of each of the bureau's complex activities and functions. The position assists in the responsibility for highly complex executive and legislative liaison functions, staff functions, and services. It is responsible for administering, planning, monitoring, organizing, and coordinating all program operations and activities of the bureau. In addition, this position affects the ability of specific bureau programs to function efficiently and effectively in carrying out federal and state laws/policies, department policies, administrative rules, and division policy. The work product impacts program operations which title and register vehicles, service the motor carrier industry, regulate automobile dealerships and administer an inspection maintenance program and which affect/allow private citizens and public enterprises to carry out their business. This position also impacts the development and expenditure of the bureau's \$24,000,000 budget and 310 staff

resources. It affects and directs the development and implementation of all operational policies and procedures which in turn affect the ability of each program to function efficiently and effectively and adequately serve the people of Wisconsin.

49. Mr. Cross made the final selection decisions after interviewing the finalists a second time and receiving input from employees of the Division of Motor Vehicles. He selected Mr. Thompson as Director of the Bureau of Driver Services, Mr. Guenther as the Director of the Bureau of Field Services and Mr. Probst for the deputy director position. All three individuals are white.

50. Respondent's Affirmative Action Plan provides that for positions in underutilized classifications, the appointing authority should discuss their selection decisions with respondent's Affirmative Action Officer before making an offer of employment when the certified list of candidates includes women or members of minority groups and the selected persons are not women or minorities.

51. Before making offers of employment to the selected candidates, Ms. Czeshinski and Mr. Cross met with Susan Christopher, Director of the Bureau of Human Resource Services and the acting Affirmative Action Officer because the classification of the positions to be filled was in a job group which was underutilized for minorities and women and the persons identified for selection were white males. During the meeting, they discussed how minority and female candidates had been evaluated in comparison to the majority candidates. This included a discussion of the evaluation of complainant. Ms. Christopher was aware of the race and gender of the candidates on the certification list. Ms. Christopher, in her role as acting Affirmative Action Officer, concluded that the minority and female candidates (1) had been given fair and equal consideration by the appointing authority; and (2) were not selected because other non-target group candidates had been determined to be better qualified on the basis of non-discriminatory job-related factors. She approved the appointments, as did DOT Secretary Terrence Mulcahy.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.
2. Respondent has demonstrated it is entitled to summary judgment because there are no genuine disputes of fact as to any material issues, and respondent is entitled to prevail as a matter of law.
3. Complainant has failed to show he is entitled to summary judgment.

OPINION

I. Summary Judgment Authority and Method of Analysis

In the typical summary judgment procedure, the governing rule is that "[S]ummary judgment is appropriate when no *genuine* issue of material fact exists and the moving party is entitled to judgment as a matter of law." II BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 33, p. 1464 (emphasis added); §802.08(2), Stats. ("The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no *genuine* issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [emphasis added]) The requirement of a *genuine* issue of material fact means that it is not sufficient for the nonmoving party to raise *any* dispute of fact. The court looks at the conflicting evidence and decides whether, after consideration of both parties' affidavits or other showing, a reasonable jury or other fact-finder could make the finding in question in favor of the nonmoving party. See *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N. W. 2d 648 (Ct. App. 1991).

A key question in analyzing a motion for summary judgment is whether an evidentiary hearing would add anything to the adjudicative process:

In general, pinpointing the location of an issue on the factual-legal spectrum is essential for assessing the appropriateness of summary judgment. In non-jury situations, however, the decision maker's role shifts from identifying the type of issue to appraising the value of full adjudication. In other words, in

non-jury situations , including administrative evidentiary hearings, the critical question for determining summary judgment is: Would a complete adjudicative proceeding improve the decision maker's ability to resolve effectively the disputed factual or legal issue? R. Cammon Turner, Note, *Streamlining EPA's NPDES Permit Program with Summary Judgment: Puerto Rico Aqueduct and Sewer Authority v. Environmental Protection Agency*, 26 Environmental Law 729, 733 (1996) (footnote omitted)

This article goes on to discuss the materiality and genuineness requirements as follows:

[A] non-moving party must advance a "material" factual dispute to avert a motion for summary judgment. If resolution of a factual dispute would not affect the final determination of the claim, the issue is immaterial and summary judgment is appropriate. the materiality requirement applies equally to administrative summary judgment.

In addition to fulfilling the materiality requirement, a nonmoving party must also establish a genuine issue to avoid summary judgment. summary judgment is precluded when the dispute over a material fact is genuine. A genuine issue exists when a reasonable decision maker could render a favorable verdict to either party under the applicable standard of proof. Accordingly, the test for genuineness has become the applicable standard for assessing summary judgment proof. If it is clear that the non-moving party cannot prevail at trial, summary judgment should be granted for the moving party. The nonmoving party in the administrative context must also establish a genuine issue to avoid summary judgment. *Id.*, 734-35. (footnotes omitted)

See also Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency, 35 F.3d 600, 605 (1st Cir. 1994):

To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure. Indeed, to argue--as does petitioner--that a speculative or purely theoretical dispute--in other words a non-genuine dispute--can derail summary judgment is sheer persiflage.

Another significant aspect of summary judgment practice is that if the non-moving party has the ultimate burden of proof on the claim in question, that ultimate burden remains with that party in the context of the summary judgment motion. *See, e. g., Transportation Ins. Co. v. Huntziger Const. Co.*, 179 Wis. 2d 281, 290-92, 507 N. W. 2d 136 (Ct. App. 1993):

Just as a defendant moving for dismissal at the close of the plaintiff's case must demonstrate that the evidence is insufficient to sustain the plaintiff's burden on one or more elements of the plaintiff's proof, a party seeking summary judgment must "establish a record sufficient to demonstrate that there is no triable issue of material fact on any issue presented." The ultimate burden, however, of demonstrating that there is sufficient evidence to either continue with the trial (in the case of a motion to dismiss at the end of the plaintiff's case) or to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion.

[I]n the context of summary judgment, once the moving party demonstrates that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law," Rule 802.08(2), Stats., the opposing party may avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial," Rule 802.08(3), Stats.

Often, a party moving for summary judgment is able to submit evidentiary material that specifically negates an essential aspect of the adverse party's proof. Under the rules, the adverse party must then counter with evidentiary material showing a triable issue of fact. Other times, however, a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but cannot submit specific evidentiary material proving the negative. Once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial "to make a showing sufficient to establish the existence of an element essential to that party's case." The party moving for summary judgment need only explain the basis for its motion and identify those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that it believes demonstrate the absence of a genuine issue of material fact; the moving party need not support its motion with affidavits that specifically negate the opponent's claim. (citations omitted)

See also Moulas v. PBC Prod., 213 Wis. 2d 406, 410-11, 570 N. W. 2d 739 (Ct. App. 1997) ("[O]nce the motion is made and demonstrates the support required by the statute, the opponent does not have the luxury of resting upon its mere allegation or denials of the pleadings, but must advance specific facts showing the presence of a genuine issue for trial.")

Balele v. WPC, 223 Wis. 2d 739, 589 N. W. 2d 418 (Ct. App. 1998) provides the governing authority for the decision of cases before the Commission by the use of a process

similar to judicial summary judgment procedures under §802.08, Stats. The Court of Appeals affirmed the Commission's decisional process used in that case, noting an absence of precedent as to whether such a procedure was statutorily authorized in the administrative law arena, and then relying heavily on *Puerto Rico Aqueduct & Sewer Authority v. U. S. Environmental Protection Agency*, 35 F. 3d 600 (1st Cir 1994), in addressing that question. The Court of Appeals held "that §227.42(1)(d), Stats.,¹ provides authority for state agencies, such as the Commission, to develop appropriate summary judgment procedures, where the disposition does not require the resolution of any disputes of material fact." 223 Wis. 2d at 746. Since the Court concluded that the Commission had actually dismissed the case under review for failure to state a claim for relief, not on the basis of full-blown summary judgment, the Court concluded that it need not "decide here to what extent the commission's summary dispositions in other contexts may permissibly parallel the summary judgment procedures authorized by §802.08, Stats., for actions in circuit court." 223 Wis. 2d at 748 (footnotes omitted).

In *Balele*, the Court cited with approval the following caveat contained in the Commission's decision:

The commission also explained, however, that its "summary judgment" procedures must be adapted to the circumstances of the types of claims brought before the commission:

[C]ertain factors must be kept in mind in evaluating such a motion in a case of this nature. First, this case involves a claim under the Fair Employment Act with respect to which complainant has the burden of proving that a hiring decision, which typically has a multi-faceted decisional basis, was motivated by an unlawfully discriminatory intent. Second, complainant is unrepresented by counsel who presumably would be versed in the sometimes intricate procedural or evidentiary matters that can arise on such a motion. Third, this type of administrative proceeding involves a less rigorous procedural framework than a judicial proceeding. Therefore, particular care must be taken in evaluating each party's showing on the motion to ensure that complainant's right to be heard is not unfairly eroded by engrafting a summary judgment process designed for a judicial proceeding. 223 Wis. 2d at 746-47

¹ This subsection provides for a right to a hearing when "there is a dispute of material fact."

In summary, the court in the *Balele* case did not address the question of whether, in the summary judgment context, the Commission can go beyond an analysis of whether the complainant's allegations (including both those in the complaint and those in the evidentiary material submitted by complainant) fail to state a claim on which relief can be granted, and handle a motion much like a court would in a s. 802.08, Stats., proceeding. However, the court provided some general guidance, particularly by its citation to the Commission's decision in *Balele v. Chancellor, UW-System*, 91-0002-PC-ER, 6/11/92, quoted above, which addressed the need to handle summary judgment issues with particular care due to the nature of the administrative process.

In many cases before the Commission, it would be inappropriate to force a complainant into a "trial by affidavit" type of process akin to the judicial summary judgment model provided by s. 802.08, Stats., because it would be inconsistent with the administrative process provided by the provisions of the WFEA, and the indications provided by judicial decisions applying the WFEA or the Administrative Procedure Act. For example, in *Kropiwka v. DILHR*, 87 Wis. 2d 709, 721, 275 N. W. 2d 881 (1979), which involved a complainant in a WFEA proceeding who lacked fluency in English, the Court observed that "in state administrative agency hearings, the hearing examiner often must protect the rights of a party not represented by counsel, and see to it that the party's case is properly developed." In *Hiegel v. LIRC*, 121 Wis. 2d 205, 359 N. W. 2d 405 (Ct. App. 1984), the Court indicated that the hearing examiner had to go to considerable lengths to accommodate a complainant who raised an issue at hearing which was outside the scope of her complaint that she had drafted herself², but apparently with some assistance from the agency. The Court held that the examiner not only should have allowed the complainant to amend the complaint, but also should have continued the hearing to provide the employer notice and an opportunity to respond to the new issue. In *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30,

² While unrepresented by counsel when she filed her complaint, she did have an attorney at the hearing where the issue in question was raised.

505 N. W 2d 462 (Ct. App. 1993) (a non-WFEA case), the court held generally that “Pleadings are to be liberally construed in administrative proceedings.”

Consistent with the principles underlying these decisions, the Commission has taken the position that the summary judgment process must be used with a great deal of care in the context of the administrative process involved under the WFEA. In *Masuca v. UW-Stevens Point*, 95-0128-PC-ER, 11/14/95, the Commission discussed this point as follows:

The WFEA contemplates that a person who believes that he or she has been the victim of employment discrimination can file a complaint alleging this, and is entitled to an investigation and/or hearing on the allegations. *See, e. g.*, §111.39(1), 230.45(1m), Stats. In cases where it is clear that the complainant fails to state a claim--e. g., the complainant is not a member of a protected category, the complainant's retaliation complaint rests on an activity not covered by the WFEA--it may be appropriate to dismiss the complaint on the basis of a motion supported by a factual showing establishing the defect in the claim. However, in a case like this, where the parties differ about such things as whether a supervisor's complaints about complainant's work were racially motivated, and whether the complainant's choice of options presented by management rendered the personnel transaction in question voluntary or involuntary, the claim cannot be resolved on this motion. Complainant is entitled to have his complaint investigated and then to proceed to a hearing.

In consideration of these principles, in the Commission's opinion, it is appropriate to look to the following factors³ in determining the degree of scrutiny to which a complainant's claims should be subjected upon a respondent's motion for summary judgment:

1) Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a motion of this nature. For example, Wisconsin courts have recognized that issues of subjective intent are typically difficult to resolve by summary judgment, *see e. g.*, *Doern v. Crawford*, 30 Wis. 2d 206, 214, 140 N. W 2d 193 (1966) (“upon this record the issue of Paulson's intent is not one that properly can be decided on a motion for summary judgment. Credibility of a person with respect to his subjective intent does not lend itself to be determined by affidavit.”) On the other hand, an issue concerning whether a complainant has engaged in activity which the WFEA protects against retaliation⁴

³ This enumeration is not intended to be exhaustive, as different facts might give rise to other factors.

⁴ Sec. 111.322(3), Stats.

may involve historical facts which can more readily be resolved by affidavits or other documentary evidence.

2) Whether a particular complainant could be expected to have difficulty responding to a motion for summary judgment. For example, a complainant unrepresented by counsel and unfamiliar with the Commission's processes could be expected to have more difficulty responding to a motion for summary judgment than a complainant represented by counsel, or a *pro se* complainant who has had numerous cases before the Commission and may have had specific experience litigating motions for summary judgment.

3) Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion. For example, if the evidence needed involves the internal workings of the selection process that is subject to the respondent's control, the case would be less susceptible to the summary judgment process than if the evidence needed related to the complainant's involvement in purported protected activity which would be readily available to the complainant. Related to this is the question of whether the complainant could reasonably be expected to engage in necessary discovery. A complainant well-versed in the Commission's processes and with experience conducting discovery pursuant to § PC 4.03, Wis. Adm. Code⁵, would be better-equipped to respond to a motion for summary judgment than a *pro se* complainant with no previous such experience.

4) Whether an investigation has been requested and completed. The Commission does not wish to unfairly erode a complainant's right in most cases to have his or her case investigated by the Commission.⁶ The WFEA's framework provides for an investigation of a complaint followed by a determination of probable cause (unless waived by the complainant pursuant to s. 230.45(1m), Stats.) and a hearing. While the right to a hearing is not absolute, *see, e. g., Schaeffer v. State Personnel Commn.*, 150 Wis. 2d 132, 142, 441 N. W 2d 132 (Ct. App. 1989), *rev. den.* 446 N. W 2d 286 (complainant is not entitled to a hearing where federal litigation concerning the same subject matter has a preclusive effect on the claim before the commission); *Balele v. Wis. Pers. Comm.*, 223 Wis. 2d 739, 746-47, 589 N. W 2d 418

⁵ "All parties to a case before the commission may obtain discovery and preserve testimony as provided by ch. 804, Stats."

⁶ *See Masuca v. UW-Stevens Point*, 95-0128-PC-ER, 11/14/95, discussed above.

(Ct. App. 1998) (complainant was not entitled to a hearing where, assuming the complainant's factual allegations, they do not give rise to a claim on which relief can be granted); the WFEA process is significantly different from the processes followed by courts in, for example, Title VII cases. The Commission must consider this difference when dealing with summary judgment motions. For example, requiring an unrepresented complainant who is not versed in the administrative process before the Commission, and who has not waived an investigation, to respond to a motion for summary judgment prior to an investigation raises policy concerns not present in a case involving a represented complainant who has waived investigation and conducted extensive discovery.

5) Whether the complainant has engaged in an extensive pattern of repetitive and/or predominantly frivolous litigation, which suggests that using a means of summarily evaluating his or her claims before requiring the employer and the Commission to expend their resources on a full-blown contested case hearing will serve the policy factors underlying the WFEA.

II. Summary Judgment Analysis

A. Standard for Assessment of Complainant's Assertions

The Commission concludes that on this motion for summary judgment it should utilize a method of analysis very similar to that which would be employed by a court in addressing a motion for summary judgment pursuant to s. 802.08, Stats.⁷

The Commission first notes that, subsequent to its ruling in *Balele v. UW-Madison*, 91-0002-PC-ER, 6/11/92, complainant has been involved in numerous proceedings in which the Commission has considered one or more motions for summary judgment: *Balele v. DNR*, 98-0046-PC-ER, 1/25/00; *Balele v. UW*, 98-0159-PC-ER, 10/20/99; *Balele v. DOT*, 99-0103-PC-ER, 11/15/00; *Balele v. DOA*, 00-0057-PC-ER, 9/20/00; *Balele v. DATCP et al.*, 98-0199-

⁷ Even in such a case as this, in the Commission's opinion it has the discretion to administer the summary judgment process in some respects different from the judicial model because of the fundamental differences between a judicial proceeding and an administrative process like this.

PC-ER, 4/19/00.⁸ This means that complainant is more familiar with the summary judgment process than a typical *pro se* litigant.

It is also noteworthy that complainant has conducted extensive discovery in the present case, a process with which he is clearly familiar, as demonstrated not only by the discovery he conducted here, but also in the many cases he has pursued before this Commission. In this case, the respondent has answered four sets of interrogatories from complainant, four requests for production of documents, and one request for admissions. Complainant has clearly made full use of his opportunities to obtain information from respondent that might tend to support his claims of discrimination/retaliation. This makes it relatively unlikely that he would be as disadvantaged by having to deal with the merits of his claim before hearing as would be the case with the average *pro se* litigant.⁹

As discussed above, another factor involves the complainant's overall record of litigation before this agency. This was summarized in *Balele v. DHFS*, 00-0133-PC-ER, 5/24/01 (initial ruling), 8/15/01 (final ruling); where the Commission dismissed Mr. Balele's complaint as a sanction for misconduct that occurred in that proceeding, and in the context of a history of misconduct and bad faith:

Since July 1, 1996,¹⁰ complainant has filed 35 equal rights complaints with the Commission and in all but one has alleged that he was discriminated or retaliated against when he was not the successful candidate for certain positions. These complaints were filed against one or more of 14 state agencies. Complainant has not prevailed on the merits in any of the complaints he has filed with the Commission. In prosecuting several of his complaints, complainant has demonstrated a pattern of abuse of the Commission's processes, including the pleading and discovery processes, and a pattern of misrepresentation, obfuscation, and prevarication. *See, e.g., Balele v. DOC, DER & DMRS*, 97-0012-PC-ER, 10/9/98 (Balele misrepresented witness's testimony in post-hearing briefs); *Oriedo v. ECB, DER & DMRS*, 98-0113-PC-ER, 7/20/99 (Balele, serving as the complainant's representative,

⁸ Complainant was also involved as the representative for complainant in *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99, when the Commission addressed a summary judgment motion in that matter.

⁹ In judicial summary judgment proceedings, the non-moving party usually has the opportunity to conduct discovery before being required to make a showing in opposition to the motion. *See, Transportation Insurance Co. v. Hunziger Const. Co.*, 179 Wis. 2d 281, 292, 507 N. W. 2d 136 (Ct. App. 1993).

¹⁰ Prior to July 1, 1996, complainant filed an additional 13 equal rights cases related to hiring decisions.

misrepresented witness's testimony); *Balele v. DER & DMRS*, 98-0145-PC-ER, 12/3/99 (case dismissed and sanctions ordered for Balele's bad faith pleading and engaging in bad faith in discovery process); *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, 2/11/00 (Balele misrepresented statements made by the hearing examiner, and failed to introduce evidence at hearing he had pledged at prehearing that he would be introducing); *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00 (Balele made statements in post-hearing brief contrary to evidence of record, and hearing testimony not credible); *Balele v. DHFS*, 99-0002-PC-ER, 5/31/00 (gave false testimony, and misrepresented witness testimony and other evidence of record); and *Balele v. DOA, DER & DMRS*, 00-0104-PC-ER, 12/1/00 (complainant engaged in bad faith pleading and, as a result, his whistleblower claim was ruled frivolous and attorney's fees assessed). Initial ruling, Finding 13, pp 5-6.

Complainant has met with a singular lack of success with his complaints, both before this agency and in the courts on review of the Commission's decisions. While the Commission of course must independently evaluate the substantive merits of each case regardless of a party's prior lack of success, Mr Balele's track record is congruent with the use of an approach to summary judgment that would subject his claims to relatively exacting preliminary review to weed out claims which do not require an evidentiary hearing.

Also relevant here is the fact that complainant in this case has waived his right to a Commission investigation of his charge. While in some cases it would contravene the policy underlying the administrative structure of the WFEA to require a complainant to try to support a claim at a preliminary stage of the administrative process, without the benefit of a Commission investigation, this consideration obviously does not pertain to a case like this.

B. Review of Affidavits

Both parties have submitted affidavits in support of their written arguments regarding the cross motions for summary judgment.

The Commission declines to follow an overly formalistic process when deciding a motion for summary judgment, in the sense that a technical problem with how an affidavit was executed would not be a basis for ignoring the substance of the affidavit. However, the Commission will not give any weight to a statement in an affidavit that is clearly beyond the personal knowledge of the affiant or is an allegation of ultimate fact or a conclusion of law.

Webb v. Ocularra Holding, Inc., 2000 WI App 25, ¶ 33, 232 Wis. 2d 495, 606 N.W.2d 552;
Parr v. Milwaukee Bldg. & Const. Trades, 177 Wis.2d 140, 501 N.W.2d 858 (Ct. App. 1993)

Respondent has submitted an affidavit by Ms. Czeshinski in which she avers that Mr Cross and Lewis "had no knowledge of Mr Balele's prior complaints during the interviews or before final selection decisions were made." She also avers that "[n]one of the interviewers had knowledge of candidates' political party affiliation or history of contributions to political campaigns or candidates for public office." Ms. Czeshinski is certainly in a position to know that she did not tell either Mr Cross or Ms. Lewis about complainant's protected activity.¹¹ The Commission can also rely on Ms. Czeshinski's statement in terms of what *she* knew about a candidate's political party affiliation or history of political contributions and in terms of what was discussed when the panel deliberated about the candidates. However, Ms. Czeshinski is not in a position to know what information the other panelists might have gained from outside the interview process. Ms. Czeshinski is not in a position to aver to what the other panelists knew or didn't know about such matters as whether complainant had engaged in a protected activity under the Fair Employment Act. Unless there is also an affidavit (or some other form of evidence) from Ms. Lewis or Ms. Cross on this topic, the Commission is not in a position to conclude what either one might have learned about complainant from sources outside of the interview.

The complainant relies on his own affidavit to support his claim of discrimination/retaliation. Complainant's affidavit is subject to the same restrictions as any other affidavit being considered with respect to the pending motions. In *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37, 50-51, 14 IER Cases 1577 (1st Cir 1999), the court considered an affidavit submitted by the appellant employee in response to the employer's motion for summary judgment. The court noted that the nonmoving party cannot rest on mere denials, and continued:

¹¹ At page 26 of his brief, and in his affidavit, complainant says that given the working relationship between Ms. Czeshinski and Mr. Cross, and the friendship between Mr. Cross and Ms. Lewis, Ms. Czeshinski *would have* shared her knowledge of complainant's protected activity with Mr. Cross and Mr. Cross *would have* shared this knowledge with Ms. Lewis. This statement is barely more than conjecture by complainant. It is not something that is within complainant's personal knowledge, it is supported by little, if any, circumstantial evidence, and the Commission declines to rely on it.

Nor may the court accept the nonmovant's subjective characterizations of events, unless the underlying events themselves are revealed. On the other hand, the competence of the nonmovant's own testimony is treated no differently than that of any other potential trial witness. Thus, the nonmovant's statements normally pass muster provided they (1) are made "on personal knowledge" of the facts or events described; and (2) neither depend on inadmissible hearsay nor (3) purport "to examine the [movants'] thoughts as well as their actions." (Citations omitted, emphasis added.)

Complainant's affidavit includes information that extends well beyond the appropriate scope of an affidavit. The following portion of complainant's October 30, 2000, affidavit, is an example of a speculative conclusion that "purport[s] to examine the [panelists'] thoughts":

7 On oral communication; I know the three interviewers docked me out heavily because I have a foreign national accent.

Complainant's affidavit also includes information that is merely speculative because it extends beyond the scope of complainant's personal knowledge:

17 I believe the DOT Secretary inquired who Balele was and found that Balele was black and had sued DOT before.

C. Disparate Treatment Analysis

It is undisputed that complainant is black, was born in Tanzania, was certified for the three vacancies in question, has previously filed one or more complaints of discrimination against respondent and was not selected for any of the three vacancies. These points satisfy the prima facie case elements in the analytical structure set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) with respect to complainant's disparate treatment theory.¹² Respondent asserts that it declined to hire complainant because there were other candidates who were significantly better qualified for the positions than complainant. The question under the *McDonnell Douglas* analysis then turns to that of pretext.

"[T]he pretext analysis seeks to uncover the true intent of the defendant, not the belief of the plaintiff." *Sanchez v. Henderson*, 188 F.3d 740, 747, 80 FEP Cases 714, 719 9 AD Cases 1006 (7th Cir 1999), cert. denied, 528 U.S. 1173, 120 S.Ct. 1201, 83 FEP Cases 544 (2000). The focus of the present case is on whether the three panelists believed that

¹² Complainant's disparate impact theory is addressed separately, below.

complainant did not perform nearly as well as numerous other candidates during the first round of interviews.

The three panelists carried out a relatively subjective analysis of all 26 of the candidates they interviewed. However, the panelists had a structure to follow because the questions had been established in advance as had the "dimensions" on which the responses were be rated. Complainant has not referred to any specific comments by the panelists during his interview or in the panelists' written notes that were inconsistent with the score given to complainant. There is nothing in the panelists' notes that is inherently illogical.

The Commission has reviewed the interview notes, the scores and the relevant resumes. There is nothing in these materials that suggests pretext. They are all consistent with respondent's view that complainant was far less qualified than the successful candidates. In the Commission's opinion, no reasonable fact-finder could find, on this record, that the successful candidates were not considerably better qualified for these positions than complainant.

The complainant contends his education was superior to that of the other candidates.¹³ However, it is undisputed that education was not one of the previously established "dimensions" to be considered by the panel. Complainant may feel that relative levels of formal education attained by the various candidates should have been considered as part of the panel's analysis. There are undoubtedly other factors that could have been considered by the panel as well. However, the panel was working with a previously established set of "dimensions" that was applied to all of the interviewees. Level of education was not mentioned in the job announcement (Finding 10) and the fact that it was not included as one of the dimensions does not support complainant's claims.

As noted previously, complainant contends that his foreign accent was reflected in his interview score:

¹³ The resumes show that Mr. Thompson held a Bachelor of Science degree from the University of Wisconsin-Whitewater, Mr. Guenther had 18 credits towards an Associate degree from Moraine Park Technical College, Mr. Probst had a Bachelor of Science degree from the University of Wisconsin-Platteville and a Master of Science degree from Central Michigan University, and complainant had a Bachelor of Science degree and a Master of Science degree from the University of Wisconsin-Platteville as well as a certificate from the Mzumbe School of Management.

On the other hand on oral communication skills included such things as persuasiveness. Balele believes that this is where all the screeners docked out Balele interview. Although the interviewers perfectly understood Balele, they could tell that Balele was of foreign national origin. Balele believes that the interviewers docked out his grade because of his foreign accent. DOT had the burden to document that having an accent turns off DOT stakeholders. (Complainant's brief, page 18)

"Oral communication skills (including persuasiveness)" was one of eight "dimensions" scored by the panelists. If complainant's accent would be reflected in any of the categories, it should show up in this dimension. However, Complainant's score on this dimension was very similar to the scores he was awarded in the other categories. (Finding 39) As discussed above, there is nothing to support complainant's contention that the panel's score was improperly influenced by his accent other than his own speculation. On the basis of this record, no reasonable fact-finder could so find.

Complainant observed that one of the panelists, Ms. Czeshinski, was "tight-lipped during the interview clearly indicating her anger toward Balele." (Complainant's affidavit, ¶ 23) Complainant did not offer any further explanation of this observation and his conclusion. According to *Webster's New Collegiate Dictionary*, "tight-lipped" is defined as: "1. having the lips closed tight (as in determination); 2. reluctant to speak: TACITURN" Complainant's conclusion that Ms. Czeshinski was angry at complainant is speculative and is another attempt by complainant to state his conclusion about the panelists' thoughts. As shown by the dictionary definition, complainant's description of Ms. Czeshinski during the interview as "tight-lipped" is not even particularly consistent with an attitude of anger. The Commission declines to interpret complainant's description of Ms. Czeshinski as "tight-lipped" as reasonably indicative of bias by Ms. Czeshinski towards complainant based on race, color, national origin/ancestry or FEA retaliation, and concludes that no reasonable fact-finder could so find.

Complainant contends he "should have scored as highest at interview" and he "was better qualified than Mr. Allan Probst was."¹⁴ (Complainant's brief, p. 31) These contentions

¹⁴ In his affidavit dated October 30, 2000, complainant included two paragraphs relating to these conclusions:

are actually unsupported conclusions. Mr. Probst's resume (Finding 33) is significantly stronger than complainant's (Finding 34). Complainant has not pointed to any specific comments during the interview or interview notes that are inconsistent with the scores the panelists awarded to him. On the basis of the record before it on this motion, the Commission concludes that no reasonable fact-finder could find that complainant was better qualified than Mr. Probst for these positions.

Complainant takes the position that, as a minority certified for the vacancies, he had a right to be hired into one of the three positions. Complainant contends the failure to hire a black person to these positions that were underutilized for minorities constituted a violation of the Fair Employment Act simply because one or more minorities had been certified as eligible for the positions.

Complainant submitted a copy of respondent's Equal Employment Opportunity/Affirmative Action Plan, covering the period from January 1, 1997, through June 30, 1999.¹⁵ The key language from the body of the Affirmative Action (AA) plan is found on page 3 of that plan and is also part of respondent's Transportation Administrative Manual (TAM) 29:

The Department recognizes the need to take affirmative action in classified, limited term, project and unclassified positions where under-utilization exists for racial/ethnic minorities, women or persons with disabilities. It should be noted that hiring policies provide for selection of the most qualified candidate. Affirmative action affects the selection process in two ways if the job area is underutilized: the number of minority candidates eligible to compete is expanded; and in the event that two equally qualified candidates are being considered, preference may be given to the target group member

2. I did very well at interview. The reason is that despite their hatred, eventually I got Ms. Lewis and Mr. Cross smiling. Further at the end of the interview, both were relaxed with me. In fact their interview notes and comments do not correspond to the grades and rank they gave me.

11. Looking at the resume of Mr. Allan Probst, I believe I was more qualified than Mr. Probst for the position he was appointed into.

¹⁵ While the hiring decisions in question were outside of this period, neither party has suggested this fact is of any consequence in terms of the resolution of this case.

The AA plan, on page 8, also includes the following language under the heading of "Short-Term Affirmative Action Goals":

Short term AA goals are based on the DER/DAA's determination of underutilized job groups. When a permanent position is to be filled in a classification which is in an underutilized job group, additional measures may be taken. These include additional, targeted recruitment efforts and expanded certification.

When a manager is preparing to fill a position in an underutilized classification, additional measures may be taken to ensure involvement of target group members in the hiring process. These measures are targeted recruitment and expanded certification.

Targeted recruitment attempts to involve more target group members in the application and hiring process, by making them aware of openings and encouraging them to apply. Advertisements placed in minority newspapers are a common example. In addition, copies of the job announcement may be mailed to groups, organizations or educational institutions which are associated with relevant target groups. For these purposes, the DOT AA Office has developed a Recruitment Resource Listing for use by agency managers. The listing contains over 1,100 entries, which may be sorted by target group, type of organization, county, region, etc. Using the listing, an extensive pool of relevant resources can be provided to the hiring manager.

The hiring process itself is tracked via the DOT Justification Process, which applies to hiring transactions in underutilized classifications. The process is implemented by a system of designees, with the AA Officer as the central authority. Designees are involved in all stages of the interviewing process, by monitoring interview questions, briefing interview panels, and signing off on each transaction. Those positions for which a non-target group member is not being recommended for hire are forwarded to the AA Officer for review. Completed tracking forms for all hires in underutilized classifications are retained in the AA Office.

The other mechanism for affirmative action in hiring is the expanded certification. This tool provides additional candidates, from relevant target groups, for the interviewing process. The target groups for which this applies are minorities, females and persons with disabilities.

Complainant has failed to identify any authority, either in the AA plan or from any other source, that entitled him to appointment to one of the three vacancies simply because he is a minority, he was certified for the positions, and because the classification is underutilized for

minorities. The Commission has reached this same conclusion in other cases filed by the complainant. *Balele v. DOA*, 00-0057-PC-ER, 9/20/00; *Balele v. UW*, 980159-PC-ER, 10/20/99.

The Commission also notes that complainant has failed to identify any affirmative action procedure that was not followed in the present case.¹⁶ To the contrary, Jeffrey Fischer, an employee of respondent's Bureau of Human Resource Services, provided an affidavit that stated, in part:

4. Seven employees of the state of Wisconsin who passed the civil service examination were certified under Option 3 and eleven persons who were not state employees and passed the civil service examination were certified under Option 4. One of those eleven persons, Mr. Stephen Williams, was certified under expanded certification for racial minorities. The passing score on a civil service examination is 70. Mr. Williams had an examination score of 70.54. The Complainant in Case No. 00-0044-PC-ER, Mr. Pastori Balele, was a certified candidate under Option 3 and identified his race on his state application form as black. Mr. Balele also had an examination score of 70.54. Mr. Balele was not certified under expanded certification because there were fewer than 10 candidates on the civil service register under Option 3 so all were certified under basic certification without regard to their examination score. There were a total of nineteen persons on the register. Mr. Williams and Mr. Balele were the lowest persons on the register with a numerical rank of 18 and 19

¹⁶ In his brief, page 32, complainant states: "DOT through Jeffrey Fisher, lied under oath in this Commission when he asserted that DOT took affirmative action in appointing the three white individuals in the positions at issue. (Exhibit 4 page paragraph 19)." Exhibit 4 is respondent's response to complainant's third set of interrogatories and request for production of documents. Mr. Fisher signed the response. Those materials include the following:

INTERROGATORY 17b: If the answer above is that the appointing authority was supposed to take affirmative action for the two positions, please state if the Appointing authority took affirmative action in the two position according to DOT affirmative action plan.

ANSWER: Yes.

INTERROGATORY NO. 19: State the name and race of the appointing authority for the positions at issue.

ANSWER: Mr. Roger Cross, whose race is white, is the appointing authority for the Division of Motor Vehicles, however, he must obtain approval from the DOT Secretary or Deputy Secretary before making an offer of employment in a position in the Career Executive Program.

The Commission assumes that complainant intended to refer to the respondent's answer to Interrogatory 17b rather than Interrogatory 19. The complainant's statement that Mr. Fischer "lied" is wholly unsubstantiated and, therefore, inappropriate.

respectively. Mr. Williams and Mr. Balele did not initially achieve a passing score on the examination. The Bureau of Human Resource Services adjusted the raw examination scores to enable more minority candidates to be included on the register. When the adjusted raw scores were converted to civil service scores, Mr. Williams and Mr. Balele received new scores just slightly above the passing point.

It is also undisputed that Ms. Christopher, in her capacity as the acting Affirmative Action Officer for respondent with respect to these particular positions, discussed with Mr. Cross and Ms. Czeshinski how minority and female candidates compared to Mr. Thompson, Mr. Guenther and Mr. Probst. As noted in Finding 51, Ms. Christopher concluded that the minority and female candidates had been given fair and equal consideration, but that they had not been selected because Mr. Thompson, Mr. Guenther and Mr. Probst were better qualified based on non-discriminatory and job-related factors.

The meeting between Ms. Christopher, Mr. Cross and Ms. Czeshinski included a discussion of the panel's evaluation of the complainant. The panel had awarded complainant 76 points as a consequence of the interview. This score placed complainant 20th of the 26 candidates who were interviewed, 58 points behind Mr. Thompson, 56 points behind Mr. Guenther and 42 points behind Mr. Probst. He was clearly not considered by the panel or Ms. Christopher to be "equally qualified" with Mr. Thompson, Mr. Guenther or Mr. Probst. Because complainant was not "equally qualified," he was not entitled to the hiring preference permitted by respondent's AA plan and TAM 29. In the Commission's opinion, no reasonable fact-finder could find, on this record, either that complainant was equally qualified with these three applicants, or that he was entitled to that hiring preference.

In conclusion there are no genuine disputes of material fact, and on the basis of the undisputed facts, no reasonable fact-finder could conclude that respondent's rationale for not hiring complainant was a pretext for discrimination. Respondent is entitled as a matter of law to judgment in its favor in regard to the disparate treatment aspect of this case.

D. Disparate Impact Analysis

Complainant claims that respondent's decisions had a disparate impact. In his brief, page 13, he notes:

[T]he complaint does not make a specific note that racial minorities as a whole suffered a disparate impact in the selection as pertains to the three positions. Balele claim relates to him as an individual applicant and for his protected status.

Elsewhere, complainant clarifies that his disparate impact theory relates to his claims of discrimination based on race, color and national origin.¹⁷ Complainant has failed to come forward with any statistical evidence supporting a disparate impact theory.

Identical arguments were rejected by the Commission in *Balele v. DOT*, 99-0103-PC-ER, 11/15/2000. In that ruling, which granted respondent's motion for summary judgment, the Commission held:

Mr. Balele's contention that a claim of disparate impact could be established by citing to him as the sole adversely-affected individual is incorrect and contrary to the basic concept that such claims look at the impact on a protected group. His contention that a disparate impact claim can be established without statistical proof is also incorrect.

The Commission reaches the same conclusion in the present case.

Elsewhere in his written arguments, complainant states that respondent pre-selected the successful candidates based on their history of making campaign contributions. At page 10 of his brief, complainant writes:

In the last four years, there have evolved a practice of preselecting people who contribute money to Thompson's re-election. Complainant alleged the positions at issue were rigged to certain individuals and therefore complainant was denied the position long before he showed up for interview. Complainant alleged that the rigging practice is corruption, which had disparate impact on complainant because of his race, race and political affiliation.

Once again, complainant has failed to provide any basis whatsoever for his speculation/conclusion.¹⁸ There is no indication from the materials submitted in this matter

¹⁷ According to complainant's brief, page 22:

[T]he practice of forwarding only three names for equal appointment considerations for the three positions had disparate impact on Balele based on his race, color and national origin."

¹⁸ Complainant claims that in *Balele v. DOA et al.*, 99-0001-PC-ER, Mark Bugher, the Secretary of the Department of Administration, testified that "rigging positions for individuals as required by Thompson administration was common in state classified service." This characterization of Mr. Bugher's testimony was expressly rejected by the Commission in its decision in that matter:

that Mr. Thompson, Mr. Guenther and Mr. Probst had been selected for these positions before the interviews were even conducted. Ms. Czeshinski and Mr. Cross both filed affidavits that they had never heard of Mr. Probst prior to the interviews.¹⁹ Ms. Czeshinski's affidavit (dated September 13, 2000) also included the following language:

No candidate was asked during the interview or at any other time to identify their political party affiliation or to disclose whether or not they had contributed money to Governor Thompson's election campaigns. There is no policy or practice at the Department of Transportation of considering political contributions or affiliations in evaluating candidates for appointment to permanent classified civil service positions. The policy and practice of the Department of Transportation is to evaluate candidates on job related criteria.

These undisputed facts are completely inconsistent with complainant's speculation. There is no support for complainant's disparate impact theory.

Complainant refers to Secretary Bugher's testimony to the effect that he was frequently contacted by persons, such as Mr. Benner [the successful candidate for the particular vacancy at issue in that case], interested in positions with the State of Wisconsin. Complainant also references Secretary Bugher's statement that he was interested in finding a position for Mr. Benner. This testimony does not establish a "systemic pattern of pre-selection" as argued by complainant. (*Balele v. DOA et al.*, 99-0001, 0026-PC-ER, 8/28/00, p. 19, fn 5)

The only "evidence" provided by complainant that selection procedures in the state classified service are commonly "rigged" is complainant's own characterization of certain testimony by Mr. Bugher, and the Commission has already found complainant's characterization of that testimony to be inaccurate. Given these circumstances, it would be inappropriate to give any weight to the complainant's statement.

¹⁹ At page 28 of his brief, complainant contends that the reason the cut-off score was reduced from 125 to 118 for the deputy position was because Mr. Cross knew Mr. Probst and "wired in" the appointment of his friend. Complainant's contention is premised on respondent's admission (responding to complainant's Request for Admission No. 34) that "its hiring official for the positions at issue personally knew the successful candidates for the positions at issue." However, this admission was made on May 22, 2000, before the complainant amended his complaint to include the deputy director position. Respondent has only admitted that Mr. Cross knew Mr. Thompson and Mr. Guenther, the successful candidates for the director positions. In an affidavit dated November 15, 2000, Mr. Cross denied that he had ever met Mr. Probst prior to the interview in March of 2000.

E. Complainant's cross motion for summary judgment

The standard that complainant would have to meet in order for the Commission to grant his motion for summary judgment is described in II BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch. 33, p. 1464, fn. 224:

To obtain summary judgment in a typical disparate treatment case, therefore, a plaintiff would have to prove that there existed no genuine issue of material fact (1) that the defendant did indeed have a discriminatory motive, and (2) to defeat a mixed-motives defense, that the defendant, absent discrimination, would not have made the employment decision at issue. To obtain summary judgment in an adverse impact case, the plaintiff would have to prove that there existed no genuine issue of material fact (1) that the challenged selection device or criterion caused a significant adverse impact on the plaintiff's protected group, and (2) that the challenged selection device or criterion was not job related and consistent with business necessity.

Complainant has not met this burden. There is nothing to show that respondent was motivated by a discriminatory/retaliatory intent.

ORDER

Complainant's cross motion for summary judgment is denied, respondent's motion for summary judgment is granted and this complaint is dismissed.

Dated: October 23, 2001.

STATE PERSONNEL COMMISSION

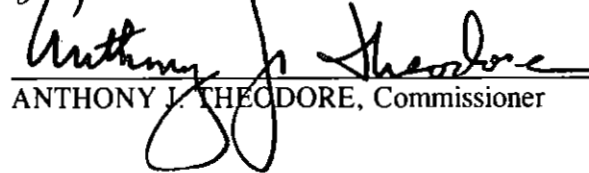


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner



ANTHONY J. THEODORE, 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