STATE OF WISCONSIN PERSONNEL COMMISSION

PASTORI M. BALELE
Complainant,

v.

Secretary, DEPARTMENT OF ADMINISTRATION,
Secretary, DEPARTMENT OF EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,
Respondents.

Case Nos. 00-0077-PC-ER, 00-0104-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

These consolidated cases are before the Commission following the issuance of a proposed decision pursuant to s. 227.46(2), Wis. Stats. Complainant has filed objections to the proposed decision. Most of these objections involve the same arguments that were made during the hearing stage. Having considered these objections, the Commission adopts the proposed decision and order with a few minor changes. The Commission also adds a section at the end of the opinion addressing complainant's motion for the recusal of the hearing examiner

These cases were consolidated for hearing. The issue for hearing in Case No. 00-0077-PC-ER is:

> Whether respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities when complainant was not certified for the position of Director, State Bureau of Procurement, in May of 2000. Ruling dated January 25, 2001.

The issue for hearing in Case No. 00-0104-PC-ER is:

Whether complainant was discriminated against on the basis of race, color, or national origin/ancestry, or retaliated against for engaging in protected fair employment activities in regard to the 10-day suspension without pay imposed by letter of August 3, 2000.[1] Conference report dated September 22, 2000.

FINDINGS OF FACT

1. A vacancy in the position of Director of the State Bureau of Procurement within the Department of Administration (DOA) was advertised on or around May 1, 2000. In this advertisement, applicants were advised how to obtain the special application materials and that completed application materials were due before 4:30 p.m. on May 12, 2000.

2. The application materials consisted primarily of a cover sheet requesting personal information about the applicant and an Objective Inventory Questionnaire (OIQ) which obtained information from the applicant about his or her work background.

3. The cover sheet of the application materials included a quote from §ER-PERS 6.10, Wis. Adm. Code, to the effect that the Administrator of the Division of Merit Recruitment and Selection (DMRS) may refuse to certify an applicant for a position who has made a false statement of any material fact in any part of the selection process or who practices, or attempts to practice, any deception or fraud in application, certification, examination, or in securing eligibility or appointment.

4. The cover sheet also included a section in which the applicant was to certify, through his or her signature, that he or she had read and acknowledged, among other things, the quoted provisions of §ER-PERS 6.10, Wis. Adm. Code; and that "my responses about my experience in the questionnaire are true to the best of my recollection; that I can document or demonstrate these experiences and performance levels if

[1] The suspension was based on complainant's misrepresentations regarding both the Bureau of Procurement position, which is identified as an issue in Case No. 00-0077-PC-ER, and another DOA position of Director, Performance Evaluation Office (PEO), which is not part of the issue in Case No. 00-0077-PC-ER. Therefore, the PEO selection process is only involved in Case No. 00-0104-PC-ER.

required to do so at some future date. Complainant signed this section of the cover sheet on April 26, 2000.

5. On April 24, 2000, complainant sent an email to DOA personnel stating that the OIQ was not job related and had an adverse impact on racial minorities because it defined the highest level of experience in terms of being the principal focus of the applicant's current job or of having more than five years of experience.

6. In the OIQ which he submitted with his other application materials on or around April 26, 2000, complainant modified the language of certain questions and apparently answered these questions based on the content of the modified questions. He also made notes reiterating his allegations that parts of the OIQ were not job related. Patricia Thysse, the DOA Human Resource Program Officer who was responsible for reviewing the OIQ's, brought this to the attention of Peter Olson, DOA Human Resources Director, and Mark Saunders, DOA Deputy Legal Counsel. These three decided that, consistent with the practice followed when applicants submitted incomplete applications, complainant should be contacted and afforded an opportunity to submit an OIQ in which he would respond to the unmodified questions. Ms. Thysse notified complainant of this opportunity by an email dated May 10, 2000, which included the following:

> I have just looked at your submittal for the above position and note that you did not follow the directions in answering the questions. You cannot just change the test to suit your needs. Please submit a new completed test answering the questions, using the response indicators as needed. Respondent's Exhibi t R-2, Attachment 2.

7 Complainant submitted a second OIQ before the application deadline which did not modify the language of any of the questions, but which contained the same answers to the questions as his first OIQ. Respondent's Exhibit R-2, Attachment 3.

8. During the relevant time period, complainant was employed by DOA as a Contract Specialist. The primary duties of his position were to review and process agency requests to purchase commodities or contractual services, and related activities.

In this position, complainant normally reported to the Procurement Services Section Chief, and did not supervise other staff.[2] Ms. Thysse, Mr Olson, and Mr. Saunders were familiar with the duties and responsibilities of complainant's position not only due to their personnel-related responsibilities for DOA, but also due to their roles in previous litigation of cases filed by complainant against DOA.

9. Section 2 of the OIQ included the following instructions:

> For each question in this section, circle the Response Criteria that best describes your highest level of experience.
>
> * * *
>
> D I have extensive working experience and a thorough knowledge. It is the principal focus of my current job.

10. Respondent concluded that complainant had answered the following questions falsely when he circled criterion D for each:

> **Section 1: Procurement Experience**
>
> Experience providing broad procurement oversight in a high-level management role equivalent to a deputy director or director of a state agency with offices located throughout the state.
>
> Experience directing a large non-governmental procurement operation (with multiple offices and more than 100 procurement-related positions).
>
> Experience directing a small to mid-size non-governmental procurement operation.
>
> Experience directing the purchase of services.
>
> Experience implementing electronic commerce solutions in procurement.
>
> **SECTION 2: Leadership and Management Skills and Experience**
>
> Experience leading strategic planning efforts.

[2] Complainant had the authority to assign work to Jennifer Allen, a clerical support person who provided support to several people in complainant's section. Complainant did not evaluate her performance or have any line authority over her, nor did his position description indicate any supervisory authority.

Experience with sophisticated or systematic approach to project management.

Experience with change management implementation.

Experience with recruitment and staffing for professional and technical talent.

Managed at least 15 professional, administrative, and technical staff through subordinate levels of supervision.

Experience managing a diverse work group with various backgrounds (cultural, technical, non-technical).

Managed staff using general management concepts such as delegation, motivation, and team building.

Experience developing performance standards and conducting evaluations for subordinate staff.

Experience establishing work plans and priorities for subordinate staff.

Experience handling employee grievance and/or disciplinary issues.

Experience testifying before boards, commissions or legislative bodies.

Experience writing complex analyses requiring research and review of opposing positions.

11. Complainant provided false information in his OIQ answers for the positions of Director, State Bureau of Procurement, as set forth above in respondent' s conclusions contained in the preceding finding.

12. Ms. Thysse discussed these issues with Mr. Olson and Mr Saunders. The three of them decided that, in view of the language of §ER-PERS 6.10, Wis. Adm. Code, quoted on the cover sheet of the application, and complainant' s certification that his responses to the OIQ were accurate, a letter should be sent to DMRS requesting that complainant be refused certification for the subject position.

13 Since Mr. Saunders had never prepared such a request before, he contacted Paul Hankes of the Public Service Commission, who had extensive human resource experience in state government, and David Vergeront, Chief Counsel, Department of Employment Relations, for advice on what the content of such a request should be.

14. Mr. Saunders did a draft of the request to DMRS during the week of May 15, 2000. Due to the press of business, this request was not finalized and sent until May 22, 2000. This request was directed to Robert Lavigna, Administrator of DMRS, and explained the basis for DOA's conclusion that complainant had misrepresented his level of work experience on the OIQ in contravention of §ER-PERS 6.10, Wis. Adm. Code.

15. DOA's request was granted by Alan Bell, Staffing Analyst, DMRS, who informed complainant of his action in a letter to complainant dated May 25, 2000.

16. On May 22, 2000, complainant submitted another OIQ for another position in DOA, Director of the Performance Evaluation Office (PEO).

16. The OIQ for the PEO position included the following:

> For each question in this section, circle the Response Criteria that best describes your highest level of experience. ...
>
> D I have extensive working experience and a thorough knowledge. It is the principal focus of my current job.

17. Respondent determined that complainant had answered the following questions falsely when he circled criterion "D" for each:

> **Section 1: Leadership and Management Skills and Experience**
>
> Managed staff using general management concepts such as delegation, motivation and team building.
>
> Experience developing performance standards and conducting evaluations for subordinate staff.
>
> Experience establishing work plans and priorities for subordinate staff.

Experience handling employee grievance and/or disciplinary issues.

Experience testifying before boards, commissions or legislative bodies.

Supervised a team of evaluation staff in completing complex and sensitive program, policy or organization performance evaluations.

Development and management of annual and biennial budgets.

Section 2: Performance Evaluation Concepts, Methods and Techniques

Tracked the progress of legislation, including the biennial budget, in order to assess the potential impact on programs and policies.

Applied knowledge of public policy or public administrative theory to analyze background documents with respect to legislative history and intent, executive branch goals, and performance expectations of a program, in order to reach a conclusion.

Completed an evaluation of complex administrative structures and procedures to provide the basis for recommendations designed to change or improve a program, policy or organization.

Developed criteria by which to judge the efficiency and effectiveness of a program, policy or organization.

Formulated final findings and conclusions about program, policy or organizational performance.

Developed performance indicators and benchmarks for major programs and initiatives.

Provided management consultation to reach consensus regarding implementation strategies that address recommendations made in an evaluation.

Compiled budget, revenue and expenditure information to provide a basis for analyzing the performance of a program; completed the fiscal analysis; and formulated findings, conclusions and recommendations about the financial performance of a program.

Completed logically, concisely, and with the appropriate tone, memoranda, reports and other written materials that required limited editing.

18. Complainant provided false information in his OIQ answers for the positions of Director, Performance Evaluation Office, as set forth above in respondent' s conclusions contained in the preceding finding.

19. On May 30, 2000, complainant filed a complaint (00-0077-PC-ER) alleging respondents discriminated against him in violation of the WFEA (Wisconsin Fair Employment Act, Subch. II, Ch. 111, Stats.) and the Whistleblower Law (Subch. III, ch. 230, Stats.) on the bases of race, color, national origin, and retaliation with regard to activities protected under the WFEA and the Whistleblower Law, in connection with the decision to remove him from the register and certification for the position of Director, Bureau of Procurement position. On August 9, 2000, complainant filed a similar complaint (00-0104-PC-ER) with regard to his two week suspension.

20 On May 31, 2000, Mr Saunders wrote another letter to DMRS recommending that complainant be removed from the PEO employment register and not be certified for that position because he had falsified his OIQ.

21. On June 2, 2000, DMRS notified complainant via letter that he would be removed from the PEO employment register, and that he would not be certified for the PEO director position because he had falsified his OIQ.

22. Respondent then decided to suspend complainant for two weeks without pay for providing false information in the two OIQ's, and advised complainant of this action in a letter dated August 3, 2000. This action was preceded by both an investigative and a pre-disciplinary hearing. No one involved in this decision consulted with the DOA EEO/AA officer prior to the imposition of discipline. DER EEO/AA Policy and Procedure Standards, Exhibit C59, p. 4, s. II.K., provides: "EEO/AA Officers should be consulted by supervisors/human resources directors when they are considering discipline or termination of racial/ethnic minorities." Complainant had never previously been formally disciplined.

23. On July 19, 2000, the Commission entered an order in 00-0077-PC-ER pursuant to its authority under s. 230.85(3)(c), Stats., granting complainant's motion for a preliminary injunction and preliminarily enjoining an appointment to the procurement position pending final resolution of the case.

24. On August 2, 2000, the Commission entered an order in 00-0077-PC-ER, following a hearing, dissolving the preliminary injunction entered July 19, 2000.

25. On October 18, 2000, the Commission entered an order in 00-0077-PC-ER denying respondents' motion under s. 230.85(3)(b), Stats., requesting placement of the Commission's August 2, 2000, ruling in complainant's personnel file and the award of attorney's fees Complainant's cross motion for damages was denied.

26. On December 1, 2000, the Commission entered an order in 00-0104-PC-ER dismissing the whistleblower portion of the complaint.

27 On January 25, 2001, the Commission entered an order in 00-0077-PC-ER establishing the scope of the issues for hearing.

28. On February 8, 2001, the Commission entered an order in 00-0104-PC-ER denying complainant's motion for substi tution of hearing examiner

29. On February 23, 2001, the Commission entered an order in 00-0104-PC-ER denying complainant's request for reconsideration of its December 1, 2000, order, concluding complainant's whistleblower claim was frivolous, granting respondents' request for $257.42 in attorney' s fees pursuant to s. 230.85(3)(b), Stats., and denying complainant's request for an award of costs.

30. On March 21, 2001, the Commission entered an order in 00-0077-PC-ER and 00-0104-PC-ER staying proceedings until complainant paid the aforementioned attorney's fees. Complainant subsequently paid the fees and these cases proceeded to hearing.

31. Complainant is black and of Tanzanian origin. He has filed numerous complaints with this Commission and actions in court alleging that respondents have discriminated against him in violation of the WFEA. All of the DOA agents who played substantive roles in the decisions to remove complainant from the subject regis-

ters and deny him certification, and to suspend him for two weeks, were aware of these facts.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities when complainant was not certified for the position of Director, State Bureau of Procurement, in May of 2000, and respondents discriminated against him on the basis of race, color, or national origin/ancestry, or retaliated against him for engaging in protected fair employment activities in regard to the 10-day suspension without pay imposed by letter of August 3, 2000.

3. Complainant has not sustained his burden of proof.

4. Respondents did not discriminate against complainant as alleged.

OPINION

Complainant advances both disparate treatment and disparate impact theories of liability.

In cases of this nature involving disparate treatment claims, 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). Where the case has been tried fully, it is unnecessary to

analyze whether a *prima facie* case has been established,[3] and the Commission should go ahead and address the question of pretext. *See United States Postal Service Board of Governors v. Aikens,* 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 403, 1983 U. S. LEXIS 141 (1983). Therefore, the Commission will proceed on the assumption that complainant has established *prima facie* cases of disparate treatment and go directly to the question of pretext.

With regard to the decisions to remove complainant from consideration for the two positions in question by denying him a place on the register or certification, there is no question respondents had legitimate reasons to have concluded that complainant had made false representations on his OIQ's and should be disqualified pursuant to ss. ER-MRS 6.10(5) and (7), Wis. Adm. Code. While complainant asserted that he had a supervisory role with regard to an employee who did some clerical support work for him, the record is clear that this employee performed clerical support tasks for other employees as well, and the extent of complainant' s "superv ision" was limited to assigning work to her and providing some limited direction to her with regard to doing the work. Complainant had no authority to hire, fire, do performance evaluations, etc. Furthermore, with regard to many of the questions complainant marked "D",[4] his answers were completely frivolous—e. g., that he managed "at least 15 professional, administrative and technical staff through subordinate levels of supervision."

Complainant contends that ss. ER-MRS 6.10(5) and (7), Wis. Adm. Code, are not applicable because his actions did not amount to fraud, citing cases involving common law claims. The Commission does not need to address the question of whether any of the principles involved in those cases apply to these rules, because the rules are

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[3] An exception to this approach is where there is a missing element of a *prima facie* case which is also an essential element for establishing liability. For example, if a person has not established that he is at least 40 years old and thus covered by the WFEA age discrimination provision, §111.33(1), Stats., it is not possible for that person to establish an age discrimination claim even if the employer's proffered reason for its action were pretextual, and there normally would be no rationale for analyzing the question of pretext.

[4] "I have extensive working experience and a thorough knowledge. It is the *principal* focus of my *current* job." (emphasis added)

worded in the alternative, and disqualification does not require a conclusion of fraudulent action.

Sections ER-MRS 6.10(5) and (7), Wis. Adm. Code, provide:

> [T]he administrator may refuse to examine or certify an applicant, or may remove an applicant from certification:
>
> * * *
>
> (5) Who has made a false statement of any material fact in any part of the selection process; [or][5]
>
> * * *
>
> (7) Who practices, or attempts to practice, any deception or fraud in his application, certification, examination, or in securing eligibility or appointment.

Laying to one side the question of whether complainant practiced, or attempted to practice, any fraud, as that term is used in the foregoing rule, there is no question but that he made false statements of material fact as part of the selection process, and was subject to disqualification under the alternative provisions of the rule. Complainant apparently argues that his answers on the OIQ' s were not "material." This is based on the fact that after respondent's agents reached the conclusion his first OIQ was specious because it grossly misstated his qualifications, they utilized what they knew about his duties and responsibilities and figured out what his score would be if he had answered honestly, and decided that he would have had a passing grade. However, the word "material" in s. ER-MRS 6.10(5) can not be interpreted as limited to false statements that make the difference between passing and failing a test. A material false statement is one that affects an applicant's score or standing. [6]

In a related vein, complainant argues that his misrepresentations "d id not make a difference. The reason is that Balele would have been certified anyway." Post-

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[5] The subsections of ER-MRS 6.10 are separated by the term " or" inserted after (9).

[6] An example of a misrepresentation that probably would not be material would be changing the date of graduation from college.

hearing brief, p. 28. It does not follow that complainant would have been certified because he would have passed the test using his actual qualifications. Passing a test places the applicant on the register, but does not guarantee certification. Certification is made from those on the register who are at the "head" of the register. Section 230.25(1), Stats. For similar reasons, complainant's contention that his misrepresentation of his credentials would not have a negative effect on other candidates is mistaken. He ranked first on the register when evaluated using his false answers on the OIQ. This would have had an effect on other applicants because it would have lowered their rank on the register and reduced their chances to be certified.

In conclusion, there is no indication respondents discriminated against complainant when it disqualified him from competition for the two positions in question.

Turning from the disqualification to the suspension, it must be kept in mind that this is a hearing on the question of whether respondents engaged in discrimination against complainant, and not on the issue of whether there was just cause for the suspension. The only question before the Commission here is whether respondent suspended complainant because of his protected statuses and his participation in activities protected by the WFEA. *See Russell v. DOC,* 95-0175-PC-ER, 4/24/97 In that case, the Commission went on as follows:

> This does not mean there is no place in the case for evidence concerning the disciplinary charges against complainant. If these charges could be shown to be relatively flimsy, this would be probative of pretext. *See, e. g., Paxton v. Aurora Health Care, Inc.*, LIRC, 10/21/93. A conclusion that there was no just cause for the discharge does not equate to a conclusion that respondent was illegally motivated. An employer's mistaken belief or inability to prevail at a hearing or arbitration is not necessarily inconsistent with a good faith belief, independent of complainant's arrest record, that discipline was warranted. However, the less support there is for the charges, the more likelihood there is of pretext. P. 5. (footnote omitted)

Complainant makes a number of arguments in support of his claim of pretext, many of which fall under the heading just discussed.[7]

He argues that he should not have been disciplined because he was on a break when he completed and submitted his second OIQ response regarding the Bureau of Procurement job and that his actions were not work-related. This argument is unpersuasive for a number of reasons. In the first place, whether he was on break or not has nothing to do with the question of whether he did something with respect to which there is just cause for discipline. Second, complainant was applying for jobs within DOA, and thus was misrepresenting his qualifications and providing false information to DOA management. Third, even if his activities were considered non-work-related, the concept of just cause for discipline encompasses more than performance-related activities. *See Safransky v. Personnel Board,* 62 Wis. 2d 464, 474, 215 N. W 2d 379 (1974):

> " one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works. The record here provides no basis for finding that the irregularities in appellant' s conduct have any such tendency. It must, however, also be true that conduct of a [civil service] employee, with tenure, in violation of important standards of good order can be so substantial, oft repeated, flagrant, or serious that his retention in service will undermine public confidence in the [civil] service." (citation omitted)

In this case, complainant has misrepresented his qualifications by falsely answering the questions on the OIQ's. As discussed above, this could have resulted in injury to other candidates for these positions by preventing them from being certified for consideration. Such misconduct is serious enough to satisfy the alternative basis for just cause for discipline under *Safransky.*

While it is not clear, it appears complainant is making the argument that his completion of the OIQ' s was in protest of what he perceived as non-job-related bench-

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[7] Complainant does not specifically address in this context his application for the PEO Director position, which, while not an issue with regard to disqualification, was part of the subject mat-

benchmarks being used in the selection process, and for that reason respondent should not have taken his actions so seriously. This argument would be more apt if respondent had imposed discipline with regard to the first OIQ he submitted for the Procurement Bureau position, because he had noted on that document his contention that some of the benchmarks were non-job-related and that "re moving the non-job related language I have answered accordingly." Respondent's Exhibit R2, Attachment 1, p. 5. However, rather than imposing discipline in connection with this application, respondent immediately contacted complainant via a May 10, 2000, email (Respondent's Exhibit R2, Attachment 2), that included the following: "You cannot just change the test to suit your needs. Please submit a new completed test answering the questions, using the response indicators as presented" (Respondent' s Exhibit R-2, attachment 2) prior to the May 12, 2000, deadline. Thus, respondent not only did not discipline complainant in connection with his first OIQ for the Procurement Director position, it gave him another opportunity to submit a timely application. However, the foregoing email makes it clear that another OIQ should be submitted "u sing the indicators as submitted." Instead, complainant submitted a second OIQ for this position, and subsequently also the PEO position, containing numerous false representations in response to questions, and without any indication that these applications were being submitted as some kind of protest, notwithstanding that he had signed the certification on the OIQ's that included the following language:

> **I certify that I have read and acknowledge that I understand the preceding excerpts from the Wisconsin Administrative Code, ER-PERS 6.10, and Wisconsin Statutes s. 230.43 which relate to [] falsification of information in any part of the selection process; and I certify that my responses about my experience in the questionnaire are true to the best of my recollection; that I can document or demonstrate these experiences and performance levels if required to do so at some future date.** Respondent's Exhibit 2, Attachment 3, p. 1.

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ter of the suspension. It is assumed that he is making essentially same arguments with regard to that position.

If respondent had not taken the action it did, but had simply run the applications through the computer, thus scoring the OIQ answers complainant submitted, complainant would have been ranked first on both registers. This would have insured that he would have been certified, and would have created the possibility that someone further down the list would have been denied certification due to his or her rank on the register having been lowered as a result of complainant's artificially raised rank.

Complainant also argues that respondent subjected him to double jeopardy by imposing two punishments for the same offense—removal from the registers and suspension. The double jeopardy clauses of the federal and state constitutions provide: "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb." U. S. CONST Amend. V; "no person for the same offense may be twice put in jeopardy of punishment." WIS. CONST Art. I, s. 8(1). In this case, complainant has not been subjected to *any* criminal penalty. The only authority he cites to support his double jeopardy contention is *State v. Kurzawa,* 180 Wis. 2d 502, 515, 509 N. W 2d 712 (1994). However, that case involved consecutive criminal prosecutions for what allegedly was the same criminal conduct, and does not provide authority for complainant's pro position.

Complainant also argues that respondent DOA' s agents who were responsible for the imposition of discipline did not consult with the agency EEO/AA officer prior to the imposition of that discipline. Complainant argues that this violated a mandatory provision in the DER EEO/AA Policy and Procedure Standards, Exhibit C59, p. 4, s. II.K. "EEO/AA Officers should be consulted by supervisors/human resources directors when they are considering discipline or termination of racial/ethnic minorities " There is no indication that this is a mandatory provision. Complainant asserts that "'shou ld' means mandatory when it appears in a policy." Complainant's Post-Hearing Brief, p. 22. Complainant apparently bases this contention on this statement in the preamble to this document: "it is the objective of DER/AA that all state agencies *shall* adhere to these Policy and Policy Standards." (emphasis added) However, the substantive provisions in this document include both the terms "should " and "shall."

Adherence to the standards would involve complying with whichever term is used—i. e., "should" or "shall." Also, not only does the segment of the standards quoted above use the term "sh ould," the preface of Section II states: "The activities included under this section represent EEO/AA initiatives that are recommended by the DER/DAA." That DOA did not follow a policy that is at least recommended by DER does provide some evidence of pretext, so complainant's contention that DOA failed to follow a mandatory requirement, which as stated is unsupported by the record, does give rise to some relevant pretext evidence.

Complainant also argues that respondent DOA ignored the advice of the DER attorney "that given the totality of evidence of Balele's behavior, the proper discipline would be a verbal or letter of reprimand only. (Vergeront testimony)" Complainant's post-hearing brief, p. 23. However, this was not Vergeront's testimony. He said:

> Q What did you tell Mr Saunders, specifically?
>
> A Only that I thought that termination would not be able to be sustained. I said the closer you get to, you know, down, move from termination down to, you know, having just a written reprimand, you have a better and better chance of having it sustained by an arbitrator. But, other than that, I didn't have anything over—It's just guidance, talking with, in generalities, nothing specific. T., II-45.
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> * * *
>
> Q Okay. What [did] you say?
>
> A I was not advising him on appropriate discipline. . We had general discussion of what might be appropriate under certain circumstances and, in particular what an arbitrator, what kind of discipline might be sustained by a, or upheld by an arbitrator. I made no recommendations. T., II-49.

The record does not support complainant' s contention that DOA refused to follow DER's recommendation on discipline.

In a somewhat related vein, complainant also argues that DOA denied him due process.[8] He argues that the decision makers were not impartial: "They were bent to punish Balele regardless of evidence. (Saunders testimony Vol. I-223, lines 1-10)." Complainant's Post-hearing brief, p. 25. The Commission does not find anything in this testimony (or in any other evidence) that supports this contention. Saunders testified as follows:

> Q So, actually, you said that it was my prerogative to come there [to the investigative hearing] to say whatever was, I didn't, I didn' t have to come there, is that right?
>
> A That's true. It's your option.
>
> Q Okay. So you, DOA would have proceeded with the, their decision even if I, I did not come to, to that, to the, to the invest, investigatory hearing, that's correct?
>
> A That's true. You had a due process right to be notified of your, of the work rule violations and allow, and be allowed an opportunity to be heard.

Another related argument is that DOA denied complainant due process because "it [did] not place on themselves the burden of proof." Complainant' s post-hearing brief, p. 25. Complainant cites no authority for the proposition that the employer must in some way assume the burden of proof as part of the pre-disciplinary process, and the Commission is aware of none. As Mr. Saunders testified, "there's really no burden. It's not a hearing like, for example, this type of forum. It's an opportunity for you to provide management with any defenses, additional information, whatever it is you feel that will explain or, or address the allegations." T., I-220.

Complainant also argues that DOA did not follow progressive discipline because this was complainant's first incident of formal discipline. Complainant cites the DOA supervisor's manual for the proposition that suspension should only be used when

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[8] Again, the issue of due process is not before the Commission *per se,* but a breach of due process would have some relevance to the question of pretext.

lesser discipline has not corrected the misconduct. The supervisor's manual actually provides:

> The degree of discipline must relate to the seriousness of the offense and to the employee's employment record. Minor offenses result in lesser discipline such as oral or written reprimands. Stronger discipline, such as suspension or discharge, is reserved for serious offenses *or* cases of continued problems where progressive discipline has failed to correct the situation. Complainant's Exhibit C-54, s. 003, p. 3. (emphasis added)

The suspension would not be considered inconsistent with this provision if the misconduct is considered serious. Complainant's misconduct was serious. As has been discussed above, after having been warned that he had to answer the OIQ as it was written, he submitted two OIQ's which flagrantly misrepresented his qualifications. Not only was this arguably illegal, as set forth in the instructions to applicants on the OIQ form (Respondent's Exhibit R-2, Attachment 3, p. 1), if the OIQ's had been processed and scored in the normal process used by DOA, complainant would have wound up first on the register with a score to which his actual qualifications did not entitle him. As discussed previously, this would have guaranteed him certification and possibly improperly denied another applicant certification. In conclusion on this point, respondent DOA obviously had a range of discipline it could have imposed. Arguments could be made that a less severe penalty would have been more appropriate, but the discipline imposed was not so severe under the circumstances to provide any real evidence of pretext.

Another argument advanced by complainant in support of his pretext case is that a white employee in DOC (Division of Corrections) who had been found to have cheated on an exam was removed from the register but was not disciplined. That case provides little, if any, evidence of pretext, because it involves a different agency and appointing authority.

In conclusion on the issue of pretext with regard to the suspension, there is some evidence of pretext in that respondent' s agents did not consult with the DOA AA/EEO officer prior to the imposition of discipline, contrary to the recommendation in the DER

AA/EEO Policy and Procedures Standards. On the other hand, as discussed above, complainant engaged in serious misconduct. He twice flagrantly misrepresented his qualifications after having been specifically advised that his first OIQ would not be considered, and it was necessary for him to submit an OIQ that adhered to the criteria as written. This was also despite explicit instructions on the form about state law prohibiting falsification, and having certified[9] that his answers were accurate. As discussed above, his actions were not only improper under state law and the instructions he had been given, they would have secured him a rank on the register to which he was not entitled, would have lowered the standing of the other candidates, and possibly could have cost someone certification and consideration for appointment. This was a serious matter, and complainant has not sustained his burden of proving that DOA's professed concerns about his behavior was a pretext to cover up a discriminatory motivation.

Next, the Commission will address complainant' s disparate impact theory. The disparate impact theory "is invoked to attack facially neutral policies which, although applied evenly, impact more heavily on a protected group." *Racine Unified School Dist. v. LIRC,* 164 Wis. 2d 567, 595, 476 N. W 2d 707 (Ct. App. 1991) (citation omitted) Complainant does not have a viable disparate impact claim because he has not identified any facially neutral policy, "w hich, although applied evenly, impact[s] more heavily on a protected group." *Id.* That case discusses the kind of statistical showing that has to be made to establish a *prima facie* case of disparate impact, *see* 164 Wis. at 596-97, and particularly at n. 16. Complainant has not provided any statistical showing whatsoever. He asserts that he can establish a disparate impact claim by showing "that a factor identified **directly** removed complainant from equal appointment considera-

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[9] **"I certify that I have read and acknowledge that I understand the preceding excerpts from the Wisconsin Administrative Code, ER-PERS 6.10, and Wisconsin Statutes s. 230.43 which relate to [] falsification of information in any part of the selection process; and I certify that my responses about my experience in the questionnaire are true to the best of my recollection; that I can document or demonstrate these experiences and performance levels if required to do so at some future date."** Respondent's Exhibit R-2, attachment 3, p. 1.

tion." Complainant's post-hearing brief, p. 34. In support, he cites a Commission decision, *Balele v. DHSS,* 91-0118-PC-ER, 4/30/93, and *Melendez v. Ill. Bell Tel. Co.* 79 F. 3d 661 (7th Cir. 1996).

The Commission case is completely inapposite, because there the respondent stipulated that its decision to limit recruitment to the Option 2 Career Executive category had a disparate impact on minorities, and the Commission did not address the requirements for a disparate impact claim.

Melendez likewise does not support complainant's disparate impact claim. Complainant is apparently relying on that case's discuss ion of the standing requirement of having been injured by the employer's action. Complainant appears to be confusing a requirement for standing to bring a disparate impact claim with the elements of a *prima facie* disparate impact claim *per se.* Standing is a separate subject, as *Melendez* indicates:

> [T]his challenge raises concerns broader than the establishment of a *prima facie* case. In order for an individual plaintiff to have constitutional *standing* to bring a Title VII action, he must show that he was *personally injured* by the defendant's alleged discrimination and that his injury will be redressed by the requested relief." 79 F. 3d at 668. (citations omitted) (emphasis added)

The court goes on to point out that a plaintiff who is unable to show that he or she was not hired because of a discriminatory employment practice " would have no standing to sue under Title VII, for he could not claim that he was injured, much less affected, by the defendant's use of an employment practice with an allegedly disparate impact. In contrast, where a plaintiff demonstrates that he was not hired or promoted as the direct result of a discriminatory hiring practice, he has suffered a personal injury within the meaning of Title VII." *Id.* (citation omitted) In conclusion on this issue, complainant's has not establishe d a disparate impact claim.

Finally, complainant made many arguments in his 56 pages of post-hearing briefs. The Commission has considered all of them, but has addressed only those it considers more significant. Also, complainant' s contention that respondent conceded

the validity of any argument it did not specifically address in its brief is incorrect. The case he cites in support of this proposition, *Charolais Breeding Ranches, Ltd., v. FPC Sec. Corp.*,90 Wis. 2d 97, 109, 279 N. W 2d 493 (Ct. App. 1979), applies to proceedings before the appellate courts, not to administrative proceedings like this.

COMPLAINANT'S M OTION TO DISQUALIFY HEARING EXAMINER

Following the issuance of the proposed decision, complainant argues that the hearing examiner, Commissioner Theodore, should be disqualified from participation in the case. This argument is summarized as follows:

> 1. The author, Commissioner Theodore, wrote the decision with vengeance against complainant after complainant threatened to report Theodore to the Supreme Court for deliberately exceeding the legal time to made a decisison.
>
> 2. And as a result of anger against Balele, Commissioner Theodore fraudulently misstated the facts and the conclusions of law.

The first ground involves complainant's contention that the proposed decision was overdue, Stats., and his threat he would report the examiner to the supreme court if he did not issue the proposed decision in ten days. The examiner replied to complainant that this provision did not apply to this case at all:

> With regard to your comments on getting a decision out in 90 days, the relevant statutory provision, s. 230.44(4)(f), Stats., applies only to actions under that section (230.44) and does not apply to discrimination cases such as the ones in question. Also, the commission's rules at s. PC 5.08, Wis. Adm. Code, provide that this 90 day period begins on the last day for filing objections to the proposed decision and order, or the date for the last written or oral argument, whichever is later. Therefore, there is no 90 day period running now.[10] (September 3, 2002, email)

There is no basis for a conclusion that this exchange in some way disqualified the examiner

[10] The commissioner also pointed out that the commission had been 40% understaffed.

Complainant also makes a number of personal attacks on the examiner, for example:

> Of course Commissioner Theodore would not dare write the truth else he would not be appointed as Chairperson of the Personnel Commission. The facts and evidence in the case were overwhelmingly in my favorite.
>
> * * *
>
> Just like drunks, the officials in the commission have gotten used to acting corruptly—in fact they enjoy acting corruptly just like the Moslems who banged the jets on September 11 or Hitler who killed thousands of Jews. Hitler did not believe it was wrong. Theodore and other prior commissioners did not believe that corruption is wrong. Complainant's ob jections p. 4.
>
> * * *
>
> There is God to punish Theodore. This white official is corrupt, grid [sic] and had a [sic] axe to grind against Balele. *Id.*, p. 10.
>
> * * *
>
> Was Mr. Theodore drunk when he wrote the proposed decision and order or was [sic] acting on his own regardless of the law! Complainant' s reply brief, p. 2.

Complainant's remarks speak for themselves. The Commission concludes there is no basis either to change the proposed decision or to disqualify Commissioner Theodore.

ORDER

Complainant's motion to disqualify the hearing examiner is denied. Complainant having failed to show that he was discriminated against as he alleged, these cases are dismissed.

Dated: December 9, 2002.

STATE PERSONNEL COMMISSION

ANTHONY J. THEODORE, Commissioner

KELLI S. THOMPSON, Commissioner

AJT:000077C+dec1.1

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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 oc-*

curred 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.