

PASTORI M. BALELE*Complainant,*

v.

**Secretary, DEPARTMENT OF NATURAL
RESOURCES,***Respondent.*

RULING ON MOTIONS

Case No. 00-0087-PC-ER

This is a complaint alleging discrimination on the bases of color, national origin or ancestry, and race, and retaliation for engaging in protected fair employment activities. On February 23, 2001, respondent filed a motion for summary judgment. On April 16, 2001, complainant filed a cross-motion for summary judgment. The parties were permitted to brief these motions and the schedule for doing so was completed on May 7, 2001. The following findings of fact are undisputed unless noted to the contrary, and are made solely for the purpose of resolving these motions.

FINDINGS OF FACT

1. In early 2000, the Current Opportunities Bulletin published an announcement for the vacant position of Director, Bureau of Integrated Science Services, Division of Enforcement and Science, Department of Natural Resources (DNR). This announcement stated as follows, in pertinent part:

JOB DUTIES: Plan, direct, administer and supervise activities of the Bureau of Integrated Science Services. The Bureau consists of nine sections, which serve as a focus for scientific research and scientific policy analysis crossing organizational lines and combine research specialists with environmental analysis generalists to provide analytical reports and policy review. This position assures the continuous quality improvement and consistency of all bureau endeavors. Facilitates integration of scientific thought and the application of scientific information in Department policy and programs. Facilitates adaptive management functions in the Department, and provide a centralized location for integration and coordination of several cross program functions. Oversees the Department-wide Quality Assurance Program, coordination of agency-wide laboratory services, administration of inter-program scientific services and centralized services

which support the application of scientific methodologies, data analysis, and risk assessment. Assure that participation on bureau standing teams, ad-hoc teams, and watershed and eco-region teams is managed to address the overall needs and objectives of the Department. KNOWLEDGE REQUIRED: Program and quality management principles used in developing strategic planning, organizing people and resources, budget development and control, setting annual work objectives, and monitoring program progress. Processes and the research procedures used to conduct scientific research supporting the implementation of integrated ecosystem management. Familiarity with the public and private sector scientific research community to enable the development of partnerships and funding sources for necessary research initiatives. Ability to manage conflicting objectives and negotiate agreement on highly contentious issues in a fast moving, frequently inconsistent operating environment.

2. Based on his application materials, complainant (black race and of Tanzania, Africa, national origin) was certified for this position.

3. Complainant was interviewed for this position on May 19, 2000, by Dave Meier (white race), Administrator of the Division of Enforcement and Science and supervisor of the position; and by Susan Sylvester (white race), Administrator of the Division of Water. Complainant was one of 16 candidates interviewed in this first round.

4. The interview questions and benchmarks, and interviewer notes and comments, are as follows, in relevant part:

Question 1. Based on the position description and the organization chart please summarize the parts of your training and work experience that will help you perform the duties of Director of the Bureau of Integrated Services. Specifically point out those parts of the position with regard to which you believe you possess special strengths or skills.

Rating the response: The candidate should address specific components of the Organization Chart and PD and “specifically” explain how their training and experience make them a strong candidate. Watch out for generalities, “I work harder than most.” Or the use of a list of adjectives without concrete supporting answers. Use follow up questions to probe their real understanding of the position. For example follow up with: Give us some specific examples of where you work harder than your peers.

A strong answer will be specific, relate to the PD and Organization Chart and provide the interviewer with a clear understanding of the motives and nature of the candidates’ skills.

Strong candidates will identify that:

1. They recognize that this bureau is complex and made up of disparate parts.
2. That they recognize that the position requires both a strong science background as well as a management background and they will demonstrate that they understand enough about the process of science to provide oversight and leadership to the research program.
3. They will immediately identify how managing the environmental fee program and laboratory certification and environmental review program requires a different set of skills. Outstanding candidates will explain how they will balance their skills with those of their subordinates since hardly anyone possesses an optimal skill set this wide ranging.
4. They will be able to articulate how the key components of the Environmental Analysis, Liaison, Science Support and Inventory and Monitoring Section need to be integrated to optimize their effectiveness.
5. Last they will recognize that one of the key functions of this position will be to maintain strong direct working relationships with the program bureaus.
6. DNR candidates should relate a much deeper understanding of the Bureau of Integrated Science Services and the issues relating to ATRI and the desire of other programs to continue to conduct their own research.

Meier notes of Balele response:

Experience as Deputy County Executive. Advised him what he could or could not do under the law. Tanzania.

Degree in Public Administration and Finance.

Sylvester notes of Balele response:

Integrated all Depts at County. County Exec. mgr county. Advised County Exec.

How to achieve objectives.

Must integrate entire Dept's programs at ISS.

Compared medical, forestry prog. at county to lead.

Sylvester comments relating to Balele response:

Didn't really answer questions. Gave response to generics. Very superficial responses. Only focused on work with Maswa County 1971-2.

Question 2. Please describe some of the weaknesses in your background relative to your ability to perform the duties of the Director of the Bureau of Integrated Science Services. Be specific regarding the parts of the posi-

tion that you believe may require you to obtain more training or gain more experience to bring you to the highest level of performance.

Rating the Response: If the candidate indicates that they have no or nearly no weaknesses relative to this position, treat that response as evasive. Probe with follow up questions such as "There must [be] some area in the PD that you feel less comfortable with performing." Or "Are there any areas of your present position where you would like to possess stronger skills?"

A strong candidate

1. Will identify how broad the skills set need (sic) for this position seems to be.
2. Will express concern that the PD and the Organization Chart do not provide them with all the information that they need to fully assess the full range of required skills.
3. Stronger candidates should notice the complicated supervisory relationships.
4. DNR candidates should relate to the reorganization and some of the issues relating to GMU's, conflicting views in Program Bureaus and the continued interest in program bureaus to manage their own research programs.

Meier notes of Balele response:
States has no shortcomings.

Sylvester notes of Balele response:
no short coming
make sure obj[ective] of each proj. is carried out

Question 3. What are your reasons for seeking this position and how does it fit into your career plans? What kind of work do you hope to be doing in five years? What are the achievements you hope to have made in five years that will represent your success in leading this bureau?

Rating the response:

The purpose of this question is to identify the vision of the candidates relative to leading a program bureau and to determine how their career goals fit with DNR's needs. Weaker candidates will give vague or cliché riddled answers filled with adjectives which you may like to hear, but do not provide you with an insight into their values and commitment to environmental and natural resource management. Use more probative follow up questions to gain a clearer understanding of the candidates depth of commitment to both the Department and the programs supported by this bureau.

1. Strong candidates will express clearly and concisely the key reasons that they are seeking this position and will demonstrate an understanding of what they will need to do to move this program forward.
2. Strong candidates will identify the important roles that WEPA, ATRI, Lab Certification and Analytical Services must play to assure that the Department makes science based decisions.
3. Stronger candidates will recognize that the Bureau's Section provide functional support that will assist all other units in implementing IEM.
4. Stronger DNR candidates will identify some of the issues that this Bureau faces relative to funding, priority setting and independence from programs as opportunities for them to be creative.

Meier notes of Balele response:

Will establish directives for the Bureau, with the help of others, as soon as I am hired.

I count on short-term objectives. Other Bureaus will need to be coordinated with and DHFS & DOT & other agencies

He would go by what the statute says, and would go in 1-year cycles.

Stresses Public Adm. & Finance

Gen'l Mgr. Of Cooperative

Sylvester notes of Balele response:

Est. objectives for Bureau with help of other people

Break into short-term, can't do 5 yr obj

Short term, one year cycle

Anyone can come to us to ask questions about what will contribute to their Bureau to address their problems

Make concise reports in 1 yr—not 5 yr

Now he coordinates most agencies

Works by committee to get a solution

Teaches (5 yrs) purchasing agents for State of Wisconsin

Sylvester comments relating to Balele response:

Did not answer this question

Question 4. Recent discussion in the scientific literature brings into question the ability of agency based science programs to conduct sound scientific research since agency scientists may be put under some constraint to support stated agency management policies. What is your opinion on this subject? Have you had direct experience where agency administrators shaped the range of research options or results that could be published? How would you prevent undue managerial influence from affecting the scientific quality of your investigations, assessments and certification?

What would you do if you were faced with the choice of compromising the scientific validity of your program or losing financial support for it?

Rating the response:

There seems to be growing concern by the public and some DNR employees that upper and mid-level managers are compromising the independence of scientific decision-makers. The purpose of this question is to probe each candidate to determine their opinion on this issue and to determine how that opinion will affect their ability to manage the bureau.

1. Strong candidates will recognize that there is always some tension resulting from new scientific findings that disagree with management policy.
2. Strong candidates will explain that it is critical to separate advocacy of initial or incomplete vs. findings validated by peer reviews publication.
3. Strong candidates will identify the need for continuous communication between science managers and operational program managers so that potential changes in policy can be contemplated prior to final scientific verification of research or environmental assessment decisions.

Weaker candidates will provide rote and superficial answers and miss the fact that management policy is usually subject to a thorough public dialogue, which discloses these differences in "bright daylight."

Meier notes of Balele response:

Scientists has its own disciplines—must focus on the issues.

Discusses ground water vs. hazardous waste

Will not allow people to go astray from the proper focus (taking a word used by me in passing relative to last question).

Says he has published in his prior position as Deputy County Exec.

Has never faced managerial influence on research.

Was asked by management (federal) to give a \$5,000,000 recommendation instead of his own \$3,000,000 conclusion. Truth cannot be compromised.

Sylvester notes of Balele response:

Scientists design res[earch] to respond to question

Focus intent so they don't get astray

Pastori has published reports

The truth is what is important and what he's after

These are my findings—here it is

Don't compromise truth or you get caught

Dave asked about political influence in DOA contract approval—doesn't see this at DOA

Sylvester comments relating to Balele response:
Did not know what I mean in this question.

Question 5. The role of the Bureau of Integrated Science Services is broad, complex and includes many sub-programs. (a) What is your vision as to how the Bureau can best contribute to the goal of providing integrated ecosystem management? (b) How would you integrate the Bureau's sub-programs, motivate staff and maximize the effectiveness of the Bureau in supporting resource protection?

Meier notes of Balele response:

(a) This is a place where people can come and shop.

Internals and externals.

Place for finding all of the findings, all of the reports.

This Bureau will have all the resources for the agency.

I will make sure that each Division has a reciprocal in the Bureau.

(b) If we are going to protect our findings, open records law.

Extremely difficult to put a reduction on public use of our research.

Research is not done just for fun. It's done for a public purpose.

My research for Master's thesis predicted what eventually came true in Tanzania.

Meier comments relating to Balele response:
Shallow and evasive on this question.

Sylvester notes of Balele response:

No supervisory ability in current position

3 yrs ago had some staff reporting to him before reorg of DOA

Everything comes together in this Bureau

Be contact place

Influence to other Div

Rather than each Div asking the Fed gov for funding—this Bur. Could bring it all together & apply for funds. Have a reciprocal position in each Bureau/Div

Open Records—if we are going to protect our findings, then a private sector indiv. Could capitalize on it. Put on Patent on our research.

Sylvester comments on Balele response:
Didn't answer this question [referring to (b)]

5. Meier and Sylvester selected five candidates to proceed to the second round of interviews. Complainant was not one of these five final candidates. At least some of these candidates are white. The successful candidate is white.

6. In an affidavit signed on February 19, 2001, Meier stated that he determined that complainant would not be allowed to proceed to the next round of interviews by virtue of the shallow and unresponsive quality and quantity of his replies to interview questions; that Meier had neither met nor known complainant prior to his interview of him; that Meier was not aware of complainant's prior complaints and claims filed against respondent; and that no one at the Department of Natural Resources had directed him not to hire complainant because of his national origin/ancestry, race, or color, or to retaliate against him based on his prior fair employment activities.

7. In an affidavit signed on February 19, 2001, Sylvester stated that she determined that complainant would not be allowed to proceed to the next round of interviews by virtue of the shallow and unresponsive quality and quantity of his replies to interview questions; that Sylvester had neither met nor known complainant prior to her interview of him; that Sylvester was not aware of complainant's prior complaints and claims filed against respondent; and that no one at the Department of Natural Resources (DNR) had directed her not to hire complainant because of his national origin/ancestry, race, or color, or to retaliate against him based on his prior fair employment activities.

8. In an affidavit signed on February 20, 2001, George Meyer, Secretary of the DNR, stated that he never heard Ron Semman or any other DNR employee state at a Wisconsin Association of Black State Employees (WABSE) meeting that he was opposed to hiring black people as Bureau Directors or Section Chiefs because black people did not have the expertise for the DNR's specialized bureaus or sections; that he never communicated to any DNR manager, supervisor, or appointing authority not to hire black people for any position within the agency; and that at no time prior to, during or after the interviews and/or selection process for the position of Director of the Bureau of Integrated Science Services did he direct any Department employee not to hire Mr. Balele for any reason whatsoever, including but not limited to his national origin/ancestry, race, color or retaliate against him because of his prior fair employment activities.

9. In an affidavit signed February 21, 2001, Julie Graziano, DNR Affirmative Action Officer, stated that, at no time during any discussion with complainant did she state “that she had been prevented from enforcing equal opportunity of employment for blacks in the Department by Martinelli in concert with the Division Administrators (Bazzell) with the approval of Meyer who got advice from Henneger;” or “that if the complainant wanted blacks to have equal opportunity of employment as whites in DNR career executive positions, he should further lobby with the State through the DER Secretary, DER Affirmative Action and DNR’s Administrator.”

10. The “Bazzell” reference in ¶9 is to Darrell Bazzell, who served as DNR’s Deputy Secretary at all times relevant to this matter, and who is black.

11. Division Administrator Meier had effective hiring authority for the subject position.

12. The information provided by complainant shows that, since 1985, he has 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.

13. In an affidavit he signed on April 16, 2001, complainant, in referencing his interviews for the subject position and other positions, states that, “[D]uring the interviews I had always noticed aloofness and anger from interviewers.” and, “Knowing that I had done well at interviews, I had always expected to be selected and appointed for any of the 8 positions.” (¶¶ 2 and 3) In this affidavit, complainant also states, “DNR secretary and his advisers believe diversity is having all managers white people.” (¶ 4)

14. In this affidavit, complainant states that he heard then-Deputy Secretary Ron Semman state at a Wisconsin Association of Black State Employees (WABSE) meeting that he was “opposed to hiring black people as Bureau Directors or Section Chiefs because black people did not have the expertise for the DNR’s specialized bureaus or sections.” The WABSE meeting at which this statement was allegedly made occurred several years ago.

15. In this affidavit, complainant states that Julie Graziano, DNR Affirmative Action Officer, stated in a conversation with him four to five years ago “that Martinelli had prevented her from enforcing equal opportunity of employment for Blacks in DNR in concert with the division Administrators with the approval of George Meyer who got advice from Attorney Richard Henneger.” (§10)

16. In this affidavit, complainant states, in regard to his interview for the subject position, that “Meier asked me if somebody in DNR had ‘briefed’ showed me to respond to the questions, Maier wondered how I knew the answers to the questions .Looking at his face Meier was very impressed about my interview.”

17. Complainant has filed previous equal rights complaints against respondent.

18. Since the fall of 1993, respondent has had the following affirmative action hiring policy:

[R]egarding the interview process, it is expected that all DNR managers and supervisors shall diversify all their interview panels. Within this context, diversity must include female and minority representation on every panel. Panels may vary from two to four individuals and need not be limited to supervisors or bound by pay range considerations.

In the event you cannot meet this requirement you will need a waiver from your District Director or Division Administrator only. District Directors and Division Administrators are responsible for monitoring the use of waivers.

19. In support of his disparate impact claim, complainant offered applicant flow data for respondent’s 1998 hires. This data shows as follows for administrator/senior executive positions:

Number certified for the positions 125

Number of racial minorities certified	5
Number of positions filled	10
Number of racial minorities appointed	0
Availability factor for racial minorities	7.5%

20. As of June 30, 2000, of respondent's 202 career executives, 6 or 3% identify themselves as members of a racial minority.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The moving party on these motions has the burden to show that there are no genuine issues of material fact, and that said party is entitled as a matter of law to judgment in its favor.
3. Respondent has satisfied its burden.
4. Complainant has not satisfied his burden.
5. Respondent did not discriminate against complainant on the basis of color, race, or national origin or ancestry, and did not retaliate against complainant for engaging in protected fair employment activities, in connection with its decision not to hire complainant for the position of Director, Bureau of Integrated Science Services.
6. This complaint of discrimination must be dismissed.

OPINION

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." 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).

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). *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 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. UW*, 91-0002-PC-ER, 6/11/92, which addressed the need to handle summary judgment issues with particular care due to the nature of the administrative process.

The Commission recently issued a ruling in *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, which contained an in-depth discussion of the use of summary judgment motions in this forum. The five factors identified as minimum considerations, *Id.*, pp. 18-20, are summarized below:

1. *Whether the factual issues raised by the motion are inherently more or less susceptible to evaluation on a dispositive motion.* Subjective intent is typically difficult to resolve without a hearing, whereas legal issues based on undisputed or historical facts typically could be resolved without the need for a hearing.

2. *Whether a particular complainant could be expected to have difficulty responding to a dispositive motion.* An unrepresented complainant unfamiliar with the process in this forum should not be expected to know the law and procedures as well as a complainant either represented by counsel or appearing *pro se* but with extensive experience litigating in this forum.

3. *Whether the complainant could be expected to encounter difficulty obtaining the evidence needed to oppose the motion.* An unrepresented complainant who either has had no opportunity for discovery or who could not be expected to use the discovery process, is unable to respond effectively to any assertion by respondent for which the facts and related documents are solely in respondent's possession.

4. *Whether an investigation has been requested and completed.*

5. *Whether the complainant has engaged in an extensive pattern of repetitive and/or predominately frivolous litigation.* If this situation exists it suggests that use of a summary procedure to evaluate his/her claims is warranted before requiring the expenditure of resources required for hearing.

In applying these factors, 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-PC-ER, 4/19/00.¹ 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

¹ 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.

discovery he conducted here, but also in the many cases he has pursued before this Commission. 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.²

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. 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.

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.³ It should be

² 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).

³ 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.

noted that the same conclusion was reached in regard to this complainant in *Balele v. DOT*, 00-0044-PC-ER, 10/23/01.

Disparate Treatment

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

Here, it is undisputed that complainant is black and of Tanzanian national origin; that he has engaged in protected fair employment activities by filing previous equal rights complaints with the Commission against respondent; that he is presumed to be minimally qualified for the subject position since he was a certified candidate; that he suffered an adverse employment action by not advancing to the final round of interviews, and that an inference of discrimination is created by the fact that white candidates advanced to the final round of interviews and a white candidate was ultimately hired. It is concluded as a result that complainant succeeded in demonstrating a prima facie case of race/color discrimination based on these undisputed facts.

Respondent explains that it did not advance complainant to the final round of interviews because he did not perform well enough on the initial interview. This reason is legitimate and non-discriminatory on its face.

The focus of the analysis now shifts to that of pretext. In this regard, complainant asserts that he gave excellent answers to the interview questions, and that Meier was so impressed that he asked complainant to identify the employee at the DNR who had given him the answers. Respondent, however, asserts that complainant's answers to the interview questions were inadequate to justify advancing him to the final round of interviews. This certainly presents a factual dispute, but the relevant question is whether this presents a genuine issue of material fact.

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. *See, 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). In addition, it is insufficient for complainant to rely on mere allegations or denials in opposing the motion here. *See, 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.") Moreover, the Commission is not required to accept unreasonable inferences from the evidentiary materials submitted by the parties. *See, Maynard v. Port Publications, Inc.*, 98 Wis.2d 55, 297 N.W 2d 500 (1980) (Summary judgment is appropriate when no material facts are in dispute and inferences that may reasonably be drawn from those facts are not doubtful and lead to one conclusion.)

Complainant merely alleges here that his interview performance was outstanding and sufficient, as a result, to justify advancing him to the final round of interviews. He offers few specifics regarding how his interview responses satisfied the relevant benchmarks or how his recent relevant work experience dovetailed with the duties and responsibilities of the subject position. Moreover, complainant has failed to specifically explain how Meier's or Sylvester's notes or comments did not accurately reflect what occurred at his interview, other than to offer inconsistent statements to the effect that the interviewers were "aloof and angry" but that Meier appeared interested in and impressed with what complainant was saying. Complainant has failed, therefore, to establish that there is a genuine dispute of material fact. The only reasonable inference a trier of fact could draw from the evidentiary material submitted by the parties is that complainant's interview responses did not satisfy the established benchmarks, the validity and job-relatedness of which complainant has not challenged, and did not, as a result, justify his advancement to the final round of interviews.

Complainant also argues that pretext is demonstrated by the fact that respondent failed to follow its own requirement that interview panels be balanced on the basis of both race and gender. Respondent has such a requirement but its policy provides that “in the event you can not meet this requirement,” (Finding of Fact 18), it can be waived by a District Director or Division Administrator, and both Meier and Sylvester were Division Administrators at the time the subject interview took place. The only reasonable inference that can be drawn from these facts is that one or both of them waived this requirement. Complainant has not pointed to any evidence that this requirement was not waived. Under these circumstances, a trier of fact could not reasonably find that respondent violated its affirmative action policy in this regard.

Although the DNR policy provides for waiver of a racially balanced panel, respondent’s failure to have assembled a racially balanced panel could itself be considered some evidence of pretext, notwithstanding it did not constitute a violation of respondent’s affirmative action policy. However, it is not enough to create a genuine issue of disputed fact.

The position in question in this case is that of Director, Bureau of Integrated Science Services. The required knowledge for this position includes: “Processes and the research procedures used to conduct scientific research supporting the implementation of integrated ecosystem management. Familiarity with the public and private sector scientific research community to enable the development of partnerships and funding sources for necessary research initiatives.” (Finding of Fact 1). Although this job requires knowledge of administrative and management principles, it is not a generalist position. Complainant may be considered nominally qualified for this position in the sense that he was certified for further consideration following the submission of his application materials. However, at the stage the panel made its evaluation, the evaluation was based on how the panel perceived his performance responding to pre-established, job-related questions. Complainant did not adduce any evidence that he had anything resembling the kind of scientific background that would have provided the skills, knowledges, and abilities to have been considered seriously for this position. In the Commission’s opinion, no reasonable fact-finder could conclude on this record, notwithstanding the absence of a

balanced panel, that respondent did not hire complainant for this job because of his color, national origin or ancestry, or race, or in retaliation because of his previous complaints against DNR.

The *McDonnell Douglas* analytical framework applies to indirect evidence of discrimination. Complainant also argues that there is direct evidence of discrimination here, i.e., Semman's statements at the WABSE meeting, Secretary Meyer's failure to react to these statements, and Graziano's discussion with complainant about her inability to enforce affirmative action requirements at the DNR. The pivotal point in this regard is that the available information does not supply any direct link between Semmann, Secretary Meyer, and Graziano, and the rating of complainant's interview by Meier and Sylvester. *See, Balele v. DNR, 98-0046-PC-ER, 1/25/00.*

It is concluded, in regard to the disparate treatment analysis, that there is no genuine dispute of material fact and that, based on the above analysis, respondent is entitled to judgment as a matter of law.

Retaliation

Many of the elements of a retaliation analysis parallel those of the disparate treatment analysis as set forth above. One of the key questions on such an analysis is whether the alleged retaliators were aware of complainant's protected activity. There is a factual dispute in this regard, but it is superficial. Respondent offers the affidavits of Meier and Sylvester, both of whom deny that they were aware, at the time of the subject interviews, that complainant had filed previous equal rights complaints against respondent. Complainant counters with his assertion that, because one of respondent's staff attorneys, Richard Henneger, is, "[a]t all times. . .consulted by hiring officials whenever protected group members are denied underutilized positions in DNR," and, because Henneger is aware of complainant's previous filings, then Meier and Sylvester had to be aware, through Henneger, of complainant's previous filings. First of all, complainant's conclusion that Meier and Sylvester necessarily had contact with Henneger is not based on first-hand knowledge but instead on unsubstantiated conjecture. The Commission is not required within the context of a summary judgment analysis to accept as fact the unsubstantiated conjecture of a party. Second, even accepting complainant's assertion that

Henneger is always consulted by hiring officials when a protected group member is denied a position, this contact would not have occurred until after complainant was interviewed and rejected by Meier and Sylvester. This could not have affected Meier's and Sylvester's interview impressions, as memorialized in their notes of complainant's interview, which support and were the basis for their conclusion that complainant's interview was inadequate. As a result, it is concluded that on the basis of the information available here, a reasonable fact-finder could not find that Meier and Sylvester were aware of complainant's earlier filings, and that complainant failed, therefore, to make out a prima facie case of retaliation.

Even if it could be concluded that a genuine dispute of fact existed in this regard, this would not affect the ruling on respondent's motion. Here, even if it were found that Meier and Sylvester were aware of complainant's earlier filings and that a prima facie case of retaliation had been established, the remainder of the retaliation analysis would parallel that for the disparate treatment analysis, above. As a result, the dispute relating to Meier's and Sylvester's knowledge of complainant's earlier filings would not disturb the conclusions of the remainder of the analysis which, as discussed above, support the grant of summary judgment for the respondent.

Disparate Impact

There is no factual dispute relating to this aspect of complainant's case. The question then, within the context of the subject summary judgment motion, is whether, based on the undisputed facts, respondent is entitled to judgment as a matter of law.

The test to be applied in a disparate impact analysis is whether a facially neutral employment policy had a significantly disproportionate effect on the opportunity for racial minorities to compete for the position. *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 1642 (7th Cir. 1984); *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, 4/19/00.

Complainant argues that, within the context of the subject recruitment, because he, as a minority candidate, was screened out of the process based on the results of the first interview, respondent's use of an interview as a screening device had a disparate impact on racial minorities. However, by advancing this argument, complainant is offering himself as a group consisting of one member. The Commission has decided, in previous

cases involving this same complainant, that a group consisting of one member is not sufficient to sustain a finding of disparate impact. *See, e.g., Balele v. UW Madison, 99-0169-PC-ER, 2/26/01.*

Complainant offers the statistical evidence set forth in ¶¶ 19 and 20, above, in support of his disparate impact argument. However, those set forth in ¶20 (as of June 30, 2000, of respondent's 202 career executives, 6 or 3% identify themselves as members of a racial minority), don't permit an analysis of the number of opportunities respondent had to appoint a member of a racial minority and cannot, therefore, sustain a finding of disparate impact.

The statistics stated in ¶19, above, relate to 10 recruitments carried out by respondent in 1998. Not only is what occurred in 1998 irrelevant to the time period at issue here, but the sample size of 10 is too small for the development of reliable statistical conclusions. *See, Balele v. DOT, 98-0104-PC-ER, 9/29/99.*

If the statistics offered by complainant had supported a conclusion that respondent's hiring practice had a substantially disproportionate impact on minority candidates, the burden would shift to respondent to demonstrate a sound business rationale for the practice. Respondent has made this demonstration by showing that the interview questions were reasonably job-related, and that the interview process is a universally recognized and utilized screening/selection tool. Complainant's suggestion/ argument that a random drawing of candidates' names is a superior screening/selection technique is not only offered without any supporting authority but is ludicrous on its face. Complainant bases this suggestion/argument on the fact that appointing authorities are not required to hire the candidate who achieves the highest interview score. As explained to complainant, however, in *Balele v. UW-Madison, 99-0169-PC-ER, 2/26/01*, this fact does not stand for the proposition, as complainant advances here, that performance on interviews is meaningless in the context of the hiring process.

There is no genuine dispute of material fact in regard to the disparate impact argument and, based on the above analysis, respondent is entitled to judgment in this regard as a matter of law.

Complainant's Cross-Motion

Although respondent has raised a question as to the timeliness of complainant's filing of this cross-motion, taking into account the parties' agreement during the course of this litigation as to the filing of motions, it is not necessary to address that question in view of the fact that complainant has offered nothing in his cross-motion that was not resolved above.

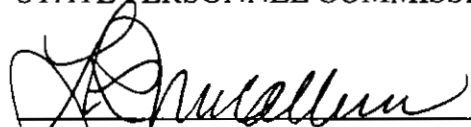
Finally, it should be noted that complainant advanced many arguments and assertions here, but only those sufficiently material were addressed in this decision.

ORDER

Respondent's motion for summary judgment is granted, complainant's cross-motion for summary judgment is denied, and this complaint is dismissed.

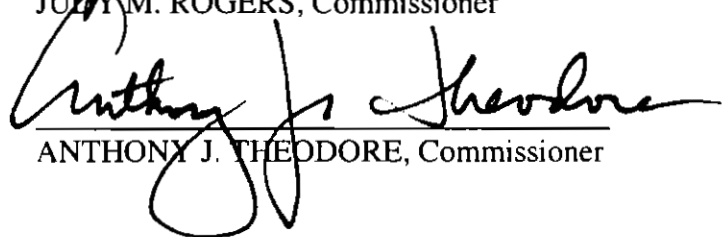
Dated: November 19, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:000087Cru1.2


JUDY M. ROGERS, Commissioner


ANTHONY J. THEODORE, Commissioner

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