

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

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

**RULING ON CROSS
MOTIONS FOR
SUMMARY JUDGMENT**

Case No. 00-0088-PC-ER

Respondent filed a motion for summary judgment and complainant filed a cross motion for summary judgment. The Commission received the final brief on January 22, 2001.

The parties agreed to the following statement of the hearing issue (see Conference Report dated September 25, 2000):

Whether respondent discriminated against complainant based on color, race, and national origin/ancestry or in retaliation for engaging in activities protected under the FEA with respect to the following hiring decision: DOT Program Chief – Payro II and Expenditure Accounting Section.

It is understood that Mr. Balele intends to pursue both a disparate impact theory of discrimination and a disparate treatment theory as part of the above-noted statement of the hearing issue.

FINDINGS OF FACT

1. In the spring of 2000, the Division of Business Management in the Department of Transportation (DOT) combined the Payroll Section and the Expenditure Accounting Section in the Bureau of Financial Services. DOT then proceeded to fill the Chief position for the combined section.

2. The vacant position was classified as a DOT Program Chief, which is in State Job Group 003 entitled “Administrators-Others.” This classification is included in the Career Executive Program at DOT

3. As of April 2, 2000, the Department of Employment Relations (DER) determined that State Job Group 003 is not underutilized for minorities or women statewide or at DOT. DER made this determination based on an availability factor of 7.7% for qualified minorities in the relevant labor market.

4. DOT announced the vacant Chief position in the Current Opportunities Bulletin published on April 17, 2000. The announcement included the following relevant information:

JOB DUTIES: Manage staff in the Payroll & Expenditure Accounting Section who have responsibility for the accounts payable, encumbrance, pre-audit, and payroll and benefits functions for the Department. Develop policies, procedures, and audit sample techniques for the pre-audit of accounts payable and encumbrance transactions. Develop and maintain complex automated and manual systems for the processing of accounts payable and encumbrance transactions and for payroll and benefits processing functions. Responsible for the functional design, maintenance, and operation of accounts payable, encumbrance subsystems, payroll accounting and tax functions and the Transportation Employees Automated Management System.

KNOWLEDGE, SKILLS AND ABILITIES: 1) Management principles and practices including strategic planning and resource allocation; 2) Complex automated and manual systems; 3) Personnel management including employee development techniques and practices required to organize work, assign, training and motivate staff; 4) Ability to interpret complex materials such as statutes, compensation plans and labor agreements, and 5) Excellent communication skills including the ability to identify the need for and ability to make presentations to diverse customers and vendors to achieve business needs.

5. Four options exist for recruiting applicants to fill career executive positions. Option 1 allows current DOT employees with career executive status to apply. Option 2 allows current state employees with career executive status in agencies other than DOT to apply. Option 3 allows current state employees without career executive status to apply. Option 4 allows individuals who are not current state employees to apply. All four options were used here.

6. Complainant competed for the position under the third option noted in the prior paragraph. He is from Tanzania, Africa. He is black. He has filed at least one prior discrimination case against respondent.

7 Complainant was the only racial minority certified for interview. The certified candidates are noted below along with the recruitment option under which they applied.

<u>Option 2:</u>	Susan Losen Nancy Foss ¹	<u>Option 4:</u>	Margaret Erickson David Jensen
<u>Option 3:</u>	Complainant David Miller Lynette Pauls Carol Phillips Mary Rondou		

8. The interview panel included Cynthia Morehouse (white), Director of DOT's Bureau of Financial Services (direct supervisor of the vacant position). Tracy Han (Asian American born in Korea), Supervisor of DOT's Purchasing Unit in the same bureau, also was a member of the panel.

9. Ms. Morehouse wrote the interview questions. Prior to the interviews, she met with Ms. Han to review the questions and to establish benchmarks for evaluating answers. Ms. Morehouse reminded Ms. Han that DOT is committed to non-discrimination and to equal employment opportunity and emphasized that candidates were to be evaluated only on job-related criteria. She explained that the purpose of the panel was to identify a small group of the best-qualified candidates from which Ms. Morehouse would make her appointment.

10. The benchmarks established by the interview panel are described in this paragraph. An "ideal" candidate would have substantial experience both in payroll and expenditure accounting, substantial supervisory and managerial experience, strong communication skills and a management style compatible with DOT's emphasis on customer service. A "good" candidate would have substantial work experience in either payroll or expenditure accounting and would have had substantial supervisory and managerial experience, strong communication skills and a customer service oriented management style. An "average to poor" candidate would have some type of other financial related work experience or no financial work experience, some or no supervisory and management experience, and average communi-

¹ Ms. Foss withdrew her candidacy prior to the interviews.

cation and management skills. The established benchmarks were related to the duties of the position.

11. Each interview lasted about an hour. Each candidate was asked the same questions. Each panel member independently evaluated each candidate's answers against the pre-established benchmarks and the candidate's work history. The panel discussed each candidate and reached a consensus on what rating to award each candidate.

12. At the end of each interview, Ms. Morehouse asked each candidate for a list of references and said the candidate could contact her if the candidate had additional questions about the position or wanted her to consider additional information. She also indicated when the hiring decision would be made and how each candidate would be notified of the hiring decision. Ms. Morehouse did not say to complainant (either directly or indirectly) that she was so impressed that she wanted to offer him the position.

13. After all interviews were completed, the panel determined that Ms. Pauls and Ms. Erickson were the best qualified (with a "good" rating). The other candidates were rated as "average to poor" and were not considered further.

14. Neither panel member knew that complainant had filed discrimination complaints with the Personnel Commission or that he had otherwise engaged in an activity protected under the Fair Employment Act (FEA).

15. Both panel members rated complainant as "average" because his recent work experience was not in payroll or expenditure accounting, his supervisory and managerial experience occurred a substantial number of years in the past, his responses to interview questions were not well organized or focused and he frequently did not directly answer the interview question asked.

16. The resume complainant submitted for this position includes the following information:

Work History

September 1985 to present: **Contractual Services Management Assistant, State Bureau of Procurement, Department of Administration (DOA)**: Participates in the development of administrative policy studies for the State Bureau of Procurement; ensures that all contractual purchasing requests from state

agencies and the Bureau of Procurement meet federal and state laws, policies and procedures; acts as contact for purchasing agents, program directors and the public on state contractual service matters; for five years was trainer for purchasing agents and contract administrators; manages and administers statewide contracts for courts (sic) reporters and clipping services; works closely with EEO/AA Compliance Officer to ensure vendors do not discriminate against people on impermissible basis; for four years was a back-up for the Minority Business director to ensure maximum competition from small and minority businesses in the state; for four years was the coordinator of the Sheltered Workshop Program to ensure maximum purchases from sheltered workshops in state; for four years participated in agency audits; five years have been a member of [DOA's] Affirmative Action Advisory Committee to the Secretary.

May 1981 to August 1985: Marketing Coordinator, Federal Property Program, DOA. Coordinated studies to resolve marketing problems of the Federal Property Program; advised management on distribution of items in marketing areas; developed and evaluated customer marketing strategy, outreach and information programs; supervised assigned 2-3 temporary employees.

June - December 1975 General Manager, Kigoma Association: Was accountable to the Board of Directors for the management of the Cooperative Association; was the final authority for budget reviews and presentations to the Board; was the final decision maker for hiring, firing, grievance handling; was the main contact for the public, media; was the final authority for contract negotiation, investment decisions, financial borrowing, regulatory government agencies, external audits regarding financial policies and procedures of the cooperative.

January 1973 - June 1975 Accountant, Shirecu Association: Supervised departmental of staff 12 (sic), although there were 10 other employees at 5 branches; ensured accounting principles, methods and procedures were followed; was responsible for financial reports such as financial statements, budgets, feasibility studies on investments and borrowing alternatives; was answerable for external audits regarding financial policies and procedures; was advisor to the organization on international trade transactions.

January 1971-December 1972 Administrative Officer, Maswa County Council: Assisted the County Executive in planning and implementation of all County affairs; authorized purchases for the county; deputized the County Executive in review of the county budgets including revenue budgets; received and reviewed progress reports from all departmental programs and in turn briefed the County Executive on sensitive program issues; supervised staff in the executive branch (300-400); was responsible for hiring, discharge and grievance handling of employee in executive branch.

Education

Mzumbe School of Management January 1969 - December 1970. Graduated with a Certificate in Public Administration and Finance. Major studies included: Public administration, finance, Law, Purchasing, accounting, auditing and personnel management.

University of Wisconsin (UW) Platteville January 1967 - May 1979. Graduated with a Bachelor of Science in Ag-Business Administration. Major areas: Marketing, finance, accounting, business, Business law. I also studied general requirement classes: Statistics, computer programming and management information systems.

UW Platteville June 1979 - May 1980. Graduated with a Master's of Science - Agriculture Management. Major areas: Finance, Marketing, Research Procedures and various Computer software used in management.

17. The resume that Ms. Pauls submitted for this position includes a summary of her work history but not her education. Her resume includes the following information:

May 1994 - Present **Chief, Payroll and Benefits Section:** Manage and direct WISDOT's Payroll and Benefit operations with full knowledge of the DOT and DOA automated and manual systems to support these functions (Time and Travel, TEAMS, TACS, WISPER/WISPAY, WISMART). Develop and maintain policy and procedures for all areas of responsibility using TAMS, the Payroll and Personnel manual, memos, training, etc. Oversee Payroll's accounts receivable and accounts payable. Supervise and support Payroll and Benefits Supervisor, Payroll and Benefits Specialists, and LTE's. Provide direction and training to the network of WISDOT Payroll Coordinators; counsel employees one-on-one and in group settings such as New Employee Orientation and The Benefits of Your Benefits. Maintain a comprehensive knowledge of Compensation Plan and Union Contracts. Negotiate and monitor delegation agreements between Payroll, BHRS and other DOT employing units for personnel related documents such as reclassification and LTE requests. Develop and maintain partnerships with other state agencies, such as DOA, ETF, and DER, as well as maintain internal partnerships with all divisions.

August 1990 - May 1994 **Supervisor, Payroll and Benefits Section:** Directly Supervise the Payroll Processing Unit. Manage the Time and Travel System and provide support to the development and implementation of TEAMS. Provide Payroll interpretation of the Compensation Plan and union contracts. Develop policy, procedures and provide guidance for payroll and benefits admini-

stration, including wage adjustments, taxes, W-2's, unemployment compensation, leave accounting, retirement, all insurance programs, and other fringe benefits as appropriate.

January 1981- August 1990 Payroll and Benefits Specialist: Various Payroll and Benefits duties: process certification, LTE, reclassification, and reallocation requests; process payroll and leave accounting adjustments; audit insurance applications and collect payments for premiums; produce monthly ETF benefit reports; handle unemployment claims and develop the monthly UC report. Work in conjunction with Risk and Safety to provide worker's compensation benefits.

1976-1981 Program Assistant

1961-1976 Typist

Work Related Activities: Statewide Payroll Council and Benefits Committee Member, American Payroll Association, Employee Assistance Coordinator [and] Strategic Directions/Event Planning Team/DBM Planning Team.

18. Before making a job offer, Ms. Morehouse discussed the selection process with Demetri Fisher, DOT's Affirmative Action Officer. She was not required to consult with the Affirmative Action Office for this hire because the position was not in an underutilized job group. Ms. Morehouse reviewed the list of certified candidates with Mr. Fisher, including the race and gender of candidates. She described how the candidates were evaluated and why she considered Ms. Pauls to be the best qualified. Mr. Fisher gave his approval for an offer of employment to Ms. Pauls. Ms. Morehouse also sought and received approval from Joyce Gelderman, Administrator of DOT's Division of Business Management and Gene Kussart, DOT's Deputy Secretary. Thereafter, Ms. Morehouse offered the position to Ms. Pauls who accepted. The appointment was effective on June 4, 2000.

19. DOT had no internal policy requiring the Secretary to be informed of the names of each interviewed candidate.

20. Ms. Pauls was more qualified for the vacant position than complainant. She had extensive knowledge and experience in the state payroll system, state employee benefits, state compensation plan and state labor agreements. She gained this experience over twenty years in progressively responsible professional and supervisory positions in respondent's payroll and

benefits area including serving as section chief of the Payroll Section (one of the merged entities noted in ¶1 above).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to §230.45(1)(b), Stats.
2. Respondent has met its burden of showing entitlement to summary judgment.
3. Complainant has not met his burden of showing entitlement to summary judgment on his cross motion.
4. Complainant has not met his burden of showing that certain affidavits should be stricken.
5. Respondent did not discriminate or retaliate against complainant with regard to the contested hiring decision.

OPINION

I. Summary Judgment Authority and Method of Analysis

The case of *Balele v. WPC*, 223 Wis. 2d 739, 589 N.W.2d 418 (Ct. App. 1998) provides the governing authority for the Commission to decide cases using a process similar to summary judgment procedures under §802.08, Stats. 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 and identified five factors as minimum considerations. These factors 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.

The Commission now turns to applying the above principles to this case.

This particular complainant can be expected to respond to a motion for summary judgment. Subsequent to the Commission's 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. He also has filed briefs in opposition to summary judgment motions for other complainants (see, e.g., *Oriedo v. DOC*, 98-0124-PC-ER, 2/2/99).

This particular complainant can be expected to obtain evidence needed to oppose a summary judgment motion. This is demonstrated not only by the discovery he conducted in this case but also in the extensive discovery he has conducted in his numerous other cases in this forum.

No investigation has been conducted in this case. The reason is that complainant waived investigation and requested to proceed directly to a hearing on the merits.

This particular complainant has engaged in an extensive pattern of repetitive litigation, including a history of misconduct and bad faith as summarized in *Balele v. DHFS*, 00-0133-PC-ER, 5/24/01 (initial ruling), 8/15/01 (final ruling). He 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. 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, however, 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.

II. Bald Assertions Made by Complainant in this Case

Respondent filed affidavits in support of its motion. The complainant references his affidavit (see p. 3 of his discovery answers which served as his initial brief and p. 7 of his brief dated 1/16/01) but, in fact, he tendered no affidavit.

The Commission declines to follow an overly formalistic process when deciding a motion for summary judgment. This complainant, however, is familiar with the affidavit process and has filed his own affidavit in other cases (for example, *Balele v. DOA*, 00-0104-PC-ER, complainant's affidavit attached to his petition for rehearing filed on 1/8/01). Furthermore, this complainant has been untruthful in his representations in prior cases as briefly summarized in *Balele v. DOA, et. al.*, 00-0104-PC-ER, 2/23/01. Absent an affidavit here to support his contentions, he has failed to raise any genuine issue of fact.

Complainant's answers to discovery might have the same safeguards as an affidavit (if they were signed under oath before a notary). However, complainant's discovery responses generally contain bald assertions without supporting facts (see examples in following paragraphs). Accordingly, no weight was given to those statements or assertions that were clearly beyond complainant's personal knowledge, or statements of ultimate fact or conclusions of law. (See related discussion in *Balele v. DOT*, 00-0044-PC-ER, 10/23/01, at pp. 22-24).

Complainant asserted in his discovery answers that respondent pre-selected Ms. Pauls for the position. (See his answers to interrogatories 24, 30 and 31.) He fails to reveal, however, what facts he relies upon in reaching this conclusion. Accordingly, this is a statement of ultimate fact and, without supporting facts, is insufficient to defeat respondent's summary judgment motion. The Commission rejected a pre-selection argument for similar lack of proof in at least one of complainant's prior cases *Balele v. DOC, et al.*, 97-0012-PC-ER, p. 15, 10/9/98 ("Other than the facts that the successful candidate was white and had been known to

Ms. Brandon before the selection process, there is no basis for a conclusion that DOC had pre-selected this white candidate, did not want to hire a minority candidate, and had requested a one-time staffing delegation as a means to this end. The evidence . . . is far short of what would be needed for complainant to prevail on this contested issue of fact.”)

Complainant answered interrogatory #17 (p. 11 of his discovery response) is shown below (emphasis in original):

Morehouse had one time during the interview almost hiring [sic] Balele on the spot. Balele impressed Morehouse so much that she asked Balele to call for the job. Had Morehouse had the power, she would have appointed Balele on the spot. But Morehouse has now lied under oath and withheld the information that she wanted to hire Pastori M. Balele on the spot. **I also believe the affidavits were imposed on Han [sic] and Morehouse to lie in this Commission.**

Complainant has no first-hand information to support his beliefs about Ms. Morehouse’s assessment of his interview performance. His statement that Ms. Morehouse asked him to “call for the job” appears to be his unreasonable interpretation of the words she uttered as supported by her affidavit and as noted in ¶12 of the Findings of Fact. (Complainant has a record in this forum of drawing unreasonable inferences from undisputed facts, *Balele v. DOA, et al.*, 00-0104-PC-ER, 2/23/01.) He also has no first-hand knowledge of whether affidavits were imposed on members of the interview panels. Nor has he tendered affidavits from the panel members (or others who have first-hand knowledge) to support his claim.

Complainant also expressed his suspicion that Mr. Fischer told Ms. Morehouse that complainant had filed prior discrimination cases against respondent (see answer to interrogatory #26). His suspicion is unsupported by first-hand knowledge and conflicts with information in Ms. Morehouse’s affidavit.

III. Disparate Treatment

The initial burden of proof under the FEA 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, in turn, may 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).

A prima facie case of discrimination may be established by showing that 1) complainant is a member of a class protected under the FEA, 2) he applied and was qualified for the position offered, 3) he was rejected despite his qualifications, 4) the position was given to a person who had similar or lesser qualifications, and 5) the person hired is of a different race, color or national origin than the complainant. *Malacara v. City of Madison*, 224 F.2d 727 (7th Cir. 2000). The Commission, without resolving the matter, will presume for purpose of discussion that complainant established a prima facie case.

A prima facie case of retaliation under the FEA includes a requirement that the alleged retaliators were aware that complainant participated in an activity protected under the FEA. *See, Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89: “[T]he plaintiff must present evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action.” A prima facie case was not established for this claim because neither of the interview panel members (Morehouse and Han) nor the person making the hiring decision (Morehouse) was aware that complainant had participated in an activity protected under the FEA.

Complainant contends that Mr. Fischer had a duty or obligation to tell Ms. Morehouse that complainant “has sued DOT and implicated Fischer in the Complaints” (see answer to interrogatory #27, item b). He cited no basis for this proposition and the Commission knows of none. In fact, arguably it would have been prudent for Mr. Fischer to keep this information to himself so that Ms. Morehouse’s hiring recommendation could not be impacted by any knowledge of complainant’s prior discrimination cases.

The burden shifts to respondent to articulate a legitimate, non-discriminatory reason for hiring someone other than the complainant. Respondent met its burden by stating that Ms. Pauls was hired rather than complainant because she was more qualified.

The burden shifts to complainant to establish that respondent’s articulated reason (as noted in the prior paragraph) was a pretext for discrimination. As discussed below, he has

failed to show there are any genuine issues of material fact; i. e., that a reasonable fact-finder could rule in his favor on the issue of pretext.²

Complainant contends pretext is shown because his name was not forwarded to the DOT Secretary for consideration (see his response to interrogatories 9-11, 13, 15, 22 and 24). He stated: "DOT has to come up with explanation for using interview result as justification for forwarding only one name to the DOT Secretary, excluding Balele, from equal appointment consideration or appointment" (see p. 8, brief dated 1/16/01). DOT is not required by law or by any internal policy to forward the names of all interviewed candidates to the Secretary. Accordingly, respondent's failure to forward complainant's name is not probative of pretext. As noted by respondent's counsel, it appears complainant is improperly attempting to graft into this case an internal policy within a different agency involved in one of complainant's other cases. (See footnote 4 on p. 18 of respondent's brief dated 1/16/01, citing *Balele v. DHFS 99-0002-PC-ER, 5/31/00.*)

Complainant contends pretext is shown because respondent did not check his references (see his response to interrogatory #31). He also contends pretext is shown because Joyce Gelderman, Terry Mulcahy and Demetri Fischer "failed to investigate why Pastori M. Balele was denied the position by Ms. Morehouse" (see his response to interrogatory #17-2 on the top of p. 11 of his discovery response.) Respondent was not required to either check complainant's references or to conduct the suggested investigation. Accordingly, these observations are not probative of pretext.

Complainant contends that Ms. Pauls lacked the necessary job qualifications because her resume does not show that she had experience or education in certain areas which he believes are required to perform the duties in the position description (PD). (See complainant's responses to interrogatories 15, 17 and 22). The Commission disagrees. The strict selection criteria designed to predict successful performance on the job required under the competitive examination process described under §§230.15 and .16, Stats., apply only up to the time that the certification list of qualified candidates is developed. Thereafter, the appointing authority

² The Commission considered all of complainant's arguments of pretext. Only his main arguments are addressed in this decision.

is required only to base its selection on more flexible criteria that are reasonably related to the responsibilities of the position in the quest to appoint the best candidate for the position. *Postler v. Wis. Pers. Comm., et al*, Dane County Circuit Court, 95CV003178, 10/9/96; affirmed by Court of Appeals, *Postler v. Wis. Pers. Comm.*, 96-3350, 1/27/98. The benchmarks used to score the interview questions were reasonably related to the responsibilities of the position. Accordingly, this argument is insufficient to suggest pretext. A similar analysis applies to complainant's contention that he was more qualified for the job than Ms. Pauls due to his extensive formal education (see response to interrogatories 25 & 31). This observation is not probative of pretext when education was not emphasized in the job announcement (§4, Findings of Fact) or the benchmarks used at the interviews (§10, Findings of Fact).

Complainant contends that the notes taken by the interview panel show that he was more qualified for the position than Ms. Pauls (see response to interrogatory #17). He did not provide an analysis of the interview notes to support his claim. It is not apparent from the interview notes that he was more qualified.

Based on the foregoing, respondent's motion for summary judgment on the disparate treatment claim is granted.

IV Disparate Impact

Complainant contends disparate impact exists with regard to the following practices followed here: a) Ms. Morehouse's action of forwarding to the Secretary's office only the name of the person recommended for hire and b) Ms. Morehouse's use of the interview process in making a hiring recommendation. He offered as supporting statistics: a) the examination pass/fail rates for career executive positions in fiscal years 1994, 1995 and 1996; and b) state-wide composition of the career executive work force as of the pay period ending January 16, 1999. (See complainant's answers to discovery, and complainant's brief dated 1/06/01.)

The statistics offered by complainant are insufficient to establish his claim of disparate impact. The sample size involved in this particular hiring transaction is too small for meaningful analysis (see, for example, *Balele v. DOT*, 98-0104-PC-ER, 9/29/99; *Balele v. UW System*,

98-0159-PC-ER, 10/20/99; *Balele v. DNR*, 98-0046-PC-ER, 1/25/00 and *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00).

Complainant passed the examination in this case and was interviewed. Accordingly, statistics regarding examination pass/fail rates are not relevant here. Even if examination pass/fail rates were deemed relevant, the statistics offered by complainant³ covered fiscal years 1994 through 1996 – a time period well before and not relevant to the hiring transaction here.

Complainant also offers statistics based on the workforce composition in career executive positions as of January 16, 1999.⁴ Not only is the data more than a year old by the time of the hiring transaction at issue in this case, but the data also fails to indicate whether any minority candidates applied or were certified for the jobs when they were vacant. Nor is there information provided to tie the data into the practices contested here (use of post-certification interviews and forwarding to the Secretary's office only the name of the candidate recommended for hire). In short, these statistics too are insufficient to establish disparate impact.

Complainant's use of the information noted in the prior two paragraphs is objectionable on a separate basis. As noted by respondent's counsel (starting on p. 4, brief dated January 16, 2001) these are the same statistics complainant used in a prior case and about which the Commission provided a detailed explanation of why they were insufficient to establish disparate impact (*Balele v. DOT, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00).

On pp. 5-6 of complainant's brief, he attempts to compare the statistics discussed previously with information in an affidavit signed on March 31, 1989, which apparently was developed for litigation in the federal court case of *Humphrey and Balele v. DETF & DER*, 88-C-679-C. The affidavit recites workforce composition in 1987 (§§2102& 2202) and 1986 (§§2103 & 2203). Again, the workforce composition data is insufficient to establish a disparate impact claim for the same reasons noted in regard to the other workforce data offered by complainant.

Complainant offers information about his own experience with other DOT vacancies. Specifically, he notes on pp. 6-7 of his brief that he has interviewed for 10 vacancies at DOT over the "last six years" yet was not hired. Contrary to his assertion, this information is insuf-

³ See Exh. C-15 attached to complainant's discovery answers.

⁴ See Exh. C-14 attached to complainant's discovery answers.

ficient to establish a claim of disparate treatment. This he should have known from *Balele v. DOT*, 99-0103-PC-ER, 11/15/00, in which the Commission stated (p. 11) as shown below:

Mr. Balele's contention that a claim of disparate impact could be established by citing to him as the sole adversely-affected individual is incorrect and contrary to the basic concept that such claims look at the impact on a protected group.

Complainant also asserted that he does not need statistical proof for a claim of disparate impact. The Commission has rejected this argument in his prior cases. *Balele v. DOT*, 99-0103-PC-ER, 11/15/00 and *Balele v. UW-Madison*, 99-0169-PC-ER.

Based on the foregoing, respondent's motion for summary judgment on the disparate impact claim is granted

V Complainant's Request to Strike Certain Affidavits

Complainant, in his answers to discovery (p. 3) requested that the Commission "strike Ms. Han's and Ms. Morehouse affidavits and regard them as perjury." The main basis for this request is Mr. Balele's opinion that he should have ranked first after interviews. He concludes from his opinion that any contrary statements in the affidavits are false. His mere assertions are insufficient to support his allegations or his request to strike the affidavits.

Complainant also contends that the affidavits contain information that conflicts with respondent's answers to discovery. This allegation was thoroughly discussed by respondent's counsel (pp. 9-11, brief dated 1/16/01). As noted by respondent's counsel, this allegation is incorrect:

[I]t should suffice to affirmatively demonstrate that in its answer to the complainant's interrogatories the DOT did not fail to mention that the interview results were used as a selection tool. The following is Complainant's Interrogatory No. 31 and the DOT answer:

Interrogatory No. 31. As briefly as possible state the events that took place after Balele was interviewed for the position at issue.

Answer: After each candidate was interviewed, the panel members discussed the candidate and reached a consensus. Of the eight candidates interviewed, the panel selected two finalists, Lynette Pauls and Margaret Erickson, from whom the selection would be made. **The finalists were selected based on their prior experience and their management and communication**

style and skills as revealed in their responses to interview questions. [emphasis original]

The above answer clearly does identify that the information provided by the candidates during the interview was used by the panel members to evaluate the candidates. The statements of Ms. Morehouse and Ms. Han in their affidavits are entirely consistent with the DOT answer to Complainant's Interrogatory No. 31. In particular Ms. Han and Ms. Morehouse both aver that following each interview they "independently evaluated each candidate based on his or her previous employment experience and responses to the interview questions. We then discussed the candidates and reached a consensus on whether the candidate should be placed in the category of ideal, good, or average to poor." The Complainant has not established the existence of directly conflicting statements by the DOT and its witnesses on a material fact such that summary judgment would be precluded."

VI. Complainant's Cross Motion for Summary Judgment

The arguments raised in complainant's cross motion have been considered and rejected in resolving respondent's motion for summary judgment. Accordingly, complainant's cross motion is denied.

ORDER

Complainant's cross motion for summary judgment is denied. Respondent's motion for summary judgment is granted and this case is dismissed.

Dated: November 16, 2001.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner


ANTHONY J. THEODORE, Commissioner

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Madison, WI 53707-7910

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 op-

eration 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