STATE OF WISCONSIN | PERSONNEL COMMISSION

LAWRENCE R. ALLEN,
Complainant,

v.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,
Respondent.

Case No. 01-0091-PC-ER

FINAL DECISION AND ORDER

After a hearing in which the complainant appeared *pro se*, the designated hearing examiner issued a proposed decision and order on November 27, 2001.[1] Complainant subsequently retained an attorney who filed objections to the proposed decision, as well as a request for oral argument, a request for a copy of the hearing tapes, a request for limited discovery, and a request for additional time to file additional written objections to the proposed decision. The Commission made arrangements for a copy of the hearing tape to be provided to complainant. Respondent objected to complainant's request for additional discovery and took the position that oral argument would be an inefficient use of resources. The Commission subsequently scheduled oral argument. Complainant also moved to re-open the hearing.

Oral arguments were held on March 20, 2002. At the conclusion of the oral arguments and at the complainant's request, the Commission established a schedule by which complainant could submit additional written materials. Pursuant to that schedule, the complainant filed additional arguments in support of his objections to the proposed decision and asked that the Commission "re-open this case to allow for an investigation of Mr. Allen's complaint."

[1] A copy of the proposed decision is attached and incorporated by reference. Changes to the proposed decision are noted by alphabetical footnotes.

The Commission adopts the proposed decision and order, a copy of which is attached, with the modifications noted therein. The complainant's remaining arguments are addressed below.

I. Case background

This complaint was filed on June 11, 2001. On the same date, complainant asked to waive the investigation and to proceed directly to a hearing on the merits.

A prehearing conference was held on July 16, 2001. At that time, the parties agreed to a statement of the issue for hearing and agreed to hold the hearing on October 15 and 16, 2001. The conference report specifies that exhibits and witness lists had to be exchanged no later than 4:30 p.m., on October 10, 2001. The Commission provided the parties with a copy of the conference report and also supplied complainant with "Instructions for unrepresented parties." Respondent indicated it would file a preliminary motion.

Respondent filed a motion to dismiss for failure to state a claim on August 8, 2001. Respondent argued that complainant had failed to allege an adverse employment action. Complainant responded to the motion. By letter dated October 5, 2001, the designated hearing examiner notified the parties that the Commission could not reach a majority decision on respondent's motion to dismiss, so the matter proceeded to hearing. In the same letter, the examiner reminded the parties that their exhibits and witness lists had to be exchanged at least 3 working days prior to hearing, i.e. by 4:30 p.m. on October 10, 2001. Respondent named complainant, Steven Dold and Bryan Albrecht as witnesses, and supplied 10 exhibits on October 10, 2001.

On Friday, October 12, 2001, complainant hand-delivered his "Witness and Exhibit List" for the hearing scheduled to commence on Monday, October 15th. Complainant supplied 16 exhibits and made the following statement:

> Dear Commissioners, choosing not to involve professional peers/directors to testify in my behalf, at the risk of suffering consequences for speaking out against the department – I will serve as my own

> witness to address the concerns that I raised in my complaint [of] discrimination.
>
> Witness for the Complainant: Lawrence R. Allen

All of respondent's 10 exhibits were admitted without objection during the hearing. Complainant's exhibits C1 through C7 and C9 through C16 (including C16A, B and C) were admitted at hearing, even though they clearly had not been exchanged by complainant 3 days prior to the date of the hearing. Complainant's exhibits C8A and C8B were excluded.

II. Complainant's requests for additional discovery, to reopen the hearing and for an investigation

These three requests all seek some additional procedural opportunities for the complainant beyond those provided to date. Complainant's requests raise the question of whether the procedures already taken are legally insufficient as well as whether the complainant now has a right to any of these additional steps.

The Commission has issued previous rulings addressing related requests. In *Smith v. UW-Madison*, 90-0033-PC-ER, 7/30/93, a disability discrimination case, the complainant chose to represent herself at the hearing and stated at the commencement of her hearing that she was not going to call her personal physician or anyone else as a witness. After the conclusion of her own testimony, the complainant stated she was going to call her physician as well as another physician and a third witness. The hearing examiner sustained respondent's objection to complainant's attempt to call anyone other than her personal physician because complainant had failed to list these additional witnesses prior to hearing according to the Commission's administrative rule requiring the exchange of the names of witnesses. After the proposed decision was issued, complainant retained counsel, filed objections to the proposed decision and asked to reopen the hearing for further evidence. The Commission denied the request and noted:

> Contrary to her contentions, the complainant had a full opportunity to offer evidence in support of her allegations of discrimination. She simply did not make use of the opportunity provided her She did, in fact, tes-

> tify at the hearing. Her testimony extended over a period of more than an hour and she was asked questions on cross-examination as well as questions by the examiner Had complainant properly prepared her case by identifying her witnesses in advance of the hearing and making arrangements to ensure their attendance, she would have been able to offer additional witnesses.
>
> The complainant chose to represent herself at the hearing. She may not now, after the conclusion of the hearing and after having received the adverse proposed decision, be provided a second opportunity to present her case. (Footnote omitted.)

The Commission sees no reason to depart from the conclusion reached in *Smith* and declines to reopen the hearing in the present matter. The Commission notes that the hearing examiner contacted complainant when no exhibits or witness list had been received from him pursuant to §PC 4.02, Wis. Adm. Code, by the morning of Friday, October 12th, the last work day prior to the scheduled hearing. As a consequence of this contact, complainant delivered the exhibits and witness list to respondent at approximately 2:15 p.m. on Friday afternoon. At hearing, respondent moved to exclude complainant's exhibits and witness list. Counsel for respondent noted that she had not seen complainant's exhibits 8A and 8B prior to 2:15 on Friday. All of complainant's exhibits, except 8A and 8B were later admitted into the record over respondent's objection. Complainant stated he made a conscious decision not to include co-workers as witnesses. Complainant made an opening statement in which he contended that the reason advanced by respondent for his reassignment was not valid, and he was permitted to call himself as a witness despite his failure to comply with the exchange of witness requirement. The hearing examiner asked numerous questions of the complainant in an effort to develop a factual record relating to the question raised in respondent's motion to dismiss, i.e. whether respondent's conduct amounted to an adverse action. Complainant proceeded with his testimony on direct and the hearing examiner also asked him questions relating to complainant's contention that he was treated differently. After complainant completed his testimony, respondent called its witnesses and the hearing examiner asked numerous questions in an effort to explore complainant's theory of the

case. The examiner also helped complainant clarify his questions so they were understandable. Complainant had a full opportunity to question respondent's witnesses and then proceeded to make a closing statement.

The hearing examiner took an active role to help complainant advance his contentions. The examiner conscientiously fulfilled the role described in *Kropiwka v. DILHR*, 87 Wis. 2d 709, 721, 275 N.W.2d 881 (1979):

> In *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 210, 94 N.W.2d 711 (1959) this court observed that, in state administrative agency hearings, the hearing examiner often must protect the rights of a party not represented by counsel, and see to it that the party's case is properly developed. The examiner must be impartial, however, and may not engage in partisan activity on behalf of an unrepresented party. *Pruno v. Industrial Commission*, 187 Wis. 358, 203 N.W. 330, 204 N.W 576 (1925).
>
> Within these guidelines, the hearing examiner provided Mr. Kropiwka a full opportunity to develop his case and cross-examine witnesses. The hearing examiner elicited Mr. Kropiwka's direct testimony, including testimony which conflicted with that of his employer; the hearing examiner explained exhibits and the grounds for objecting to these exhibits; the hearing examiner assisted Mr Kropiwka in his cross-examination of the witnesses. Although representation by counsel would have been beneficial, Mr. Kropiwka demonstrated an understanding of what the witnesses testified to by the questions he asked and contradictory information he brought out during cross examination. As Judge Bardwell pointed out *in the ruling on the motion to present additional evidence*, "when petitioner decided to relieve his original attorney prior to the hearing and proceed without counsel, it was at this own risk." (Emphasis added.)

In *Kropiwka*, the party lacked fluency in the English language. No similar impediment was faced by the complainant in the present case.

Complainant contends that because "genuine issues of material fact remain disputed," the Commission is required to conduct an investigation of his complaint of discrimination:

> More specifically, Mr. Allen seeks to determine whether DPI's documents support its contention that it had a legitimate business reason for its decision to demote him. There is no prejudice to DPI if this informa-

> tion is provided for the Commission to consider (Post oral argument filing, page 6)

Complainant's suggestion is clearly inconsistent with the procedures described in §§111.39 and 230.45(1m), Wis. Stats. The latter provision reads:

> (1m) The commission shall waive the investigation and determination of probable cause of any complaint that is filed by a complainant under sub. (1) or s. 103.10(12)(b) at the complainant's request. If the commission waives the investigation and probable cause determination, the commission shall proceed with a hearing on the complaint. The commission's waiver of an investigation and probable cause determination does not affect the commission's right to attempt to resolve the complaint by conference, conciliation or persuasion.

Complainant waived the investigation in this matter and asked for a hearing on the merits of his complaint as specified in §230.45(1m). Now that the hearing has been held and a proposed decision has been issued, he does not have the option of obtaining the investigation that he had previously waived.

Complainant also asks that he be provided an opportunity to conduct discovery, and offers the following argument:

> The Commission, in the Findings of Fact section of its proposed decision, at paragraphs 5 - 14, finds that the Department of Public Instruction (DPI) was experiencing financial challenges, requiring it to dissolve Mr Allen's work unit and change his job duties from EOT director to LET assistant director These findings provide the factual basis for the Commission's opinion and legal analysis of the viability of Mr Allen's claims. But was DPI, in fact, experiencing the type of financial challenges it claims it was experiencing? And in a multi-billion dollar budget, why was Mr Allen's EOT unit dissolved – the only unit headed by the only African American working in the Madison office?
>
> Mr Allen needs additional time to obtain this information. The Commission needs to see this financial information and committee notes before it renders a decision in this case. Mr Allen respectfully requests 20 days from the date his attorney receives this information to file additional written objections to the Commission's decision.

The Commission declines to stay consideration of the proposed decision in order to give the complainant an opportunity to discover information that was available to him earlier but was never requested. The Personnel Commission's rules provide parties with an

opportunity to engage in discovery. See §PC 4.03, Wis. Adm. Code. Complainant did not exercise that opportunity prior to hearing. The Commission also notes that the financial and committee records now being referenced by complainant are extra-record with respect to the hearing already held in this matter. As a result, even if complainant was now able to obtain these records from respondent, they would not serve as an appropriate basis for objecting to the proposed decision.

III. "Whistleblower" issue

During a statement immediately prior to the commencement of the oral argument, complainant's attorney noted that upon her review of the testimony and exhibits, her client "should file" a complaint under the whistleblower law because the attorney "suspected" that perhaps hundreds of thousands of dollars of federal funds had been improperly spent by respondent. The attorney asked that the Commission issue an order prohibiting respondent from retaliating against complainant for broaching this topic and the attorney also stated that complainant would file a specific written motion/petition setting forth his request. The Commission noted that it would await receipt of complainant's motion/petition.

In his submission after the oral argument, complainant suggested that the case "may be more than an employment discrimination complaint" given the "serious question whether DPI properly used federal funds for the administration of federal programs." Complainant then posed various questions about respondent's use of federal funds and concluded with the following statement:

> Answers to these questions are essential. They must be answered before a determination about the "non-discriminatory" reason for DPI's decisions can be made by the Commission.

Despite what was said immediately prior to the oral argument, complainant has not filed a motion/petition delineating his request. He has merely restated his request that he be allowed to conduct additional discovery. The Commission has already declined to grant complainant's request to conduct discovery at this point in the process. The "suspicion" by complainant's attorney that respondent may have misused federal

funds is unrelated to the question of whether the respondent discriminated against the complainant on the basis of color or race.

IV Complainant's allegations of specific procedural irregularities during the hearing

Complainant contends that several procedural irregularities occurred at hearing. According to complainant, 1) his misapprehension of the hearsay rule caused him to fail to offer certain evidence, 2) the hearing examiner forced complainant to provide a copy of his "work product" to respondent, and 3) the examiner failed to address a conflict of interest question raised by complainant during the course of the hearing.

A. "Hearsay" confusion

Complainant explained this objection as follows:

> As the tapes of the hearing clearly show, the hearsay issue was raised by DPI's attorney at the hearing when Mr Allen attempted to introduce out-of-hearing statements made by other persons. This evidence was excluded because of DPI's attorney's objection. Once [the hearing examiner] agreed and announced she would apply the hearsay rules, then both parties had an obligation to follow these rules. In fact, Mr. Allen can be heard on the tape limiting his evidence because of his attempt to comply with the hearsay rules.
>
> The unfair prejudice to Mr. Allen inevitably occurred because he is not an attorney and did not understand hearsay rules. Therefore, he could not object to the admission of improper hearsay evidence offered by DPI's attorney during the hearing. Because Mr Allen was not able to object to DPI's inadmissible hearsay evidence, inadmissible hearsay evidence and other irrelevant evidence was admitted and improperly considered by [the hearing examiner].

The complainant's argument fails to consider the administrative rule that specifically relates to hearsay evidence in proceedings before the Personnel Commission. Pursuant to §PC 5.03(5):

> As specified in s. 227.45, Stats., the commission is not bound by common law or statutory rules of evidence. All testimony having reasonable probative value shall be admitted, and immaterial, irrelevant or unduly repetitious testimony shall be excluded. The hearing examiner and the

> commission shall give effect to the rules of privilege recognized by law. *Hearsay evidence may be admitted into the record at the discretion of the hearing examiner or commission and accorded such weight as the hearing examiner or commission deems warranted by the circumstances.* (emphasis added)

The complainant has failed to specify the particular evidence that he feels was inappropriately admitted into the record, so the Commission is unable to determine whether that evidence was accorded weight *not* "warranted by the circumstances." Complainant's underlying theory is that he should not suffer any negative consequences from his decision to represent himself at the hearing. The Commission has already noted the extensive assistance provided to complainant by the examiner during the hearing. In light of the fact that the Commission is entitled to admit hearsay evidence, it is hard to understand how the examiner may have improperly failed to raise an hearsay objection on complainant's behalf to evidence offered by respondent.

During oral argument, complainant explained his hearsay argument somewhat differently. He contended that because respondent had voiced a hearsay objection to certain evidence early in the hearing, complainant later unilaterally declined to even offer testimony on one or more topics because of the complainant's misunderstanding that the testimony would be subject to a hearsay objection. Complainant did not specify when this occurred. However, the Commission has reviewed the hearing record and notes the following portions of complainant's testimony:[2]

> Witness: " at no point did I or John [Fortier] expect that this team would be eliminated. In fact, on his last day, he shared with me his disappointment that this had happened and he could not stop it."
>
> Examiner: OK, now, again I will caution you not to refer to statements told you that you don't have witnesses, well, let me think about that. [Pause] No, no, I will leave that in the record. It is not double hearsay.
>
> Respondent: What Mr. Fortier told Mr. Allen who is telling us here in court?

[2] This and other portions of the record of the record set forth in this decision represents an unofficial, rather than official, transcript of the proceeding.

Examiner: Right. I get mixed up about inadmissible hearsay and admissible hearsay. I think that what is told you directly is admissible.

Respondent: No, it is still hearsay. It is an out of court statement made by someone that's not in court. It is what Mr. Allen is telling us Mr. Fortier said, but Mr. Fortier is not here for me to ask him what he said, so there is no, Mr. Fortier would have to be here to testify what he told Mr. Allen. Then what he told Mr. Allen would not be hearsay. But it is hearsay for Mr. Allen to tell us what Mr. Fortier told him.

Examiner: I think that is right. Um, I am going to leave it in in case I am wrong on court review, but I think you do need to limit your testimony to personal knowledge rather than what other people say. [Tape 2, 7 minutes]

[The examiner later overruled another hearsay objection to what Supt. Benson said during a meeting with complainant. The examiner explained to complainant that respondent needed to place her objection in the record to preserve it for court review.]

Witness: "I might add, my boss, [unclear], John Fortier, was in full support of the letter stating my concerns and if you don't consider this hearsay, I hope you don't, John -"

Respondent: Objection. The hearsay, again. I don't have to object every time, do I?

Examiner: No

Respondent: I'll have a standing objection that anything that he says that Mr. Fortier told him is hearsay.

Examiner: Yes, as to any conversations, you have a standing objection.

Respondent: Thank you. [Tape 2, 15 minutes]

Respondent: He is attributing facts to people without naming who these people are that he doesn't have support for. I don't know, objection on hearsay.

Witness: I will withdraw my statement that Connie Colucci got it though we know she did. I will withdraw that statement. I will say that Larry didn't get it.

Examiner: That, you know.

Witness: That, I know. [Tape 2, approximately 20 minutes]

Cross-examination of complainant

> Respondent: Did you have to submit reporting of your time so that it could be traced back to your funding source?
>
> Witness: We didn't have to. We were asked to. In most or many, this is hearsay, I can't say it. We were asked and in some quarters they insisted we have to have it. In other quarters we were paid out of fund sources determined by fiscal. [Tape 2, 47 minutes]

The Commission assumes that these are the portions of complainant's testimony when he allegedly withheld testimony. However, it is unclear what information he failed to offer, and complainant has not made any showing how the allegedly withheld testimony would be material to the issue before the Commission. Complainant is not arguing that the hearing examiner did anything wrong in terms of dealing with the evidence actually presented during the hearing. Complainant merely suggests that the hearing examiner should have anticipated what complainant wanted to establish at these particular points in his cross-examination and should have advised him to offer the testimony despite any concerns he might have had regarding hearsay. Complainant's argument would require the examiner to maintain a level of omniscience that is inconsistent with reality. The complainant has failed to establish that the examiner acted improperly with regard to complainant's testimony.

B. Materials complainant took to witness stand

Complainant also argues that the examiner erred when she made him provide a copy of a document that he kept with him as he was about to begin his own testimony. The document in question consists of 7 typewritten pages and is entitled "Questions for DPI Witnesses." Although the document includes 17 such "questions," it also includes additional materials. The document reads, in part, as follows:

> Ask DPI witness(es) to answer the questions and respond to the comments presented below. The questions are intended to show that there was a conscious plan to eliminate the Education Options Team – and thereby negate the need for my role as its director .

2. At least three other directors in the *Division of Learning Support/Instructional Services were* allowed to hire *assistant* directors. The Teacher Certification and Licensing Team, Lifework Education Team, and the Content and Learning Team were allowed *assistants (each of whom I helped to interview for their positions)* for the directors. However, on the Education Options Team critical vacancies for consultants, despite your knowledge of this situation, were not filled. **Why did you not consider the legitimate needs of the EOT to be as significant as other team needs?** (Emphasis in original.)

Will the Personnel Commissioners please consider the legality of the (past) superintendent, his Deputy, and persons in positions who had considerable influence over decisions that he made (the Assistant Superintendent/Director of Finance and the Director of Human Resource Services) - concluded that Larry Allen should be the only director in the entire department to receive this sort of negative treatment?

Despite my high-quality work performance and that of my former staff, evidence above suggests that, my contributions to the DPI were not appreciated, nor was I neither [sic] treated equitably/fairly nor treated with dignity or respect by the superintendent and his closest advisors. Such shameful behavior suggests or confirms that I was hired for the wrong reasons. The arbitrary and shameful treatment that I received is obvious to everyone except the persons who were/are responsible for it. This must not continue - whatever it takes. Please inform me of your decisions.

Lawrence R. Allen
Director
Former Education Options Team

Summary of Attachments/Exhibits

Atch.#

1. Letter, Staffing Concerns, Dec 01, 2000 - An early Request for a new consultant to replace one who was planning to retire. Comments about the negative impact that attrition was having on the work of the team. **Exhibit #____**

3. Letter, Logical Solution, Jan 10, 2001 - I offer a solution to both a financial concern and volunteer to assume responsibility for another team - and explain the benefits of doing this. {*No response received.*} **Exhibit #____**

The document in question was the subject of the following discussion at hearing:

> Examiner: O.K. Mr. Allen, if you could come up please to the witness stand. You may bring your exhibits with you and nothing else. [Pause] Is there something that you are hesitating about?
>
> Complainant: My exhibit is tied into my questions.
>
> Examiner: Oh, you have prepared questions for yourself?
>
> Complainant: No. I can go. Yes. If I might. Because they [unclear].
>
> Examiner: OK. What we need to do is go off the record and anything else besides exhibits that you have in front of you, I need to make copies of because Attorney Berkani is entitled to see it and review it determine if she has objections. And we are off the record.
>
> Examiner: Back on the record. Attorney Berkani?
>
> Respondent: I have received this document entitled "Questions for DPI Witnesses" that Mr. Allen has taken up to the stand with him. My only concern about this document is that I am not sure if Mr. Allen intends to just read this into the record, and if that's the case, one, I think it is inappropriate, two, many of these questions are beyond the scope of the issue as decided in conference report and it is merely questions, not evidence. And so I guess I would object to the form of the statement if that is the intent. But I am not sure if that is the intent so that is just preliminarily with this document.
>
> Examiner: OK. They are noted for the record and let's see where it goes.
> [Tape 1, 41 minutes]

It is noteworthy that the examiner cautioned complainant only to have his *exhibits* with him for his testimony. Complainant chose to rely on the additional document in order to provide his own testimony. The document does not appear to be particularly sensitive, nor does its disclosure appear to provide any significant advantage to the respondent.

The bulk of the document served as a reminder for the points complainant should cover in his testimony. Complainant had to establish the facts on which to base the questions that he had prepared for respondent's employees. The document provided descriptions of complainant's exhibits. These descriptions merely served as reminders

to complainant for his testimony. One portion of the document appears to be an opening or closing statement.

Complainant did not object to providing a copy of the document to the respondent. The hearing examiner properly followed the general rule, applicable to court proceedings, that materials being relied upon by a witness are subject to review by the opposing party.[3] While the Commission is not bound by such rules and, as a consequence, the hearing examiner was not required to apply the rule here, nothing prevents the Commission from following those rules where appropriate.

The attorney-client privilege does not relate to this document. The document was not prepared by an attorney and there was no attorney-client relationship.[4] Complainant also contends the examiner's actions violated the work product rule, as reflected in §804.01(2)(c), Stats.[5] That rule reflects a balancing process. Here, the bulk of the document served simply as a reminder to complainant of questions to ask and items to cover. Complainant made no showing of actual advantage to the respondent upon obtaining the document and complainant failed to raise an objection at the time of

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[3] Pursuant to §906.12, Stats. "If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to inspect it. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto."

[4] In addition, §906.12, Stats., effectively supersedes any attorney-client or other privilege. As noted in *Wisconsin Practice*, Blinka, Vol. 7, §612.4: "If the witness has reviewed a writing for the purposes of testifying, §906.12 guarantees its production regardless of whether the document itself was otherwise privileged or protected. In this sense, the rule works a waiver of the attorney-client privilege or the work product protection." (footnote omitted)

[5] Pursuant to §804.01(2)(c)1., Stats:

> Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

the examiner's action. Given all these circumstances, the Commission rejects complainant's contention that he was unfairly prejudiced when the examiner supplied respondent with a copy of the document he chose to take to the witness stand.

C. Appropriateness of Ms. Berkani serving as counsel for respondent

Complainant "raises the issue" of whether counsel for respondent, Sheri Berkani, had a conflict of interest because she had previously worked with complainant on DPI matters during their joint employment with the agency. In his post-oral argument filing, complainant describes his argument as follows:

> During the hearing, as can be clearly heard on the tape recording, Mr. Allen bitterly complained about the conflict of interest DPI's attorney had in representing DPI. In a very eloquent manner, Mr Allen talked about how unfair it was for his "sister" to represent another member of the family during the dispute. Mr Allen and DPI's attorney had worked closely worked [sic] together before the contested decisions of DPI. Now, she sits here, using information she obtained from that working relationship, to oppose Mr Allen's request for justice. The [hearing examiner] erred when it failed to even address this timely raised issue.

The Commission has reviewed the hearing record and believes that complainant's argument is premised on a statement, set forth below, that he made as part of his lengthy response to respondent's motion to exclude his exhibits and witnesses. Respondent's motion was based on the fact that this information was exchanged after the specified deadline. The examiner asked complainant a series of questions in an effort to understand why he had not submitted this information earlier

> Examiner: And October 10th, you were at the office. What about that evening, October 10th?
>
> Complainant: I'll share with you, I've shared with you the best I can. Some evenings I would just read this material to make sure that I hadn't thrown in something not true. I didn't sit down at my computer every night, and re-write what I had already stated because it was my understanding that I had presented my case in June and that that's what we were going to discuss. I didn't expect that the attorney for the department would find yet a third reason to ask for dismissal. If you will al-

> low me one small analogy. My sister is defending my brother against a complaint against our mother. My sister in the Department, Attorney Berkani, professionally speaking, defends my brother, Steven Dold, John Benson and others who were involved in this, in a suit that I bring for discrimination against our mother, the Department. Who protects Larry? All I wanted was fairness, Attorney Rogers, and I have no one to represent me and I am doing the best I can professionally, but credit me with integrity to represent myself. I am disturbed by the tone of the department towards me. [Tape 1, 23 minutes]

The examiner then noted that it was appropriate for a respondent to file motions to dismiss, if warranted, to avoid wasting judicial resources, and the examiner explained to complainant that "It is something that you should not be personalizing." Complainant offered an apology. The examiner then made her ruling, allowing complainant to call himself as a witness and allowing most of complainant's exhibits to be considered.

The Commission cannot agree that the complainant identified a conflict of interest by Attorney Berkani. The most that can be said is that complainant expressed that he felt it was unfair that the respondent's interests were being advanced by an attorney while complainant did not have an attorney to represent his own interests. Complainant objected to the multiple motions that were advanced by respondent both before and during the hearing. He felt like respondent was picking on him, but he did not articulate an allegation that Ms. Berkani had a conflict of interest. He waived that claim.

In his argument, complainant states that Ms. Berkani and complainant had a close working relationship at DPI and that in representing respondent, Ms. Berkani improperly made use of information she obtained during her working relationship with complainant that existed before the contested decisions of DPI. There is no evidence in the record that Ms. Berkani and complainant had a close working relationship.[6] There is no evidence in the record that Ms. Berkani gained some information from having worked with complainant that could have been used to complainant's disadvantage. There is no evidence in the record that Ms. Berkani actually, and improperly, used such

[6] During oral argument, Ms. Berkani stated that she and the complainant had merely served on a single hiring panel together.

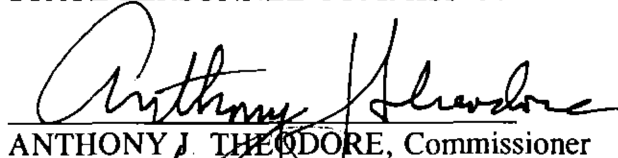
information to disadvantage complainant's claim of discrimination. In addition, complainant has cited no authority for his suggestion that respondent's counsel had a conflict of interest that prevented her from appearing before the Commission to defend respondent against complainant's claim of discrimination. For all these reasons, the Commission rejects the complainant's contention that the examiner erred by failing to bar Ms. Berkani from representing respondent's interests due to a conflict of interest.

ORDER

Complainant's request to reopen the hearing, request for limited discovery, and request for an investigation are all denied. Complainant's remaining objections are denied, the proposed decision and order, a copy of which is attached hereto, is adopted, and the complaint is dismissed.

Dated: July 16, 2002

STATE PERSONNEL COMMISSION



ANTHONY J. THEODORE, Commissioner

KELLI S. THOMPSON, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set

forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95

STATE OF WISCONSIN | PERSONNEL COMMISSION

LAWRENCE R. ALLEN,
Complainant,

v.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,
Respondent.

Case No. 01-0091-PC-ER

PROPOSED DECISION AND ORDER

A hearing was held in the above-noted case on October 15, 2001. Respondent moved for dismissal after complainant finished his case in chief. The examiner held the motion under advisement and allowed the hearing to go forward. The parties gave closing arguments orally in lieu of submitting post-hearing briefs.

The parties agreed to the following statement of the issue for hearing (see Conference Report dated July 20, 2001):

> Whether complainant was discriminated against on the basis of color or race in regard to respondent's alleged demotion of him effective July 1, 2001.

FINDINGS OF FACT

1. Complainant, who is African-American,[A] worked for respondent as an Education Administration Director, starting on December 1, 1997. This was a career executive position functioning as the Director of respondent's newly created Education Options Team (EOT). The EOT was dismantled, effective July 1, 2001 (first day of the 2001-03 biennial budget), as part of a reorganization necessitated by budget cuts. Effective the same day, complainant was transferred to another career executive position as Assistant Director of the Lifework Education Team (LET). The transfer transaction is at issue in this case.

2. Before complainant began working for respondent, he applied for the LET Director position but a more qualified candidate was hired. Respondent, however, was

[A] Complainant's race was added to the proposed decision as part of this finding.

impressed with complainant and later saw a way to bring him into the agency. Specifically, respondent took functions from existing teams to create the EOT and then hired complainant as Director. Respondent always has had a high regard for complainant. (Dold testimony)

3. The School Improvement Team (SIT) was created in a manner similar to the method used for EOT.[B] Specifically, respondent created SIT by assembling a number of functions from other teams. Scot Jones (white) was hired as SIT Director. (Dold testimony)

4. The EOT and SIT teams were created to attract and maintain qualified staff. This worked until budget problems arose. (Dold testimony)

5. Steven Dold, at all times pertinent here, has been the Division Administrator or Assistant Administrator of respondent's Division of Finance and Management. Due to anticipated state budget decisions there was an anticipated 5% cut of state general purpose revenue (GPR) funds, a $1 million cut for respondent.[C] Also, respondent's receipt of federal funds had remained "flat" (at the same dollar level) while respondent's positions supported by federal funds had increased. Also expected was a 10% loss of program revenue funds ($135,000). Respondent also would lose its Goal 2000 federal funds because Congress eliminated the program. Respondent lost federal Job Training and Partnership Act (JTPA) funds. Respondent kept complainant and all team Directors aware of the budget situation on an on-going basis (e.g., Exh. R-101, R-102, R-103, R-104). (Dold and complainant's testimony)

6. Respondent's funding outlook worsened on August 11, 2000, when respondent was informed of further budget reductions (Exh. R-102). Specifically, respondent prepared its budget based on its normal assumed 3% position vacancy rate. Respondent was informed that it was required to write a budget assuming a 7% position vacancy rate. This translated into an additional cut in respondent's receipt of GPR funds in the amount of $499,000. (Dold testimony)

[B] This sentence in the proposed decision was rewritten for purposes of clarity.

[C] A reference in this sentence to the anticipated *federal* budget decisions was deleted from the proposed decision in order to better conform with the record.

7 Between August 11, 2000 and July 1, 2001, respondent was required to absorb wage increases negotiated under union contracts. These wage increases were effective July 1, 2001, and respondent was expected to pay them during fiscal year 2001 (July 1, 2001, through June 30, 2002), without additional funding. Respondent would receive GPR funds for fiscal year 2002 to meet the wage increases, but not for positions that were federally funded.

8. On January 18, 2001, respondent was informed that its GPR funds were reduced an additional $134,000. (Exh. R-105 & Dold testimony)

9. Respondent convened a standing committee to meet weekly (as necessary) to review the status of the budget and to make recommendations to the Superintendent. The committee members included Mr Dold; Brian Pahnke, Budget Director; Faye Stark, Assistant State Superintendent of Finance; Nancy Holloway, Executive Assistant; Paul Halvorson, Special Assistant to the Superintendent and Kathy Knudson, Human Resource Director Once the Superintendent approved reduction recommendations from the committee, the information was shared with the Division Administrators who then had an opportunity to express their disagreement. Basically, however, the administrators were told that the reduction had to be done and asked whether they could live with it. No employee's race or color played a part in any of the committee's recommendations. (Dold testimony)

10. Respondent's approach to the budget crisis was to take remedial steps, from least to most intrusive. First, supplies and services were reduced including reductions in travel and consulting visits, as well as the use of limited term employees (LTEs). Second, switches to healthier funding sources were explored.[D] Third, vacant positions were frozen (not re-filled). Fourth, teams were consolidated. Fifth, functions could be eliminated or persons laid off.[E] Respondent was able to meet its budget reduction requirements by utilizing steps 1-4 and without eliminating functions. (Dold testimony)

11. Vacancies and the need for additional positions existed in EOT and in other teams during the budget crisis. Complainant's requests to fill the vacancies or for new positions in EOT were treated no differently than similar requests from other teams.

[D] This sentence in the proposed decision was rewritten to better reflect the record.
[E] Language was added to the proposed decision in order to accurately reflect the record.

12. Complainant suggested combining EOT and SIT (see ¶¶2-4 above) after Jones left the SIT Director position. This suggestion was considered by the standing committee (see ¶9 above) but rejected because it would not result in significant GPR savings. Complainant was never informed that his suggestion was even considered much less rejected. Dold admits that with the benefit of hindsight, it would have been better if he had responded to the suggestions made by complainant and suggestions made by others. Complainant, however, was treated no differently than other individuals in this regard.

13. The committee thought it was logical to eliminate the EOT and SIT which had been the most recently created. Eliminating these teams saved significant GPR money. Both Director positions were eliminated but the SIT Director position was vacant when this occurred.

14. Eliminating complainant's position as EOT Director and transferring him to Assistant LET Director meant that his entire position was now funded by federal money. This transaction alone represented a $53,000[F] savings in GPR funds. Consolidating the EOT and LET also generated additional savings associated with eliminating or not filling positions.[G]

15. In addition to eliminating vacant positions, respondent was forced to layoff four employees. These were white individuals in GPR-funded positions. (Exh. R-108)

16. Respondent thought complainant was well suited for reassignment as Assistant Director of the LET team. As noted previously (see ¶2 above), his first interest in the agency was in connection with the LET team. Respondent felt so strongly about this that the incumbent of the LET Assistant Director, Connie Colucci, was transferred elsewhere (to Title 1) to enable complainant to have the job.[H] Both complainant and the transferred incumbent received a federally funded hourly wage increase of $1.00. Their team directors also received hourly increases of $0.50.[I]

[F] The amount listed in the proposed decision was changed from $50,000 to $53,000 in order to more accurately reflect the record.
[G] This sentence was added to the proposed decision to better reflect the complete record.
[H] This sentence was modified from the proposed decision to provide the name of the LET Assistant Director and to specify where she was transferred.
[I] This sentence was added to the proposed decision to show that the two team directors also received additional compensation.

17 Complainant was one of two black Directors employed by respondent. The remaining 18 Directors were white.[I] Complainant was the only Director who was transferred to an Assistant Director position due to the budget cuts. Mr. Spraggins, the other black director, did not lose his team. Members of teams other than EOT were reassigned as a consequence of the fiscal problems. SIT was reassigned to Title 1. The position of director of SIT was vacant at the time of the reassignment. At the time the former director left that position, respondent was considering whether to eliminate SIT as a separate team.[J]

18. Complainant as EOT Director reported directly to John Fortier, an Assistant Superintendent. As Assistant LET Director, complainant reports to the LET Director, Brian Albrecht (white). Mr. Albrecht was one of complainant's peers prior to the elimination of the EOT

19. Mr. Fortier was notified that the EOT was being eliminated and complainant transferred. (Dold testimony) On about June 1, 2001, Mr. Fortier notified complainant that his team was gone. (Dold and complainant testimony) Respondent did not provide complainant with less warning than others whose positions were eliminated. Respondent did not involve complainant in the decision to eliminate EOT and to transfer complainant, but he was treated no differently than others in this regard.

20. Complainant supervised roughly 11 positions as EOT Director The number of positions varied based on the number of limited term employees.[K] The classification of those positions were as follows: Education Program Coordinator 3, Education Program Specialist, two Education Consultants, Administrative Assistant 3, three School Administration Consultants, two Program Assistant 3's, and Program Assistant 2. As EOT Director, he was in charge of the following programs, meaning he ensured that subordinates managed the programs appropriately:

- Job Training and Partnership Act (JTPA)
- Goals 2000

[I] Complainant testified there were 20 directors.

[J] The last four sentences were added to the proposed decision in order to more completely reflect the record.

[K] This sentence was added and the previous sentence modified in the proposed decision in order to clarify that the number of positions supervised by complainant was not constant.

- Alternative Education Program
- Youth Options Program
- General Educational Development Program
- Student Achievement Guarantee in Education (SAGE) Program
- Block Scheduling
- Waivers
- High School Equivalency Diploma Program
- Charter School Program

The Education Options Team was funded by state general purpose revenues as well as certain federal grants, including JTPA funds (no longer available), Goals 2000 funds (no longer available and they comprised at least 10% of the funding for complainant's position as director) and Charter School funds. The Goals 2000 funds were the funding source for 2 or 2.5 of the positions on EOT Two EOT employees whose positions had been funded by Goals 2000 funds resigned their positions because of the impending funding problems approximately 8 months before their funding ran out. Carl Perkins was a source of funding for the Alternative Education Program but most of the EOT programs were not eligible for Carl Perkins funding. At the time that complainant's director position with EOT was eliminated, 60% of the funding for that position came from state GPR funds.[L] (Exh. R-109, Dold's and complainant's testimony)

21. As Assistant LET Director, complainant is expected to perform the duties noted in his position description. Complainant continues to supervise at least 3 or 4 employees, including the State GED administrator.[M] Complainant is responsible to assist the LET Director by providing leadership, facilitation and supervision to the team. The LET has more staff (29) and a larger budget than EOT did. The main LET programs and approximate related budgets (when known) are noted below:

- Career & Technical Education in Wisconsin ($10 million)
- Alternative Education ($5 million)
- Special Education ($3 million)
- School to work

[L] The last five sentences in this finding were added to the proposed decision in order to more completely explain the funding sources for EOT

[M] This sentence was added to the proposed decision to note the complainant's continuing supervisory responsibilities.

- Tech prep
- Wisconsin Investment Act
- GED/HSED
- Carl Perkins Federal Program
- Wisconsin Youth Options Program

None of the funding for complainant's current position is from state GPR. Carl Perkins federal funds serve as the primary funding source for LET Carl Perkins funds have not been placed into jeopardy Mr Albrecht's position is also largely funded with federal funds.[N] (Exhs. R-109 & R-110. Testimony from complainant, Dold and Albrecht.).

22. Complainant was forced to move to a different office when he became the Assistant LET Director. His new office is on the same floor as his prior office and it is generally in the same area. His new office is about half as large as his prior office. The Division Administrator/Assistant Superintendent, a position that had been vacant when complainant had the office, now occupies his prior office.

23. Office size entitlement is determined by classification. Complainant's current office is not less than his entitlement based on his current classification. While he believes that Directors Wall, Albrecht and Cook have larger offices than he has, this leaves 16 other Directors with offices either the same size or smaller than complainant's present office.

24. An Assistant Superintendent is entitled to a larger office than any Director.

25. Complainant contends his current office also is less desirable because it has no light switch or ventilation. He agreed that the lack of a light switch had no negative impact on his job. He also agreed that he has a fan running at all times which corrects the ventilation problem.

26. There were individuals in Director positions for a shorter time than complainant when EOT was eliminated. Complainant had no right to bump a less senior Director position because such right only arises if complainant had lost his career executive status, as noted in §ER-MRS 30.105, Wis. Adm. Code. Complainant did not lose his career executive status.

[N] The last three sentences and the final six bulleted items have been added to the proposed decision in order to more fully reflect the record.

Rather he was reassigned from one career executive position to another, pursuant to §ER-MRS 30.07(1), Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this case pursuant to §230.45(1)(b), Stats.

2. Respondent is entitled to have its motion to dismiss granted based on complainant's failure to establish an element of his prima facie case; to wit: that a cognizable adverse action occurred.

3. Respondent did not discriminate against complainant because of his race or color

OPINION

I. Analytical Framework

The initial burden of proof under the Fair Employment Act (FEA) is on the complainant to show a prima facie case of discrimination. The particular elements of a prima facie case are not rigid and may vary between cases depending on the nature of each case. If complainant establishes a prima facie case, 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).

The hearing issue is repeated below:

> Whether complainant was discriminated against on the basis of color or race in regard to respondent's alleged demotion of him effective July 1, 2001.

A prima facie case of race or color discrimination in this case would require complainant to show that (1) he is protected under the FEA because of his race and color, (2) he was performing his job satisfactorily, (3) he was subjected to an adverse employment

action[0] and (4) others of a different color or race were treated more favorably The parties do not dispute that complainant established the first and second elements of the prima facie case.

II. Respondent's Motion to Dismiss

Respondent moved to dismiss the case at the close of complainant's case in chief contending that complainant failed to establish the third element of the prima facie case. Specifically, respondent argued that complainant failed to show that he was demoted or that any cognizable adverse action occurred. The hearing examiner took the motion under advisement for consideration by the Commission[2] and, since all witnesses were present, allowed the hearing to go forward.

In the civil service system, as pertinent here, a demotion means the permanent appointment of an employee with permanent status in one class to a position in a lower class. See §ER-MRS 1.02(5) and Ch. ER-MRS 17, Wis. Adm. Code. Here complainant was transferred from one job classified as a career executive position to another job in the same classification (see ¶26, Findings of Fact). Technically, a demotion did not occur The question remains as to whether complainant's transfer constitutes a cognizable adverse action.

A required element of a prima facie case is that a cognizable adverse action occurred. *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97 Section 111.322(1), Stats., makes it an act of employment discrimination to "refuse to hire, employ, admit or license any individual, to bar or terminate from employment . or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment." The applicable standard, if the subject action is not one of those specified in this statutory section, is whether the action should be characterized as having affected complainant's "terms, conditions or privileges of employment." *Klein, supra,* at 6.

In determining whether complainant has stated a cognizable adverse action, it is helpful to review case law developed under Title VII, which includes language parallel to the statutory language under consideration here. 42 USC §2000e-2. Generally, the Seventh Circuit Court of Appeals has not required that an action be an easily quantifiable one such as a termination or

[0] This clause in the proposed decision was modified to delete the reference to demotion.

reduction in pay in order to be considered adverse, *Collins v. State of Illinois*, 830 F.2d 692, 703, 44 FEP Cases 1549 (7th Cir 1987), but has concluded that not everything that makes an employee unhappy is an actionable adverse action, *Smart v. Ball State University*, 89 F.3d 437, 71 FEP Cases 495 (7th Cir 1996).

In *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir 1993), the employee was offered a transfer from a position as an assistant vice president and manager of a branch bank to a loan officer position managing collections at a different branch. The transfer did not involve a wage reduction. In concluding that the employee had not suffered an adverse employment action, the court stated that:

> .Crady did not show that his transfer from the Sellersburg branch manager position to a collections officer position in Charleston was a materially adverse employment action. As we indicated in *Spring* [*Spring v. Sheboygan Area School District*, 865 F.2d 883, 48 FEP Cases 1606 (7th Cir. 1989)], a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. Crady would have maintained a management-level position at the same salary and benefits he was already receiving. Although his responsibilities changed, he does not show that they were less significant than the responsibilities he previously enjoyed in Sellersburg. Assuming that Crady was an assistant vice president in Sellersburg and that the collections officer position did not carry the AVP designation, this alone is not enough to constitute a materially adverse employment action.

The circumstances of this case are so similar to those in *Crady*, that the Commission is compelled to conclude that no cognizable adverse action occurred. The change in job title from Director to Assistant Director is less of a decrease in title stature than occurred in *Crady* where the employee went from a bank manager to a collection officer. Complainant's wages here were actually increased and he lost no benefits. He now has a less distinguished title as Assistant Director but he works in a program with more staff and a larger budget. His classification remained the same and he retained management and supervisory duties.

A contrary result is not justified by the fact that complainant now has a smaller office. Someone with a higher ranking who is thereby entitled to the larger office occupies

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[2] The examiner lacked authority to resolve the motion. §PC 5.01(2), Wis. Adm. Code.

complainant's previous office. Complainant's current office is not less than he is entitled to by virtue of his classification and it is, in fact, larger than most of the Directors' offices. This is not a situation where complainant's new office is located in an isolated corner of the workplace without support services as were the circumstances present in *Collins v. State of Illinois*, 830 F.2d 692 (7th Cir 1987).

A contrary result is not justified because complainant now reports to a lower classification than before and the person to whom he reports was his peer Such conclusion is supported by the decision in *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994). Flaherty's position as a principal scientist was eliminated and he was offered a position as a project manager of the fuel cell program without loss of pay or benefits and with greater growth potential than his prior position. Flaherty considered the change as a demotion because of his less-prestigious title and because he would report to a lower classification than before and the person to whom he would report was a former subordinate. The Court held that no cognizable adverse action occurred under these circumstances.

The Commission, accordingly, grants respondent's motion to dismiss raised after complainant presented his case-in-chief at hearing.

III. Alternative Analysis

This case would be dismissed even if respondent's motion had not been granted. If complainant had established a prima facie case, the burden would have shifted to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent met this burden by not only articulating but by showing that elimination of complainant's position as EOT Director resulted in a significant savings of GPR funds which was necessary due to budget reductions and which would not otherwise be realized. Respondent also showed that the transfer of complainant to a different career executive position as Assistant LET Director was logical and the least oppressive available option.

The burden then would shift to complainant to establish pretext, which he failed to do. Complainant's first pretext argument was that respondent could have let him bump into a Director position, the incumbent of which had less seniority than complainant. Such option

was unavailable, however, as noted in ¶26 of the Findings of Fact. Complainant also contended that respondent could have combined the EOT and SIT teams instead of eliminating them. Respondent showed, however, that such an option would not have resulted in the same GPR savings as occurred by eliminating these teams.

Complainant also asserted that respondent had been in the process of eliminating his team for several months. In support, he notes that positions were left vacant in EOT and his requests for filling the positions and for additional staff were not fulfilled. Such requests, however, were made during the budget crisis. Mr Dold testified that the other teams also were short-staffed and that complainant was not treated differently in this regard. Complainant offered no contrary evidence.

ORDER

Respondent's motion to dismiss for failure to state a claim is granted and this case is dismissed.

Dated: ________________, 2001

STATE PERSONNEL COMMISSION

JMR:010091Cdec1.1

____
JUDY M. ROGERS, Commissioner

____
ANTHONY J. THEODORE, Commissioner

Chairperson McCallum did not participate in the consideration of this case.