

EDWARD J. GERMAIN,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES [DHFS]¹**
Respondent.

INTERIM
DECISION AND
ORDER

Case No. 90-0005-PC-ER

NATURE OF THE CASE

This is a complaint of discrimination on the bases of race and sexual orientation in regard to a hiring decision. This complaint was filed on January 4, 1990. A hearing was originally scheduled in this matter for January of 1990 and then rescheduled for July of 1990. In February of 1990, the parties agreed that the hearing should be postponed pending completion of an investigation. An Initial Determination was issued on August 25, 1992. In December of 1992, the parties requested that the matter be held in abeyance while they engaged in settlement discussions and the Commission granted the request. After the decision of several motions during 1993, the Commission scheduled a hearing for May of 1994. On May 16, 1994, complainant indicated that he wished to pursue a Title VII claim and, as a result, requested that the matter be held in abeyance until his federal claim was decided. The Commission, consistent with its usual practice, granted this request. After numerous inquiries by the Commission, it became apparent in November of 1996 that complainant never filed a Title VII action. As a result, the Commission convened a prehearing conference on November 20, 1996, at which the parties again requested that the matter be held in abeyance while they engaged in settlement discussions. The Commission granted this

¹ Pursuant to 1995 Wisconsin Act 27 §9126, as of July 1, 1996, the name of Department of Health and Social Services changed to Department of Health and Family Services.

request. When the case had not been settled by May of 1997, the Commission convened a prehearing conference and the hearing was scheduled for September of 1997 and then rescheduled for December of 1997. The hearing commenced on December 1, 1997, and continued on December 2 and 4, 1997, and March 30 and April 1, 1998. At the conclusion of the hearing, the parties requested that the establishment of a briefing schedule be postponed until a hearing transcript was prepared. The hearing examiner understood that the parties would be contacting him for the purposes of establishing a briefing schedule once they had received the transcript. When this had not occurred by December of 1999, the Commission established the briefing schedule by letter dated December 17, 1999. This briefing schedule, as subsequently modified through request and agreement by the parties, concluded on September 18, 2000.

FINDINGS OF FACT

1. Complainant, who has identified himself as a white male homosexual, earned a Ph.D. in psychology in 1981, and was licensed as a psychologist in Wisconsin during all times relevant to this matter. From 1973 through 1975, complainant served as a psychologist and therapist with a county department of adult corrections, working closely with courts, attorneys, physicians, psychologists, state and local mental health agencies, and social service organizations. From 1976 to 1979, complainant served as a mental health planner for a private consulting group with responsibility, in conjunction with other health professionals and social workers, for creating a county mental health services plan. From 1979 through 1982, complainant was employed as a forensic mental health specialist for a county mental health department with responsibility for serving as the primary therapist for individuals found not guilty of crimes due to mental disease or defect and for individuals on probation or parole.

2. In January of 1983, complainant was appointed to the position of Unit Chief of the Forensic Assessment Unit (FAU) in the Forensic Program Area at respondent's Mendota Mental Health Institute (MMHI). In this position, complainant was responsible for the management and administration of the largest unit at MMHI, with

direct supervisory authority over 25 professional positions, including psychologists, social workers, and occupational therapists, and indirect supervisory authority over nurses, nursing aides, and clerical staff. The FAU is the unit responsible for assessing and planning treatment for the highest security forensic patients at MMHI. Complainant authored and implemented the policies and procedures for the FAU when it was first established.

3. A performance evaluation signed by complainant's supervisor on September 23, 1983, rated complainant's performance as good on 6 factors and average on 2 and stated as follows, in pertinent part:

Dr Germain has done an impressive job in developing his unit program. He tends to have high standards of quality. He needs to develop ways to deal with negativistic staff. Good liaison work with other facilities. Has worked diligently to compensate for difficulty in recruiting a staff psychologist for his unit.

At times is perceived to be authoritative and hostile by others. Needs to work on own interpersonal presentation. Time management issue should be addressed so that medical record requirements are met. Needs to identify more with management than with unit staff.

Dr Germain is an intelligent, skilled clinician who with experience and temperance may prove to be an asset once he further develops his management style.

4. A performance evaluation report signed by complainant's supervisor on November 23, 1983, and by Terence Schnapp, MMHI Director (Chief Executive Officer), on December 2, 1983, gave complainant a superior rating and stated as follows, in relevant part:

Dr Germain has consistently been an outstanding employee. During the last year he was instrumental in designing and implementing a new Maximum Security Forensic Unit. He has instituted improved assessment and treatment procedures. His relationship with referral sources, especially with the Division of Corrections, is excellent. Dr Germain has impressed me clinically and has provided much staff training in diagnostic and psychological issues. He is an able administrator and has deftly handled staff feelings and personnel issues. Dr Germain is an outstanding employee.

5. A performance evaluation signed by complainant's supervisor on December 23, 1983, ranked complainant's performance as excellent on 2 factors, good on 4 factors, and average on 2 factors and stated as follows, in relevant part:

Dr. Germain continues to provide exceptional leadership to the Forensic Assessment Unit. He is a skilled clinician who adapts the FAU program to meet patient needs. Largely through his efforts, unit morale has increased. Interpersonal presentation has improved considerably.

Medical Records problem still exists and improvement in this area is needed. Partly this is due to a vacant half time psychologist position on Dr Germain's unit.

Dr Germain has matured as an administrator and has demonstrated capacity for growth.

6. A performance evaluation report signed by complainant's supervisor on June 12, 1984, and by Mr Schnapp on June 11, 1984, rated complainant's performance as above average and stated as follows, in relevant part:

Dr. Germain has consistently been an outstanding employee. During the last year he was instrumental in designing and implementing a new Maximum Security Forensic Unit. He has instituted improved assessment and treatment procedures. His relationship with referral sources, especially with the Division of Corrections, is excellent. Dr Germain has impressed me clinically and has provided much staff training in diagnostic and psychological issues. He is an able administrator and has deftly handled staff feelings and personnel issues. Dr. Germain is an outstanding employee.

7 A Performance Planning and Development Report signed by complainant's supervisor on June 11, 1986, stated as follows, in pertinent part:

During the past year, while FAU has experienced problems with employees and patients, Dr Germain has skillfully documented the basic issues and formulated appropriate management or treatment plans, respectively. In particular, I was impressed with his dedicated efforts to identify and work through some significant staff counter-transference issues. He requested the support of Sue Jansen for an all-day Me-Time with all levels of his staff, which resulted in a tangible improvement in staff morale. He has maintained direct control over the treatment

approach to a difficult high functioning patient who had manipulated a staff member into a compromised position which resulted in her termination.

Dr. Germain has maintained good working relationships with staff here and at referring agencies in regard to the critical issues surrounding admission and discharge patients. Our court reports remain of high caliber.

While the completion of time-limited paperwork continues to be a problem for all levels of FAU staff, Dr. Germain continues to address the same with optimism.

8. A review of complainant's prior year's performance expectations signed by complainant's supervisor on December 8, 1987, stated as follows, in relevant part:

During the past year Dr. Germain has consistently addressed the problem of timely completion of Medical Records by FAU staff. While there is still room for progress, the FAU staff appear to have the need to be responsible in this area as a priority.

Dr. Germain has also addressed the difficult area of staff counter-transference with potentially aggressive short term patients. For various reasons including staff training, staff turnover and a better understanding of the interplay between security needs and assessment/treatment needs, there have been no major problems in regard to the humane treatment of FAU patients.

Dr. Germain continues to maintain good working relationships with senior Mendota clinical and administrative staff and referring agencies. With the advent of our involvement with the Milwaukee courts, Dr. Germain has been provided with a challenging opportunity to maintain effective working relationships. The bottom line is that our court reports remain of high caliber

9. A Discretionary Award Report signed by complainant's supervisor on June 9, 1988, and by Mr Schnapp on or around June 13, 1988, indicated that complainant met expectations (the second highest rating of four), and stated as follows, in relevant part:

Dr Germain has provided good leadership to his staff. He has been successful working with staff on meeting his standards for patient care.

He has continued to do an exemplary job coordinating admissions. He has also provided timely, competent service to WRC by assessing Medically Disordered Offenders for possible treatment. Medical Record delinquencies have improved on FAU and Dr. Germain has personally improved.

Dr. Germain met the goals on his PPD. . .

10. A Performance Planning and Development Report signed by complainant's supervisor on March 27, 1989, indicates that complainant met his performance objectives and states as follows in relation to the objective of meeting affirmative action goals and objectives:

Hired minority aide. Continued Black Issues Group. Frequent topic of discussion at Me-Time as related to patient care.

11. As the result of the filing of a complaint on February 11, 1988, by a public interest advocacy group in which it was alleged that racial/ethnic minority patients at MMHI, particularly African-Americans, were being discriminated against in the delivery of services and in their treatment by a predominately white staff, MMHI administration conducted an investigation and developed and issued an action plan on August 29, 1988. The focus of the investigation was the Forensic Program at MMHI. One of the three major goals stated in the plan was to increase the number of minority employees at MMHI. Beth Cox, Director of Treatment Evaluation and Training for respondent's Division of Care and Treatment Facilities and Mr. Schnapp's first-line supervisor, was assigned primary responsibility for implementation of this plan. At least in part because of the media and other public attention the complaint had received, MMHI invested substantial effort into the development and implementation of this action plan, and established it as one of the institution's highest priorities. As a direct result of the complaint and its ramifications, MMHI created the position of Minority Affairs Coordinator. This project position was filled by the appointment of Kelvin Reed, a black male, in November of 1988. Dr. Reed became the chair of MMHI's Affirmative Action Committee which, pursuant to the action plan, was charged with aggressive minority recruitment for staff at the institution.

12. In a meeting of the MMHI Oversight Committee on Minority Affairs on October 24, 1988, Ms. Cox identified the Forensic Program Director position as an upcoming vacancy appropriate for minority recruitment efforts consistent with the action plan.

13. In December of 1988, respondent announced a vacancy in the position of Forensic Program Director at MMHI. This was the position which supervised complainant's position and the positions of the other nine unit chiefs/department heads within the Forensic Program, and managed a large and diverse professional staff comprised of psychiatrists, nurses, social workers, and psychologists. This position reported to the Medical Director of MMHI who in turn reported to the Director of MMHI. The Forensic Program consisted of 160 to 180 staff. The duties and responsibilities of this position included: development, implementation and evaluation of policies, standards and procedures necessary for accomplishing DCTF [Division of Care and Treatment Facilities] and MMHI forensic program objectives and goals (50%); provide administrative direction of budget development and monitoring of operating budgets to assure effective and efficient fiscal management (30%); as assigned by the Medical Director, implement, direct and supervise the program's relationship with neighboring citizen groups, local and/or state governmental groups, other state agencies, and the general public in order to optimize community relations and maintain a therapeutic environment (10%); supervise and manage forensic program staff (5%); and implement affirmative action/civil rights compliance plan within the program area (5%). This is not an entry level supervisory, administrative, or management position and, as a career executive position, would not typically be filled by a candidate with no administrative or supervisory experience.

14. Complainant had been appointed to serve in the Forensic Program Director position on an acting basis by Mr. Schnapp in November of 1988. When he asked complainant to assume this acting assignment, Mr. Schnapp expressed confidence in complainant's ability to do the job. Prior to the date of the subject hire, Mr. Schnapp had never expressed any concern about complainant's work performance.

15. Each applicant for the subject Forensic Program Director position, including complainant and Claude Gilmore (a black male), the successful candidate, were required to submit an Achievement History Questionnaire (AHQ) and a resume. All ten applicants were certified for further consideration. Nine of the ten certified candidates were interviewed by a panel consisting of Kelvin Reed (black male), Stephanie Pollenitz (black female), Wendy Norberg (white female), and Rodney Miller (white male). The tenth candidate voluntarily withdrew from consideration. The interview scores for complainant and for Mr Gilmore were as follows:

	Miller	Norberg	Reed	Pollenitz	Total
Germain	37	37	30	37	141
Gilmore	35	34	34	39	142

Mr. Reed's scoring of complainant's interview was less consistent with that of the other panel members than his scoring of the interviews of the other eight candidates.

16. Complainant, Mr Gilmore, and Kristine Krenke were recommended for the final interview stage of the recruitment. Mr. Gilmore and Ms. Krenke were asked to meet with the unit chiefs and department heads of the MMHI Forensic Program prior to the final interview. The unit chiefs and department heads were provided copies of Mr Gilmore's and Ms. Krenke's resumes prior to these meetings, and were asked to evaluate the strengths and weaknesses of each candidate. Complainant was provided the option of meeting with the unit chiefs and department heads but he declined given the fact that he was currently working with all of these individuals. Complainant was unaware, however, that the candidates' resumes were being provided to the unit chiefs and department heads as a part of this process and that they were being asked to provide input into the hiring process by assessing the strengths and weaknesses of the candidates.

17 The unit chiefs and department heads met with Mr. Gilmore and Ms. Krenke on February 23, 1989. In their feedback, the unit chiefs and department heads

provided an assessment of complainant's candidacy as well as that of Mr. Gilmore and Ms. Krenke. Of these 10 individuals, 8 recommended complainant, 1 recommended Mr. Gilmore, and 2 recommended Ms. Krenke.² Of the three who did not recommend complainant, Ed Musholt, who recommended Ms. Krenke, indicated that complainant's style could be very negative and sarcastic and that complainant had not been sufficiently involved in the Forensic Program as its Acting Director; Greg Van Rybroek (who apparently gave the two conflicting recommendations), who recommended Ms. Krenke in one of his recommendations and complainant in the other, indicated that complainant had a negative attitude and used power tactics as his leadership style; and Dennis Doren, who recommended Mr. Gilmore, indicated that complainant had difficulty handling emotional personnel issues and, although well liked by the unit chiefs, did not command their respect for his administrative abilities. These concerns were not expressed by the other unit chiefs and department heads who, overall, expressed the opinion that complainant commanded the respect of staff and management, had good leadership skills, worked cooperatively with a variety of people, and had the requisite experience and knowledge base. The three who had not recommended complainant testified at hearing that they felt they had good working relationships with complainant and that complainant had generally good administrative and clinical skills.

18. Prior to the conduct of the final interviews, the references of the three remaining candidates were checked. The results of the reference checks were provided to the interviewers prior to the final interviews. Complainant's reference was Martin Acker, his doctoral advisor at the University of Oregon. Dr Acker characterized complainant as a sensitive and intelligent professional, as someone with whom he was comfortable in every respect, and as very committed to the area of psychology, and indicated that he was not hesitant to recommend complainant for the position and would like to have him back in Oregon. Mr Gilmore's supervisor Bruce Berg, Acting Administrator of the Psychological Crisis Service at the Milwaukee County Health

² Apparently, one individual made two conflicting recommendations which were counted separately for purposes of this matter.

Complex, stated that Mr. Gilmore had performed leadership roles in committee work and was very sensitive to people's needs but had not directly supervised staff; had a strong will to succeed and was good at seeing the big picture; and had good potential for supervision and management, but needed more experience. Dr. Les Gomers, Mr. Berg's supervisor and Mr. Gilmore's second-level supervisor, stated that Mr. Gilmore was very competent clinically; was bright, energetic, and flexible; and would make a great #2 person but needed more experience before he was ready for a #1 spot. William Gore, complainant's former supervisor at the Milwaukee County Health Complex, indicated that he had known Mr. Gilmore for many years, although he had never supervised him directly, and had encouraged him to get a graduate degree; observed that Mr. Gilmore was capable, conscientious, and professional but had no formal supervisory experience and a tendency to bite off more than he could chew and to spread himself too thin. Robert Weissenborn, the Director of the Faculty at Cardinal Stritch College where Mr. Gilmore was an instructor, indicated that he liked Mr. Gilmore a lot and had been impressed with his credentials when he had applied for a teaching position, but was aware that, during at least one semester, Mr. Gilmore had been unable to handle the course load or to set proper priorities for getting the work done and had received only fair evaluations, but that he had corrected this problem in subsequent semesters.[^]

19. The final interviews took place on February 23, 1989. The final interview panel consisted of Mr. Schnapp (white male); Ms. Cox (white female); and Lee Ecklund, Medical Director of MMHI (white male). The questions asked by the panel dealt with managing a staff of professionals who disagree vehemently about a treatment issue and one of whom challenges the director's authority (#1); handling professional staff concerns about their safety and about inadequate psychiatric coverage (#1); program evaluation (#2); the principles of participatory management which would be employed (#3); handling the transfer of an HIV positive patient from one unit to a unit

[^] The language "but that he had corrected this problem in subsequent semesters" was added to this finding to more accurately reflect the record.

where the staff has made it clear they don't want to deal with this patient (#4); and handling the conversion of a unit from one established to treat sex offenders to one treating mental illnesses such as schizophrenia and bipolar disorder (#5). The interviewers had available to them the candidates' resumes, the input from the unit chiefs/department heads, and the results of the reference checks.

20. Ms. Cox's interview notes could not be located for purposes of the hearing in this matter, and she could not recall how she had scored the candidates although she did recall that her scores for complainant and Mr Gilmore were very close but that she had rated Mr. Gilmore slightly higher.^b Mr Schnapp's and Mr. Ecklund's scoring of the candidates is reflected in the chart below. The data relating to the number of benchmarks satisfied by the candidates in answering each question is taken from Mr. Schnapp's and Mr. Ecklund's interview notes/scoring sheets:

	Schnapp: raw score	Schnapp: # benchmarks hit	Ecklund: raw score	Ecklund: # benchmarks hit
Germain #1	15		11	
Gilmore #1	16		8	
Germain #2	10	2	7	3
Gilmore #2	15	6	6	2
Germain #3	10	2	10	5
Gilmore #3	12	6	6	2
Germain #4	12	12	6	6
Gilmore #4	10	9	7	7
Germain #5	10	2	6	3
Gilmore #5	12	4	8	4
Total Germain	57	18	40	17
Total Gilmore	65	25	35	15

As a whole, the scoring of the interviews by Mr. Schnapp and Mr. Ecklund, including their conclusions as to the number of benchmarks touched upon by the candidates in their responses, does not appear to demonstrate consistency between the scorers.

^b The fact that Ms. Cox had rated Mr. Gilmore slightly higher than complainant was added to this finding to more accurately reflect the record.

21. During his interview, complainant mentioned to the panel that he was gay. He did this to remind the panel that, although Ms. Krenke was protected from discrimination on the basis of her gender and Mr. Gilmore on his race, complainant was also protected based on his sexual orientation.

22. On February 28, 1989, Dr Reed asked to meet with complainant. During their meeting, Dr Reed indicated to complainant that he was concerned about complainant's apparent lack of support for Dr. Reed's minority affairs agenda for MMHI. Complainant advised Dr Reed that he found his style too aggressive, that he felt Dr Reed had the tendency not to listen to suggestions that did not fit his point of view, and that he was of the opinion that Dr. Reed should spend more time acquainting himself with the operation of the Forensic Program before making decisions which affected the program. Dr Reed told complainant that he was not supporting complainant's candidacy for the Forensic Program Director position but was supporting the candidacy of Mr. Gilmore because a "brother" would not have sat quietly in a meeting, as complainant had, after Dr Reed had spoken passionately about MMHI executive staff needing to be more involved in affirmative action recruiting. Complainant's disagreement with Dr. Reed concerning his approach to minority affairs at MMHI centered on complainant's belief that Dr. Reed focused exclusively on issues relating to blacks to the exclusion of other minority groups, and that Dr Reed's style of interacting with him was abrasive and condescending.

23. In a memo dated March 1, 1989, complainant brought this meeting to the attention of Mr. Schnapp, and expressed concern as to the effect Dr. Reed's support of Mr Gilmore could have on the hiring process.

24. In a memo dated March 6, 1989, Mr. Schnapp advised complainant that Dr. Reed's only involvement in the hiring process for the Forensic Program Director position had been as a member of the first interview panel. In a memo dated March 30, 1989, Mr Schnapp advised Dr. Reed that his interaction with complainant on February 28, 1989, was inappropriate.

25. In a memo dated March 1, 1989, to Mr. Schnapp and Linda Belton, Administrator of the Division of Care and Treatment Facilities, Dr. Ecklund recommended complainant for appointment to the Forensic Program Director position, and stated as follows, in relevant part:

In making my recommendations for selection of the Forensic Program Director, I have reviewed the Achievement History questionnaires, the references, the input of the first panel, the input of the second panel and feedback from the Department Heads and Forensic Unit Chiefs.

My choice for this position is Edward Germain, Ph.D. He has a comprehensive knowledge of the types, causes, effects and treatments for forensic mentally ill persons. He has a comprehensive knowledge of forensics, including the operation of the courts, referral patterns and pressures, what the courts expect from us and what security is necessary for persons committed under various sections of Chapters 51, 55, 970 and 975 and what treatment is appropriate for persons with a particular diagnosis.

He has had five years' experience at MMHI as supervisor of one of the most difficult clinical units. Prior to that, he had four years' experience in working with forensic mentally ill patients and supervised a staff of five. Dr. Germain is keenly aware of the issues confronting the Forensic Program at MMHI. He is also aware of Dr. Maier's problems and was one of the few Forensic Unit Chiefs to openly disagree with him and this happened prior to his becoming Acting Director of the Forensic Program in November. Dr. Germain is very knowledgeable about Accreditation Standards and JCAHO Surveys. He would come "ready to go to work" with his supervisory experience and his knowledge of the Mendota Mental Health Institute.

In my dealings with Dr. Germain over the past five years, and especially during the past four months, I have found him sensitive to, and empathetic with, the problems confronted by minorities. I have no doubt that he will play an important role in meeting our affirmative action goals and that he will take a leadership role and be most supportive of hiring minorities. Further, I experience him as a person of great integrity and drive, and to be a team player.

The feedback from the Forensic Unit Chiefs and Department Heads was outstanding in its support of Dr. Germain. He received eight ratings as

number one with the other candidates receiving two and one respectively.

The next candidate is Claude Gilmore, MSW. I found him to have no supervisory experience. The Forensic Program Director's job is not an entrance supervisory position but a high level one and I consider supervisory experience essential. Mr. Gilmore had a very minimal knowledge of forensics. He has had experience with patients under Chapters 51 and 55 and in crisis intervention. He also is very experienced in counseling and therapy to couples and families. Some of the families have had delinquent boys in them. He has received a degree in Health Sciences Administration but he has not been employed as an administrator. It appears Mr. Gilmore has not been involved in JCAHO Accreditation Surveys. I believe Dr. Les Gombus in his reference expressed my feelings when he stated Mr. Gilmore would be best qualified for an entrance level administrative position like a Unit Chief or an Assistant to the Director of the Forensic Program and I would like to see us pursue one of these alternatives. Mr. Gilmore is a member of a minority group and I believe he would be helpful in the hiring and retention of minority staff. The feedback from the Department Heads and the Forensic Unit Chiefs saw him as the number two choice. I believe it will easily take a year before he would be at the level of functioning of Dr. Germain.

26. In a memo dated March 6, 1989, to Ms. Belton, Mr. Schnapp recommended the appointment of Mr. Gilmore to the Forensic Program Director position. Mr. Schnapp explained his recommendation in this memo as follows:

After reviewing all the material, I strongly believe Claude Gilmore is the best candidate and recommend Claude Gilmore for the position of Forensic Program Director. Mr. Gilmore's education in both mental health and health administration at the graduate school level gives him the tools necessary to do the job. He has a good balance between the clinical and administrative skills needed for the position. His motivation for applying for the job includes a personal challenge to meet the perpetual lack of resources problem with creativity, energy, and an willingness to include input from all relevant people. He appears to be flexible enough to listen to what other people say, yet strong enough to make decisions and stick with them. His freshness to administrative work suggests he will be most open to learning how to act based on the Institute's needs and not prior methods of behaving. He has demonstrated leadership ability in a number of projects. Particular strong leadership skills were demonstrated in starting up the Wisconsin

Chapter of Mental Health Administrators. He has a faculty appointment with the Cardinal Stritch program in health care administration. He also has excellent clinical skills in working with the mentally ill in the Milwaukee county Mental Health System. Mr. Gilmore will help me deal with the many issues facing our forensic program including waiting lists, racial insensitivity, minority recruitment, and program expansion. I have discussed this recommendation with Beth Cox and she supports my recommendation. I urge you to support my recommendation for Forensic Program Director

27 Mr. Gilmore has a B.S. in social work (1976) and an M.S. in social work (1977) and health services administration (1986). From May of 1983 to August of 1983, Mr Gilmore was employed as a marriage and family therapist for the Center for Behavioral Medicine; since November of 1979, except for a period of layoff, Mr Gilmore was employed as a mental health emergency service clinician with the Milwaukee County Mental Health Complex (MCMHC), providing mobile crisis intervention and evaluation services, including to those individuals in medical danger who refuse hospitalization or those referred by the police or the courts; from August of 1986 to December of 1987, he was employed as a part-time management intern with the MCMHC with responsibility for carrying out projects assigned by the Mental Health Administrator, including projects involving work with top managers to improve medical and mental health administration services; and since January of 1988, he was employed as a member of the adjunct faculty at Cardinal Stritch College teaching courses in health services administration.

28. In its answer to the complaint dated May 27, 1992, respondent indicated that “[i]t was very important that the successful candidate possess leadership, supervisory, and other management skills.” Also in this answer, respondent indicated that “while complainant’s managerial abilities were comparable [to Mr. Gilmore’s], the complainant did not possess the interpersonal skills, flexibility, leadership abilities, etc. that management desired for a Forensic Program Director ” The record shows that the previous incumbent of this position was hired based on his previous administrative experience.

29. In its request to hire Mr. Gilmore above the minimum of the pay range to which the Forensic Program Director position was assigned, respondent characterized Mr. Gilmore's special qualifications as: knowledge of the importance and impact of cultural differences, administrative experience in a health care setting, and advanced management methods, including working with a varied staff of professionals, paraprofessionals, security, support, etc.

30. In his hearing testimony, Mr. Schnapp, who had the effective hiring authority here, indicated that his primary reason for selecting Mr. Gilmore was that he felt more comfortable personally with him, i.e., their personalities were more compatible, than he did with complainant and this was an important consideration since he spent a lot of his time working directly with the MMHI program directors.

31. Ms. Belton approved Mr. Schnapp's recommendation to appoint Mr. Gilmore and Mr. Gilmore accepted the offer of appointment to the subject position.

32. Mr. Schnapp first met Mr. Gilmore at a personnel administrators' meeting in Florida in 1987. After that meeting, Mr. Schnapp and Mr. Gilmore met several times as part of an effort to establish a Wisconsin chapter of a mental health administrators association, and worked together on a Wisconsin mental health administrators' conference.

33. In his hearing testimony, Mr. Schnapp was reluctant to give complainant due credit for his professional accomplishments and experience and for the positive aspects of his performance at MMHI.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that he was discriminated against on the basis of race in regard to the subject hire.
3. Complainant has sustained this burden.

4. Complainant has the burden to show that he was discriminated against on the basis of sexual orientation in regard to the subject hire.

5. Complainant has failed to sustain this burden.

OPINION

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

In the context of a hiring decision, the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act, 2) applied for and was qualified for an available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Race Discrimination

Complainant has shown a prima facie case of race discrimination: as a white person, he is in a protected class; he applied for and, as the result of his certification, was considered by respondent as qualified for the subject position; and, since a black person was the successful candidate, an inference of race discrimination could be drawn from the circumstances present here.

Respondent states that Mr. Gilmore was offered the position based on Mr Schnapp's belief that he was the best qualified candidate, and this reason is legitimate and non-discriminatory on its face.

The question then focuses on that of pretext. Respondent, in its descriptions of the qualifications it was seeking in a successful candidate prior to offering the position to Mr. Gilmore, included leadership, supervisory, and management skills (See Finding

28, above). In addition, the record showed that the Forensic Program Director position was not an entry level supervisory, administrative, or management position and, as a career executive position, would not typically be filled by a candidate with no administrative or supervisory experience (See Finding 13, above). And yet, respondent selected a candidate who had no supervisory or management experience and whose administrative experience was limited to serving as a part-time intern, over complainant, who had many years' experience as a supervisor, administrator, and manager of a large and complex organization, including experience in the areas of program planning, budgeting, and accreditation.

The record also shows that respondent considered it desirable for the successful candidate to have a good balance between clinical training and experience and administrative training and experience, and that earning this experience in a forensic setting was most desirable. And yet, respondent selected a candidate with essentially no training or experience in forensics over complainant who had extensive experience in this area. Although both Mr Gilmore and complainant had extensive clinical experience, complainant had a Ph.D. in psychology while Mr Gilmore had a lesser degree, i.e., an M.S. in social work. As stated above, Mr Gilmore had essentially no experience as an administrator while complainant had extensive experience in this area. Although Mr Gilmore did have an M.S. degree in health services administration and complainant had no advanced degree in this area, Mr Gilmore's advantage in this area is more than balanced by complainant's extensive work as a health services administrator and Mr Gilmore's lack of such experience.

Mr Schnapp must have valued input from the unit chiefs/department heads within the Forensic Program or he wouldn't have asked them for it. However, Mr Schnapp essentially ignored the opinion of the substantial majority of these individuals that complainant was the best qualified of the three final candidates and, in representing the input of these individuals, focused on the few negative comments about complainant.

It is also relevant that, not only did Mr. Schnapp essentially ignore the advice of the unit heads/department chiefs who had evaluated the final three candidates, but he also ignored the advice of Mr. Gilmore's references that he wasn't ready for a position such as the one under consideration here but needed more experience first.

Mr. Schnapp, in defending his decision, testified that complainant had been experiencing performance problems for some time and this had created morale problems and other personnel problems on the FAU. However, the record does not support this testimony. Complainant's performance evaluations subsequent to September 23, 1983, describe his performance in such general terms as "outstanding," "exceptional," and "skillful," and note in particular that he had "deftly handled staff feelings and personnel issues," improved unit morale, considerably improved his interpersonal presentation, maintained good working relationships with MMHI staff in general and with senior MMHI clinical and administrative staff in particular, and had provided good leadership to his staff. Although Mr. Schnapp seemed to dismiss the content of complainant's performance evaluations by stating that the vast majority of performance evaluations completed for employees of DHFS are favorable, this may explain complainant's overall rating but it does little to explain the very specific and individualized references in complainant's evaluations. In fact, this testimony by Mr. Schnapp dovetails with the tendency of Mr. Schnapp in particular (See Finding 33, above) and respondent in general (See, e.g., Finding 28, above where respondent represented complainant's and Mr. Gilmore's managerial abilities as comparable when in fact Mr. Gilmore had no managerial experience) to diminish complainant's qualifications and to enhance Mr. Gilmore's (See, e.g., Finding 29, above). It should also be noted that Myrna Casebolt, MMHI Organizational Director, who supervised the institution's personnel function, testified that she was not aware of any management problems relating to the FAU prior to the date of the subject hiring decision; and Ms. Cox testified that the only problem she became aware of in the Forensic Program prior to the subject hire resulted from a conflict between Dr. Gary Meyer and Dr. Ecklund.

Although subjectivity enters into most hiring decisions, particularly in the latter stages of the recruitment process for positions at higher levels such as the one here, reliance on subjective factors such as “chemistry” between the candidate and the hiring authority invites abuse. This is the explanation that was used historically to exclude protected classes such as women and minorities from higher level positions, i.e., the white males who were in charge didn’t feel comfortable with someone who wasn’t like them. As a consequence, this subjective factor, which is essentially the one relied upon by Mr. Schnapp to explain his decision to hire Mr. Gilmore, is highly suspect unless it is used to distinguish between candidates whose other relevant qualifications are closely comparable. That is not the case here. Mr. Gilmore’s lack of experience as a supervisor, administrator, or manager, and lack of experience in the forensics area render his relevant qualifications substantially inferior to complainant’s. The fact that his only administrative experience was gained in a part-time intern position, and his only leadership experience in this internship and with a volunteer professional association add further support to this conclusion.

Respondent cites in support of its position here previous Commission decisions concluding that the use of subjective criteria does not necessarily imply a discriminatory motive (*Winters v. DOT*, 84-0003-PC-ER, 7/8/88); that an employer may have legitimate reasons for not hiring the candidate with superior technical qualifications (*Harbort v. DIHR*, 81-74-PC, 4/2/82); and that it does not constitute discrimination *per se* if an employer does not select the candidate recommended by the interview panel (*Byrne v. DOT*, 92-0672-PC, 92-0152-PC-ER, 9/8/93). Here, however, complainant was recommended by the department heads/unit chiefs and Mr. Gilmore by the final interview panel, so the holding in *Byrne* relied upon the respondent is not particularly useful for purposes of this analysis. In addition, the Commission agrees that the use of subjective criteria to justify the selection of a candidate with inferior technical qualifications does not necessarily evidence a discriminatory intent. However, where, as here, the subjective criterion used to justify the hiring decision is very difficult to assess in any reliable way; and the technical qualifications of the successful candidate,

measured against the criteria established by respondent, are substantially inferior to those of the complainant, a conclusion of discrimination is supported.

Finally, any hiring decision must be reviewed in the context within which it was made. During the relevant time period, MMHI was going through a period of intense scrutiny of its minority hiring record and had made the hiring of minority staff at all levels one of its foremost priorities. Also during the hiring process, Dr. Reed, the individual hired to oversee minority affairs at MMHI made it clear to Mr Schnapp that he opposed the hiring of complainant because he did not believe he would be as effective as a "brother" in supporting Dr Reed's agenda.

These circumstances, considered individually and as a whole, support a finding that the reasons offered by respondent for its decision to hire Mr Gilmore for the position of Forensic Program Director, were a pretext for race discrimination.

Sexual orientation discrimination

The first two steps in the analysis of this issue would parallel that outlined above in relation to the race discrimination allegation. However, in regard to the issue of pretext, the record does not support a conclusion that complainant was discriminated against on the basis of his sexual orientation in regard to the subject hiring decision.

ORDER

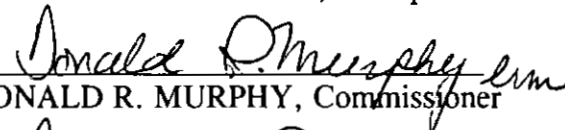
The action of respondent is rejected. A prehearing conference will be scheduled to establish the process for determining the appropriate remedy.

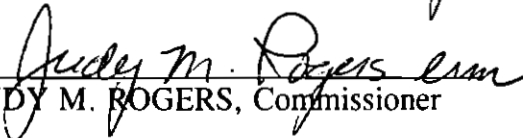
Dated: December 18, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:900005Cdec1


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, 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