STATE OF WISCONSIN PERSONNEL COMMISSION

MICAH A. ORIEDO,
Complainant,

v.

Superintendent, DEPARTMENT OF PUBLIC INSTRUCTION,
Respondent.

Case No. 98-0042-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

This case involves a complaint of WFEA (Wisconsin Fair Employment Act; Subchapter II, Chapter 111, Stats.) on the basis of race, color, and WFEA retaliation in connection with a selection process for a position in DPI (Department of Public Instruction). In a decision dated June 2, 1999, the Commission established the following issues for hearing:

> 1. Whether DPI discriminated against complainant based on color or race with respect to the alleged failure to interview, select or appoint complainant to the position of Education Administrative Director, Title I Programs - Career Executive. .[1]
>
> 3. Whether respondent retaliated against complainant for having engaged in fair employment activities by not hiring complainant for the vacancy in question.
>
> 4. Whether the option 1 career executive selection process used to fill the vacancy in question had a disparate impact on the complainant on the basis of race.

FINDINGS OF FACT

1. Complainant is black.[2]

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[1] Complainant subsequently withdrew an issue that had been numbered 2.

[2] In his post-hearing brief complainant made some arguments in connection with his national origin (Kenyan). However, since national origin was not included in the statement of issues for hearing, the Commission will not address further this basis of discrimination. (There is no indication that the decision of this case would have been different if national origin had been included as a basis for discrimination.)

2. Complainant filed another WFEA claim against respondent prior to this one.

3. A member of management in the DPI Bureau for Human Resource Services was aware during the relevant time period of said claim.

4. None of the members of management who made the substantive decision on the appointment to the position in question was aware of said claim at the time of the decision.

5. The staffing for the position in question was announced in the current opportunities bulletin (Respondent's Exhibit 3) dated August 18, 1997 The title of the position is Education Administrative Director , Director, Title 1 Programs. This position has at all relevant times been in the Career Executive Progam, *see* §230.24, Stats., Chapter ER-MRS 30, Wis. Adm. Code.

6. The announcement set forth the job duties and the knowledge required for the position and included the following:

> **Completed application/examination materials must be received by September 15** [1997]. Application materials will be reviewed and those most qualified will be invited to participate in the next step of the selection process. **NOTE: Applicants with Career Executive status need only submit a completed Application for State Employment form . . . with a current resume.**

7 Complainant timely submitted the required materials, which included an AHQ (Achievement History Questionaire) since he did not have career executive status.

8. Complainant was one of six applicants who were certified for the position on October 6, 1997 Of these applicants, four were non-minorities and two were minorities (complainant and a Native American applicant).

9. The certification of these individuals involved a determination by the Bureau of Human Resource Services that the certified candidates met the minimum qualifications for the position.

10. The cover letter to the original certification included the following: "Attached is a list of certified eligible applicants to fill this vacancy. You must contact each applicant to arrange an employment interview." Complainant's Exhibit #3.

11. None of the applicants on the original certification were eligible for an Option I or Option II appointment under the Career Executive Program according to policies published by DMRS (Division of Merit Recruitment and Selection) pursuant to §230.24(1), Stats. These policies define Option I as: "Lateral, downward, or upward voluntary movement or reassignment *of a Career Executive employe* within the employing department," and Option II as: "Lateral, downward, or upward voluntary movement *of a Career Executive employe* between different departments." Complainant's Exhibit 11, p. 281-3 (emphasis added; underlining in original).

12. On October 9, 1997, Darwin Kaufman, a white person[3] who then was employed by DPI as an Education Administrative Director, and who was a career executive employe, spoke to Steven Dold, who was Kaufman's then current supervisor, and advised Dold that he was interested in the job. Dold then served as the Deputy Superintendent of DPI and the DPI affirmative action officer, and was the effective appointing authority for the position in question.

13. As a current career executive within DPI, Kaufman was eligible for an Option I lateral voluntary movement appointment as defined above in Finding #11.

14. Pursuant to the career executive policies set forth in Chapter 281 of the Wisconsin Personnel Manual/Staffing, when an Option I appointment is made, it is not required that there be any formal announcement, position analysis, or certification. *See* Complainant's Exhibit 11, p. 281-3. If Kaufman had advised management of his interest in the position earlier, it would not have been necessary under the career executive program to have gone through the announcement, evaluation of applicants, and creation of a register discussed above.

15. The same day that Kaufman contacted Dold (October 9, 1997), Dold

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[3] Unless otherwise specified, all other persons mentioned in this decision are non-minorities.

contacted the Bureau of Human Resource Services and inquired whether Kaufman could be considered for the vacancy at that stage in the process. The bureau advised him that this was permissible.

16. The bureau's policy at the time was that it had the discretion to consider applicants after the announced deadline had occurred, provided that it was not too late in the selection process to effectively conduct any evaluation that would be needed.

17 Also on that day (October 9, 1997), Kaufman sent an email to Katherine Knudson of the bureau requesting that he be transferred to the position in question. She advised him later that day that he would be certified for the position that date. Later that day Ms. Knudson placed Kaufman's name on the certification and advised Dold of what had occurred.

18. Dold consulted with Juanita Pawlisch, who was the immediate supervisor of the position in question. They agreed that Kaufman was exceptionally well qualified for the position in question on the basis of his knowledge, skills and abilities, which included a substantial amount of relevant program knowledge and experience, and that he should be appointed to the position in question. They consulted with John Benson, the State Superintendent of Public Instruction and the head of DPI, and he agreed with them. Benson formally advised Kaufman of his transfer to the position on October 21, 1997, with an effective date of November 23, 1997

19. Although the original certification of eligible candidates occurred on October 6, 1997, when the certification was sent to Pawlisch, two of the three members of management who were involved in the substantive appointment decision (Dold and Benson) were not aware of either who was on the original certification or what their qualifications were at the time (October 9, 1997) the three decided to appoint Kaufman. Pawlisch testified she did not remember whether or not she read the certification prior to October 9th The Commission infers from the fact that Pawlisch was sent the certification on October 6th that she read the certification prior to the time the decision was made on October 9th to appoint Kaufman, and it so finds. Bob Boetzer, a member of management in the bureau, advised Pawlisch that under the circumstances, it was not

necessary to conduct any interviews of the candidates originally certified. None of the six candidates on the original certification were interviewed by management.

20. During the period in question, the state as an employer was underutilized for minorities for the job group (administrators/senior executives) which included the position in question, in the sense that the state employed less than 80%[4] of the available, qualified labor pool for this group—i. e., less than 80% of 7.5%. *See* Complainant's Exhibit 17

21. During the period in question, DPI as an employer was not underutilized for minorities in the administrators/senior executives job group. DPI had 8% minorities in this group (2/25), as compared to an available, qualified labor pool of 7.5%.

22. During the period in question, the DPI affirmative action plan (Complainant's Exhibit 16) had a short term affirmative action goal with respect to positions in the administrators/senior executives job group. According to the plan:

> The existence of short-term affirmative action goals for the agency means that affirmative action group membership should be considered as one factor among the many factors involved in filling a position and making a hiring decision. A short-term affirmative action does not mean that any specific positions are set aside for racial/ethnic minorities or females or that there are quotas to be met.

23. At the time the decision was made to appoint Kaufman to this position, both Dold and Benson, and management in the Bureau of Human Resource Services, were aware of the facts reflected in Findings #20-22.

24. During the period in question, DPI experience with hiring employes in the administrators/senior executives was as follows[5]:

a) There were 46 applicants for jobs in this group.

b) The applicants included 6 minorities.

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[4] This criterion (80%) was used by DER (Department of Employment Relations) to determine underutilization, and has effectively been adopted by the parties, and therefore will be utilized by the Commission in this decision.

[5] This data is taken from DPI's discovery response to complainant's first discovery request, Complainant's Exhibit 12. The data is for fiscal year 1997/98.

c) Seven of these applicants were hired.

d) One of these 7 hired applicants was a minority.

e) Six of these 7 hired candidates were non-minorities, so the percentage of non-minorities hired was 6/40 or 15%.

f) The percentage of minorities hired was 1/6 or 16.67%.

g) The percentage of non-minorities not hired was 34/40 or 85%.

h) The percentage of minorities not hired was 5/6 or 83.3%.

25. Following Kaufman's transfer to the position in question, his previous position was filled on an open competitive basis—i. e., via Career Executive Program Option 4. Respondent specifically advised complainant of this process. Complainant did not apply for that position.

CONCLUSIONS OF LAW

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

2. Complainant has the burden of proof to establish that: respondent discriminated against him on the basis of color or race with respect to the failure to interview, select or appoint complainant to the position in question (Education Administrative Director, Title I Programs—Career Executive); respondent retaliated against him for having engaged in fair employment activities by not hiring complainant for the position in question; and the Option I career executive process used to fill the vacancy in question had a disparate impact on the complainant on the basis of race.

3 Complainant has not satisfied his burden of proof.

4. Respondent did not discriminate against complainant on the basis of color or race with respect to the failure to interview, select or appoint complainant to the position in question.

5. Respondent did not retaliate against complainant for having engaged in fair employment activities by not hiring him for the position in question.

6. The Option I career executive process used to fill the vacancy in question did not have a disparate impact on complainant on the basis of race.

OPINION

I. RACE/COLOR DISCRIMINATION—DISPARATE TREATMENT—FAILURE TO INTERVIEW, SELECT OR APPOINT

Complainant has established a prima facie case by showing that he is in a group protected by the WFEA, he applied and satisfied the minimum qualifications for the position in question, he was not hired, and the employer hired a non-minority. *See, e. g., McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Respondent has articulated a legitimate, nondiscriminatory rationale for its action by its explanation that, after the certification occurred, it found out about an employe (Kaufman) who already was employed in DPI as a career executive, was well qualified for the position in question, and who was interested in laterally transferring into the position. Respondent decided that since the personnel transaction for Kaufman would be an Option I appointment under the career executive program, there was no need to take any other action before hiring Kaufman, such as interviewing the candidates who had been certified originally. The issue then is whether the evidence establishes that respondent's proffered rationale is really a pretext for a decision motivated by complainant's race or color. It is difficult to ascertain exactly what complainant is arguing as evidence of pretext, at least in part because his post-hearing brief addresses numerous points that at best are tangentially before the Commission, e. g., denial of due process and equal protection, abuse of discretion, breach of contract, etc., and because the issues overlap to some extent. The Commission has considered all of complainant's arguments and does not find them persuasive, but it will address only those it considers the most significant and the most applicable to the issues actually before it.

To begin with, the specific circumstances surrounding the certification and Kaufman's subsequent lateral transfer are inconsistent with an attempt to show that respondent's explanation was a pretext for an intent to deny complainant an interview and

an appointment because of his race or color. This is because at the time the three employes responsible for the substantive appointment decision (Pawlisch, Dold, and Benson) made the decision on October 9, 1997, to appoint Kaufman without further ado—and, implicitly or explicitly, without interviewing or otherwise considering the six candidates on the original certification—there is no evidence that either Dold or Benson were aware of who had been certified. They did not know that complainant, or any black person, was on the certification list. The record reflects that the certification was sent to Pawlisch on October 6, 1997, but she testified that she did not recall whether she saw the document. The Commission infers from the fact that she received the certification on October 6th, that she read that document prior to the October 9th discussions regarding the appointment. However, this leaves two of the three people involved in the decision unaware of these facts. The fact that one member of management knew of the composition of the certification list is not probative of pretext per se, but only serves to keep alive complainant's contention that it was not impossible for respondent to have intentionally discriminated against him. The Commission must still weigh any evidence of pretext against any evidence that is inconsistent with pretext.

Another factor that is inconsistent with a finding of pretext is that the members of management who were responsible for the decision to hire Kaufman were very familiar with his qualifications for the job, including the facts that he had already demonstrated very competent performance in his employment at DPI, and that he had a great deal of relevant experience. Under these circumstances, management had a strong incentive unrelated to race or color to have wanted to have hired Kaufman.

Complainant has tried to show that respondent's handling of this transaction was contrary to the established policies governing such matters, and this will be discussed under the heading of pretext.

Much of complainant's position here relates to the contention that once respondent started out with a career executive Option IV (open competitive) staffing process, the agency was locked into this process. He argues that Option I (open only to career executive employes within the agency) is contemplated only when recruitment is done

exclusively within the agency, and can not be done once the agency has announced the vacancy on a broader level. This approach is inconsistent with the testimony of both DER and DPI personnel experts, and other evidence of record. For example, the Wisconsin Personnel Manual/Staffing (Complainant's Exhibit 11) provides at p. 281-10 that: "any [career executive] option indicated will merely be the starting point for filling a Career Executive vacancy and will not necessarily be the option eventually used." The document further provides on this page that "a selection using Option I or II may still be made even though certification has been made under Option III and/or IV "

Another of complainant's arguments that is related to this area is based on Boetzer's October 6, 1997, memo to Pawlisch which states that "Attached is a list of certified eligible candidates. You must contact each applicant to arrange an employment interview." Complainant contends this demonstrates that respondent violated policy when it transferred Kaufman into the position in question without having interviewed the candidates on the original certification. However, this memo was written at a point in the process when the position had been announced without generating any internal applicants, and the certification was being made without any Option I or II eligibles. At that time, this directive was applicable with regard to the existing certification. However, once Kaufman became a candidate and was certified, that fact superseded this directive.

Complainant also contends that this process violated provisions in the Wisconsin Personnel Manual/Staffing Chapter 232 CERTIFICATION (Complainant's Exhibit 10). However, these provisions do not apply to career executive transactions. Section 230.24(1), Stats., provides: "To accomplish the purpose of this [career executive] program, the [DMRS] administrator may provide policies and standards for recruitment, examination, probation, employment register control, certification, transfer, promotion and reemployment, and the [DER] secretary may provide policies and standards for classification and salary administration, separate from procedures established for other employment." Section ER-MRS 30.01(1), Wis. Adm. Code, provides: "In accordance with the provisions of s. 230.24, Stats., where other statutes and rules conflict with s.

230.24, Stats., and the rules promulgated to effect such statute, the provisions of s. 230.24, Stats., shall take precedence." However, complainant also contends that respondent violated another provision of the civil service code.

Section 230.24(2), Stats., provides: "The appointing authority shall consider the guidelines under s. 230.19 when deciding how to fill a [career executive] vacancy under this paragraph." Section 230.19 "**Promotion**" includes the following: "(1) The [DMRS] administrator shall provide employes with reasonable opportunities for career advancement, within a classified service structure designed to achieve and maintain a highly competent work force, *with due consideration given to affirmative action."* (emphasis added) Complainant argues that respondent violated this provision, and, inferentially, that this is probative of pretext.

Before directly addressing this argument, the Commission will address a somewhat related contention by respondent. Respondent argues that since the original certification included four non-minorities in addition to two minorities (including complainant), DPI's decision to transfer Kaufman into the position without considering the other certified candidates treated both minorities and non-minority candidates the same. It is correct that complainant was treated the same as the other candidates on the original certification list. However, the comparison complainant is trying to make is to Kaufman. Obviously, Kaufman was treated differently as compared to complainant in the sense not only that he received the appointment while complainant did not, but also that as an incumbent career executive employe, he was not required to submit an AHQ and go through the scrutiny applicable to the other candidates.

Complainant's contention that respondent failed to give "due consideration to affirmative action," §230.19(1), Stats., is based primarily on the fact that there was a statewide under-utilization of minorities in the job group which includes the position in question. However, respondent's position is that Kaufman's lateral transfer was effectively neutral from an affirmative action perspective because it created another vacancy in a job at the same level as the position in question, which in turn needed to be filled. Complainant's counter arguments are unavailing. He contends:

> The counter argument against DPI reasoning is that, Oriedo was seeking promotion in that particular position. There is no law in Wisconsin that authorizes that people who seek transfers to be given preference to people who seek promotion if they are all in the same applicant pool. In fact the reverse is true. Section 281 of Wisconsin Staffing Manual commands that Option 3 career executive applicants should be given first appointment consideration. Complainant's post-hearing brief, pp. 13-14.

It is not clear what complainant means by "given preference."[6] However, the provisions governing the career executive program discussed above clearly give an appointing authority the authority to exercise his or her discretion to appoint a career executive by a lateral transfer in lieu of promoting a non-career executive. As to the cited provision in the Personnel Manual, this provides that Option III (service wide promotion) candidates have to be considered before Option IV (open competitive) candidates can be certified. Kaufman was an Option I candidate.

Complainant further argues as follows:

> At the hearing, DPI and government witnesses claimed that Kaufman, as a career executive in DPI, had an absolute right to be appointed to the position at issue under Option I regardless whether racial minorities were discriminated against.

This is not an accurate description of the testimony. Dennis Huett, a member of DMRS management, testified that under the circumstances, Kaufman had the right to be considered for the appointment, not an absolute right to the job.

Complainant also objected to the fact that Kaufman was permitted to be considered for the vacancy notwithstanding that he did not apply or express an interest in the job in accordance with the deadline in the COB. To the extent that this is advanced as evidence of pretext, it does little if anything for complainant's case. It is undisputed that DPI had a policy of permitting late applications when feasible. Kaufman, as a career executive, did not need to go through the AHQ screening process, and respondent did not do anything inconsistent with its policy or established standards applicable to

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[6] *Cf. Balele v. DHFS,* 98-0045-PC-ER, November 3, 1999.

such transactions by considering Kaufman's candidacy after the deadline for applications.

II. USE OF OPTION I—DISPARATE IMPACT—RACE

Complainant contends as follows:

> Although some whites submitted AHQ responses and their applications were similarly disbanded [sic], this did not matter because career executive positions were *not* underutilized for whites, but were grossly underutilized for racial minorities statewide (exhibit C15 page 10 request for Admission 10 and 11[7]), and in DPI. . . **Therefore any equal consideration that was restricted to career executive in DPI or statewide had disparate impact on racial minorities and therefore Oriedo based on his race and national origin.** Complainant's Post-Hearing Brief, p. 29.

The record reflects that the state as an employer is underutilized for minorities in the job group (administrators/senior executives) that most closely corresponds to the career executive pool. However, the record does not reflect that DPI is underutilized for minorities in the administrators/senior executives job group. DPI had two minorities among 25 employes in this category, or 8%, compared to the statewide pool of eligibles of 7.5%. Notwithstanding this, the DPI affirmative action plan called for remedial action[8] because pursuant to DER policy, short term affirmative action goals were required of all agencies with regard to job groups for which the state as a whole was underutilized. As discussed above under the heading of pretext, respondent's rationale for the use of a lateral transfer of a career executive (Kaufman) to another career executive position—i. e., that it did not have negative affirmative action implications because it opened Kaufman's previous position to competition, is not probative of pretext. It also did not result in a disparate impact on minorities. This is because the use of

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[7] This apparently is a reference to Complainant's Exhibit 12, pp. 6-7. Complainant's Exhibit 15 was neither offered nor admitted into evidence and does not contain any requests for admission.

[8] "The existence of short-term affirmative action goals for the agency means that affirmative action group membership should be considered as one factor among the many factors involved in filling a position and making a hiring decision." DPI Equal Employment Opportunities/Affirmative Action Plan, January 1, 1997-June 30, 1999, Complainant's Exhibit 16.

Option I (career executive movement within the employing agency) involved a pool (DPI career executives) that was not underutilized for minorities—i. e., DPI had 2/25 or 8% minorities in this group as compared to 7.5% in the available labor pool[9]

It should be noted that the record contains references to statistics and potential disparate impacts that do not fall within the scope of the disparate impact issue noticed for hearing. To some extent this may be related to the fact that "the line between the two theories [adverse treatment and adverse impact] sometimes blurs . . . In cases where the distinction between adverse impact and disparate treatment blurs, plaintiffs can, and generally will, invoke both theories of liability." 1 Lindemann & Grossman, Employment Discrimination Law, p. 82 (3rd Edition, 1996) (footnotes omitted).

In his post-hearing brief at p. 23, complainant provides an analysis that he characterizes as follows: "the statewide applicant flow showed that racial minorities had been cheated almost 25 career executive positions statewide. .racial minorities were underutilized in career executive positions statewide and in DPI as testified by Boetzer[10] " Complainant goes on to cite data taken from two exhibits that never made it into the record. In any event, it was undisputed from documents that were in the record that the state as an employer was underutilized, so it appears to the Commission that this attempt to use this data was redundant.

The Commission also notes that, as respondent has pointed out, the data of record (see Finding #24) shows that respondent's actual experience in hiring employes in the administrators/senior executives job group in fiscal year 1997-98 does not reflect any adverse impact on minorities, regardless of how the data is analyzed.

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[9] The Commission has deleted the last sentence in this paragraph from the proposed decision as unnecessary for decision.

[10] While Boetzer testified that the state as a whole is underutilized for minorities in the administrators/senior executives job group, he did not testify that DPI was underutilized. Rather, as discussed above, since the state as a whole was underutilized, all agencies had to develop their affirmative action plans from the standpoint of underutilization.

III. DISPARATE TREATMENT—WFEA RETALIATION

A complainant establishes a prima facie case of retaliation under the WFEA by showing he or she participated in an activity protected by the WFEA, that the alleged retaliator was aware of the activity, that there was an adverse employment action, and that there is evidence which creates an inference of a discriminatory motive on the part of the employer. *Schmidt v. DOC,* 91-0099-PC-ER, 2/2/94. In this case, the complainant has not established a prima facie case. While he established that he had engaged in an action against DPI, there is no evidence that anyone outside of the personnel unit, i. e., anyone in DPI management who was responsible for making the substantive appointment decision, was aware of his activity. Even if the Commission inferred from Knudson's knowledge of complainant's activities that line management had such knowledge, complainant did not establish that respondent's explanation for its decision was pretextual, for the same reasons as discussed above.

ORDER

This complaint of discrimination is dismissed.

Dated: August 28, 2000 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

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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