

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICAH ORIEDO,
Complainant,

v.

**Executive Director, EDUCATIONAL
COMMUNICATIONS BOARD, Secretary,
DEPARTMENT OF EMPLOYMENT
RELATIONS, and Administrator,
DIVISION OF MERIT RECRUITMENT
AND SELECTION,**
Respondents.

**FINAL DECISION AND
ORDER**

Case No. 98-0113-PC-ER

Oral arguments were presented to the Commission on June 30, 1999, at complainant's request. The Commission after considering the arguments raised by the parties adopted the proposed decision and order as its final decision as amended herein. The Commission agreed with the examiner's credibility determinations. Changes in this final decision are identified by alphabetical footnotes.

A hearing was held in the above-noted case on December 3 and 4, 1998. The parties elected to file post-hearing briefs. Commencement of the briefing schedule was delayed to accommodate complainant's request to obtain copies of the hearing tapes. The Commission received the final brief on March 8, 1999.

The issue for hearing was noted in a Commission ruling dated September 23, 1998, as shown below:

Whether respondents discriminated against complainant because of his color, race and/or national origin/ancestry when in June 1998, complainant was notified that he was ineligible for the position of Education Administrative Officer (EAO) Director of Research, Evaluation and Online Services and the position of EAO Director of Instructional Program Development and School Services.

Subissue #1: Whether respondents' use of an achievement history questionnaire (AHQ) was a pretext to disqualify complainant from consideration because of his color, race and/or national origin/ancestry.

FINDINGS OF FACT

1. Complainant describes his race and color as "Black" and his national origin/ancestry as being from "Kenya in East Africa." He began working for the State of Wisconsin in 1979, in the Department of Natural Resources (DNR). In 1981, he was hired as a planning analyst in DNR. In 1982, he was hired in DNR's "budget shop" as a Program and Planning Analyst 4 (PPA4). Since 1984, he has worked as a PPA4 in DNR's Bureau of Solid and Hazardous Waste.

2. The Educational Communications Board (ECB) had vacancies for two new positions. The working title of the first position was EAO Director of Research, Evaluation and Online Services (hereafter referred to as the Research Position). The second position was EAO Director of Instructional Program Development and School Services (hereafter referred to as the Instructional Position).

3. Alan Bell is an employee of the Division of Merit Recruitment and Selection (DMRS), a division within the Department of Employment Relations (DER). Prior to announcing the vacancies, he reviewed and approved the paperwork submitted by ECB. The submitted paperwork for each position included a copy of the position description, job expert certification regarding job content, an examination plan, a recruitment activity plan, a job announcement, as well as the achievement history questionnaire (AHQ) and related benchmarks.

4. ECB expected a number of candidates to apply for the positions but this did not occur. The following four people filed AHQs for the Instructional Position: complainant, Linda Hanson (the person hired), TT and NG (using initials for the candidates who were not hired). The following two people filed AHQs for the Research Position: complainant and Marge Wilsman (the person hired). The total group of candidates included three ECB employees. All ECB employees were interviewed and two were hired.

5. ECB contacted Mr. Bell and asked whether with such a small applicant pool they could skip grading the AHQs and simply let all candidates proceed to an interview. (Exh.

C-6, p. 1.) Mr. Bell advised that grading the AHQs was required so that only eligible candidates could proceed to an interview. Mr. Bell did not know who the candidates were when he made this decision.

6. The AHQs were rated by Ronald Unmacht, Administrator of ECB's Educational Division and by Larry Dokken, Director of ECB's Personnel Office. The candidates submitted an application form for State employment with their AHQs. The application form contains information about the candidate completing the form, including the candidate's name and race. Mr. Dokken, as the head of personnel, had seen the application forms prior to grading the AHQs. Mr. Unmacht did not see the application forms prior to grading the AHQs. At the time Mr. Unmacht and Mr. Dokken graded the AHQs, they did not have the application forms. Instead, each rater was given copies of the AHQs with social security numbers as "blinds" for the candidate's names. Both raters identified candidates Wilsman and Hanson from the work experience contained in their AHQs. Their review of the AHQs did not lead them to identity any other candidates.

7. Mr. Unmacht and Mr. Dokken scored the AHQs separately. The results are shown below (from Exhs. R-213 and R-214).

Instructional Position		
Candidate/AHQ Ques.	Dokken Score	Unmacht Score
<u>Complainant</u>		
• Question 1	• 0	• 0
• Question 2	• 0	• 0
• Question 3	• 0	• 0
<u>Hanson</u>		
• Question 1	• 3	• 3
• Question 2	• 3	• 3
• Question 3	• 3	• 3
<u>NG</u>		
• Question 1	• 2	• 2
• Question 2	• 2	• 1
• Question 3	• 2	• 2

<u>TT</u>		
• Question 1	• 2	• 2
• Question 2	• 3	• 2
• Question 3	• 3	• 2

Research Position

Candidate/AHQ Ques.	Dokken Score	Unmacht score
<u>Complainant</u>		
• Question 1	• 0	• 0
• Question 2	• 0	• 0
• Question 3	• 0	• 0
<u>Wilsman</u>		
• Question 1	• 3	• 3
• Question 2	• 3	• 3
• Question 3	• 3	• 3

The Instructional Position

8. The job announcement for the Instructional Position was included in the Current Opportunities Bulletin dated April 20, 1998. The stated duties and required knowledge and skills are noted below (from Exh. C-7):

DUTIES: Provide management and leadership to group of professionals who develop video and multimedia projects and promote and implement projects; direct the process and acquisition of instructional programs for statewide distribution; develop the bureau's strategic plan and budget and recruit, train and supervise staff; speak at regional and statewide professional development and in-service meetings and conferences about video, on-line and multimedia programs and services.

KNOWLEDGE AND SKILLS: Strong organizational skills, work with various individuals and groups in diverse situations; possess the ability to manage numerous tasks concurrently; experience in instructional design for curriculum based programming and multimedia projects; experience in project management and planning from conception to completion; committee coordination and facilitation skills with teachers, educators and technical developers; supervisory, staff development and team building skills; effective writing and oral communications and organizational skills.

9. The first AHQ question (Q) for the Instructional Position and related benchmarks are shown below (from Exh. R-210):

Q1. Bureau Administration: The [Instructional Position] has the overall responsibility for providing leadership to a group of professionals responsible for developing video and multimedia projects and the promotion and implementation of those and acquired projects. The Director must have strong organizational skills, work well with a variety of individuals and groups in a variety of situations, and possess the ability to manage numerous tasks concurrently.

Describe your preparation, experiences and achievements in administering a statewide educational office for developing video and multimedia projects and the promotion and implementation of those and acquired projects. Include in your response your involvement in developing a strategic plan, budgeting, hiring and supervising staff, and evaluating and communicating the results.

Benchmarks:

3 points¹: Applicant identifies extensive experience in administering a state-wide bureau, or office of similar level, that concentrated on the development of curriculum-based instructional programs and multimedia projects. Applicant will have also served as director, or similar level, in developing, promoting and delivering implementation services for schools related to video and multimedia. Through involvement with advisory committees, professional organizations and educational agencies, the applicant will demonstrate extensive experience with preparing (strategic plan) and directing (budgeting, staffing and evaluating) a program or service that has a statewide impact. Applicant describes experience in communicating with a variety of teachers, curriculum specialists, directors of instruction and library media specialists.

2 points: Applicant identifies limited experience in administering a regional or district wide bureau or office of similar level that concentrated on the development of curriculum-based instructional programs and multimedia projects. Applicant will have also served as manager, coordinator, or consultant in developing, promoting and delivering implementation services for schools related to video and multimedia. Through involvement with advisory committees, professional organizations and educational agencies, the applicant will demonstrate some experience

¹ Initially this category could have received 7-9 points. Since so few candidates applied, Mr. Bell gave ECB permission to collapse the scoring. As a result, the first category got a score of 3, the second category (previously 4-6 points) got a score of 2, the third category (previously 1-3 points) got a score of 1, and the fourth category of zero remained the same. This change was authorized and undertaken for each AHQ question for both positions.

with preparing a program or service that has had a regional or statewide impact.

1 point: Applicant identifies some experience in working with persons responsible for the development of curriculum-based instructional programs or video or multimedia projects. Applicant may have also worked with individuals who developed, promoted and delivered implementation services for schools related to video or multimedia. Applicant will have had minimal involvement with advisory committees, professional organizations and educational agencies in preparing a professional development or in-service program or service. Applicant describes some experience in communicating with a variety of teachers, curriculum specialists, directors of instruction or library media specialists.

0 points: No scoreable response or did not answer the question.

10. Complainant's answer to the first question (Exh. C-4) mentioned training and experience in budgets, supervision and various management tasks. Some of his experience was gained in an educational setting. Complainant did not indicate that any of the training or experience was related to the development of curriculum-based instructional programs, multimedia projects or video projects as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

11. The second AHQ question for the Instructional Position and related benchmarks are shown below (from Exh. R-211):

Q2: Project Management: The [Instructional Position] has the overall responsibility for providing leadership in development of program content and supervising production activities of curriculum-based instructional programs. Designing these programs includes working with curriculum specialists, technical specialists, teachers, educators and others to determine content and design of video and multimedia projects, print materials and computer software end products. These programs will be viewed and used by teachers and students in Wisconsin schools as an aid in classroom instruction.

Please describe your training and experience in initiating, administering, directing, and developing the instructional design and project deliverables for curriculum-based video and software programs. Please be sure to include the following in your response:

- Types of curriculum-based instructional programs and multimedia projects, including content and medium (i.e., video, print, etc.), you have developed and the levels of responsibility you had in the projects.

- Experience working with technical experts including teachers, educators, researchers, video producers, and multimedia developers in the production of curriculum-based instructional programs and multimedia projects.
- Specific experience and training you have received in designing and directing the development of curriculum-based instructional programs and multimedia projects.

Benchmarks

3 points: Applicant identifies extensive experience in managing the development of curriculum-based instructional programs and multimedia projects. Through involvement with advisory committees, the applicant has had experiences with instructional design; and has had training in this area. Applicant has worked with advisory committees to develop content into video and multimedia and print components. Applicant describes experience in communicating with a variety of teachers and other educators, video producers, multimedia developers, researchers and other educational specialists.

2 points: Applicant identifies limited experience in developing curriculum-based instructional programs and multimedia projects. Applicant may have only limited experience or training in instructional design or development. Has some experience developing content into video, multimedia and print components. Shows experience in communicating with a variety of educational specialists or related specialists for a project.

1 point: Applicant has had some experience with instructional design but has no direct experience in video or multimedia development. Has had experience working with individuals on projects, but not necessarily instructional in nature.

0 points: No scoreable response or did not answer the question.

12. Complainant's answer to the second question (Exh. C-4) contains some references to development of curriculum but provides no mention of such activity in conjunction with video and software programs as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

13. The third question for the Instructional Position and related benchmarks are shown below (from Exh. R- 212):

Q3: Project Management: The position of Director, Instructional Program Development and School Services has the overall responsibility for providing leadership to plan, implement and evaluate regional and statewide presentations and workshops. The Director initiates such activities with and through various professional organizations and agencies.

Describe your preparation, experiences and achievements in preparing and conducting regional and statewide professional development and in-service presentations and workshops as they relate to video, online and multimedia programs and services.

Detail the process you have used to determine a statewide curricular need; specify the technology delivery mode(s) you used in delivering the presentation or workshop to meet that need; the process you used in involving others in the activity; and detail what you did to promote the project, product or services.

Benchmarks

3 points: Applicant has a bachelor degree with some advanced training or considerable experience in education or communications (preferably radio, television, multimedia or print media). Through involvement with advisory committees, professional organizations and educational agencies, the applicant will demonstrate extensive experience with preparing a media related program or service and presenting it to a audience of educational professional representing several locations around the state. Applicant describes experience in communicating with a variety of teachers, curriculum specialist, directors of instruction and library media specialists. Applicant details the selection process for presenting a media related workshop. S/he describes determining the need, selecting the delivery mechanism, involving others in the activity and promoting the project, product or services.

2 points: Applicant has a bachelor degree with some experience in education or communications (preferably radio, television, multimedia or print media). Through involvement with advisory committees, professional organizations or educational agencies, the applicant will demonstrate some experience in preparing a media related program or service and presenting it. Applicant outlines the selection process for presenting a media related workshop. S/he describes determining the need, selecting the delivery mechanism, involving others in the activity and promoting the project, product or service.

1 point: Applicant has a bachelor degree with minimal experience in education or communications (preferably radio, television, multimedia or print media). The applicant will demonstrate some experience in preparing a media related program or service and presenting it. Applicant outlines presenting a media related workshop.

0 points: No scoreable response or did not answer the question.

14. Complainant's answer to the third question (Exh. C-4) describes his role in the professional development of his subordinates. He did not indicate that such efforts related to

use of video, online and multimedia programs and services as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

15. Linda Hanson, the person hired for the Instructional Position, also completed the required AHQ (Exh. R-207). She had eight years of experience at ECB with responsibility for multi-media projects. Her answers to the AHQ questions evidenced greater experience than complainant regarding the specific questions asked and related benchmarks.

16. Mr. Dokken contacted Mr. Bell after the AHQs for the Instructional Position were rated. Mr. Bell reviewed the results and noticed the raters failed to give applicants credit for multimedia experience in settings other than at the K-12 level. Mr. Bell informed Mr. Dokken this was inappropriate for the Instructional Position because K-12 experience was not noted as a requirement in the position announcement (as it had been for the Research Position). (Exh. C-6, p. 2) Mr. Dokken and Mr. Unmacht re-reviewed all AHQs submitted for the Instructional position and provided credit for multimedia experience even if not attained in a K-12 setting. The re-review did not result in an increased score for complainant because (as noted in the prior paragraphs) his answers did not detail any multi-media experience. (Exh. C-6, p. 3)

17. After the benchmark was modified as noted in the prior paragraph, the questions and benchmarks used to grade the AHQs submitted for the Instructional Position were related to the duties of the position.

The Research Position

18. The job announcement for the Research Position was included in the Current Opportunities Bulletin dated April 20, 1998. The stated duties and required knowledge and skills are noted below (from Exh. C-8):

DUTIES: Manage and lead a group of professionals working on formative and summative evaluation of video and multimedia projects; develop and operate professional development on-line services; and promote and implement those services; develop the strategic plan and budget and recruit, train and supervise staff. Speak at regional and statewide professional development and in-service meetings and conferences.

KNOWLEDGE AND SKILLS: Ability to manage numerous tasks concurrently; research and formative and summative evaluation skills as they relate to video, on-line and multimedia programs and services; statistical analysis and interpretation skills; experience and training with both K-12 instructional programs and teach professional development for curriculum based programming and multimedia, including on-line, projects; project management and planning from conception to completion; committee coordination and facilitation with teachers, educators and technical developers; supervisory, staff development and team building skills; effective writing and oral communications and organization skills.

19. The first AHQ question for the Research Position and related benchmarks are shown below (from Exh. R- 203):

Q1: Bureau Administration: The [Research Position] has the overall responsibility for providing leadership to a group of professionals responsible for formative and summative evaluation of video and multimedia projects, the development and operations of professional development on-line services and the promotion and implementation of those services. The Director must have strong organizational skills, work well with a variety of individuals and groups in a variety of situations, and possess the ability to manage numerous tasks concurrently.

Describe your preparation, experiences and achievements in administering a statewide educational office for formative and summative evaluation of video and multimedia projects, the development and operations of professional development on-line services and the promotion and implementation of those services. Include in your response your involvement in developing a strategic plan, budgeting, hiring and supervising staff, and evaluating and communicating the results.

Benchmarks

3 points: Applicant identifies extensive experience in administering a statewide bureau, or office of similar level, that concentrated on formative and summative evaluation of video and multimedia projects, the development and operations of professional development on-line services and the promotion and implementation of those services. Through involvement with advisory committees, professional organizations and educational agencies, the applicant will demonstrate extensive experience with preparing (strategic plan) and directing (budgeting, staffing and evaluating) a program or service that has a statewide impact.

2 points: Applicant identifies some experience in administering a statewide bureau, or office of similar level, that concentrated on formative and summative evaluation of video or multimedia projects, the operations of professional development on-line services and the promotion and implementation of those services. Through involvement with advisory committees, professional organizations and educational agencies, the applicant will demonstrate some experience with preparing (strategic plan) and directing (budgeting, staffing and evaluating) a program or service that has a statewide impact.

1 point: Applicant identifies some involvement in a regional or local office that concentrated on formative and summative evaluation of video or multimedia projects, the operations of professional development on-line services and the promotion and implementation of those services. The applicant will demonstrate some experience with preparing (strategic plan) and managing (budgeting, staffing and evaluating) a program or service.

0 points: No scoreable response or did not answer the question.

20. Complainant's answer to the first question for the Research Position (Exh. C-5) was the same answer as given to the first question for the Instructional Position. His answer contains no indication that the cited experience was related to the evaluation of video and multi-media or to the development, promotion and implementation of on-line services as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

21. The second AHQ question for the Research Position and related benchmarks are shown below (from Exh. R-204):

Q2: Project Management. The [Research Position] has the overall responsibility for formative and summative evaluation of video and multimedia projects, the development and operations of professional development on-line services and the promotion and implementation of those services. The video and multimedia projects will be viewed and used by teachers and students in Wisconsin schools as an aid in classroom instruction. Professional development on-line services are used by a variety of K-12 teachers administrators and teacher educators through out the state. Designing these services includes working with curriculum specialists, technical specialists, teachers, educators and others to determine content and design of the usable products, online activities, print materials and accompanying software.

Please describe your training and experience in initiating, administering, directing, and developing professional development on-line services. Please be sure to include the following in your response:

- Types of professional development on-line services including content you have developed and the levels of responsibility you had in the projects.
- Experience working with technical experts including teachers, educators, researchers, video producers, and multimedia developers in the delivery of curriculum-based professional development on-line services.
- Specific experience and training you have received for the delivery of curriculum-based professional development on-line services.

Benchmarks

3 points: Applicant identifies extensive experience or training in initiating, administering, directing, and developing professional development on-line services. S/he describes the content developed and demonstrates a high level of responsibility in the projects. Applicant describes several experiences working with technical experts including teachers, educators, researchers, and media developers in the delivery of curriculum-based professional development on-line services.

2 points: Applicant identifies some experience or training in initiating, administering, directing, or developing professional development on-line services. S/he describes the content developed and demonstrates some experience working with technical experts including teachers, educators, researchers, or media developers in the delivery of curriculum-based professional development on-line services.

1 point: Applicant identifies some experience or training in professional development on-line services. Applicant describes minimal experience working with technical experts including teachers, educators, researchers, or media developers in the delivery of curriculum-based professional development on-line services.

0 points: No scoreable response or did not answer the question.

22. Complainant's answer to the second question for the Research Position (Exh. C-5) was the same answer as given to the second question for the Instructional Position. His answer contains no indication that the cited experience utilized video or other media approaches as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

23. The third AHQ question for the Research Position and related benchmarks are shown below (From Exh. R-205):

Q3: Research and Evaluation. The [Research Position] has the overall responsibility for providing leadership for research and formative and summative evaluation of video and multimedia projects. The Director initiates such activities with and through various professional organizations, educational agencies and individual teachers.

Describe your preparation, experiences and achievements in research and formative and summative evaluation as they relate to video, online and multimedia programs and services. Include your experiences and achievements with both K-12 and teacher professional development.

Detail the process you have managed for determining needs of teachers for instructional programs and services.

Benchmarks

3 points: Applicant has a bachelor degree with some advanced training or considerable experience in education for research and formative and summative evaluation of video and multimedia projects. S/he has initiated such activities with and through various professional organizations, educational agencies and individual teachers. Applicant describes extensive preparation, experiences and achievements in research and formative and summative evaluation as they relate to video, online and multimedia programs and services. Experiences and achievements with both K-12 and teacher professional development are included. A process managed for determining needs of teachers for instructional programs and services is detailed.

2 points: Applicant has a bachelor degree or considerable experience in education for research and formative and summative evaluation of video or multimedia projects. S/he has conducted research and formative and summative evaluation as they relate to video, online or multimedia programs or services. A process managed for determining needs of teachers for instructional programs or services is detailed.

1 point: Applicant has a bachelor degree or considerable experience in education for research or formative or summative evaluation of video or multimedia projects. S/he has conducted research or formative or summative evaluation as they relate to video, online or multimedia programs or services. A process s/he was involved with for determining needs of teachers for instructional programs or services is described.

0 points: No scoreable response or did not answer the question.

24. Complainant's answer to the third question for the Research Position (Exh. C-5) contains no indication that the cited experience related to video or other media programs and

services as required in the question asked and related benchmarks. The raters' score of zero for complainant's answer was appropriate.

25. Margaret Wilsman, the person hired for the Research Position, also completed the required AHQ (Exh. R-202). She had fifteen years of experience at ECB as a Bureau Director in the Education Division. Her answers to the AHQ questions demonstrated responsibility for multi-media projects. Her answers to the AHQ questions evidenced greater experience than complainant regarding the specific questions asked and related benchmarks.

26. The questions and benchmarks used to grade the AHQs submitted for the Research Position were related to the duties of the position.

Composition of Rating Panel

27. Harry Tobie has served as ECB's Affirmative Action Officer for about 20 years. Prior to the hearing he was unaware that ECB's affirmative action plan (Exh. C-11) failed to follow DER's "policy and procedure" (Exh. C-10) relating to the composition of individuals who score exams. DER's policy (p. 4, item "L") states that "(e)ach agency shall have a policy regarding including racial/ethnic minorities, women, and persons with disabilities on oral boards, interview panels . . . and as exam raters." The policy does not expressly require each agency to include minorities as exam raters, but does require each agency to address the matter as a policy in an affirmative action plan.^A Inadvertently, this policy was not included in ECB's affirmative action plan.

28. ECB had an unwritten practice of attempting to achieve diversity in the composition of exam raters when possible. Diversity was not achieved with the rating panel here (two white males as raters) because the people involved (Tobie, Unmacht and Dokken) knew of very few people with the experience required to evaluate the AHQ answers, none of whom were minorities.

^A A sentence was added to this paragraph to clarify what the record showed. Complainant's final brief (pp. 14-15, submitted under cover letter dated April 19, 1999) indicated that complainant had misunderstood the meaning of this paragraph.

29. Mr. Dokken has no experience managing a multi-media project in an educational or any other setting. However, he has worked for ECB for about 25 years and is aware of the agency's work on such projects and knows the agency well.

Use of AHQs

30. Dennis Huett works for DER and is an expert in the development and administration of employment examinations. Historically, testing methods other than AHQs had been in use (such as multiple-choice and true-false questions) which later were found to have an adverse impact on ethnic minorities. AHQs became a desired alternative to other types of tests to avoid adverse impact on ethnic minorities. The State of Wisconsin as an employer has used AHQs since about 1978, as a recognized form of testing and the preferred testing method for many high-level jobs. No national studies have been done yet to verify that AHQs avoid the undesired adverse impact. Mr. Huett, however, has conducted his own studies, which demonstrated that AHQs have no adverse impact on ethnic minorities.

31. Complainant applied for other state positions prior to the positions at issue here. He listed (in response to discovery) the prior thirteen positions he applied for which used AHQs as a testing device (Exh. R-227, p. 9). He characterized the prior AHQs as "similar to those submitted to ECB." Out of those thirteen positions, his rated AHQ was sufficient to entitle him to an interview for eleven positions, was insufficient for one position and was not rated for the remaining position.

CONCLUSIONS OF LAW

1. Complainant did not meet his burden of proof to establish that respondents discriminated against him because of his color, race and/or national origin/ancestry when in June 1998, he was notified that he was ineligible for the Instructional Position and the Research Position.

2. Complainant did not meet his burden of proof to establish that respondents' use of an AHQ was a pretext to disqualify him from consideration because of his color, race and/or national origin/ancestry.

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 an available position, 3) was qualified for the available position, and 4) was rejected under circumstances which give rise to an inference of unlawful discrimination. Complainant failed to establish the third element of the prima facie case, as discussed in the following paragraphs.

Complainant contends he was qualified for the positions. His supporting analysis, however, was fatally flawed. Specifically, he measured his AHQ responses to the “Knowledge and Skills” requirements stated in the job announcements (see ¶¶8 and 18) rather than to the established benchmarks for the AHQ questions. (See complainant’s initial brief, pp. 3-5 and 11-14.) His analysis based on the “Knowledge and Skills” requirements lead him to the conclusion that he met “the majority” of the requirements such as the ability to manage numerous tasks concurrently. He acknowledged, however, that he did not meet the multimedia experience stated in the “Knowledge and Skills” requirements for the positions. (See pp. 5 and 12 of complainant’s initial brief.) He also acknowledged that he did not reveal any K-12 experience in his AHQ but felt this was somehow “cured” because his recollection is that he testified that he had such experience while in Kenya.² (See initial brief, p. 12.)

The proper analysis to determine whether complainant was qualified for the position is to undertake a comparison between the benchmarks established for the AHQs and complain-

² It is inappropriate for complainant to contend that discrimination occurred in the scoring of the AHQs due to pertinent work history which he should have known was relevant but failed to describe in his AHQs. See, *Dorf, Id.*

ant's responses to the AHQs. It is not complainant's prerogative to choose the selection criteria in a hiring case. *Dorf v. DOC*, 93-0121-PC-ER, 6/9/95. Also see, *Gygax v. DOR & DER*, 90-0113-PC-ER, 2/14/94 and *Jahnke v. DHSS*, 89-0094-PC-ER and 89-0098-PC, 12/30/90. Here the benchmarks were established before recruitment was undertaken to fill the positions. The benchmarks were job-related and consistent with the information contained in the job announcement. The benchmarks were applied the same for each candidate. Accordingly, there is no basis in this case for the Commission to use any measurement of a candidate's qualification other than the established benchmarks.

Complainant contended that the emphasis on multimedia experience contained in the benchmarks was not justified. The Commission disagrees. Complainant's contention was based on his misleading restatement of testimony from Mr. Umacht, as shown below (complainant's initial brief, p. 13):

Umacht testified that multimedia, including on-line, project management experience occupied very little percentage of the job duties.

Mr. Umacht did say that the people hired for the positions usually would not be doing the actual videotaping or development of curriculum, for example. He further stated, however, that it was "critical" that the people hired for the positions knew about the media technology and curriculum development in order to perform the job tasks. Mr. Umacht's testimony on this point was credible and persuasive.

The statement of the hearing issue included a sub-issue on whether respondents' use of an AHQ was a pretext for discrimination. Since complainant failed to show he was qualified for the position, the Commission would not need to address the pretext argument. The Commission notes, however, that the claim has no basis in fact. ECB wanted to interview all candidates without grading the AHQs but was advised by DMRS that this could not be done. ECB knew who the candidates were when it made the request and this fact dispels any inference that ECB did not want to interview complainant. Similarly, DMRS did not know whom the candidates were when it advised that ECB could not give all candidates an interview without scoring the AHQs. Accordingly, no inference is raised that DMRS' (or DER's) decision was based on

impermissible factors of complainant's race, color, national origin or ancestry. Furthermore, complainant's own history with AHQs shows that the testing device itself has not operated to exclude him from interviews.

Complainant alleged that respondents have provided inconsistent information regarding the availability of a minority qualified to grade the AHQs.^B Complainant based this argument on the following excerpt from respondents' joint post-hearing brief (submitted by cover letter dated March 1, 1999):

Complainant was thwarted – stopped cold – in his effort to “out” ECB as an agency that practices discrimination. The facts, uncontradicted facts, are that ECB has racial minorities in high-level positions, including Bureau Directors. Mr. Unmacht gave very specific testimony on the numbers and where they were located in the organization structure of ECB.

Complainant filed a post-hearing reply brief by cover letter dated March 8, 1999. This was the final brief due under the post-hearing schedule. Complainant, in his final post-hearing brief, included the following argument (from pp. 8-9):

. . . At the hearing ECB testified that there was a high ranking racial minorities (sic) in ECB who was not in Administrators-Senior Executive job group. However, now Respondents' brief is telling this Commission there was a racial minority Bureau Director in ECB . . . That means Respondents lied during the Commission's hearing. However, this factor helps complainant's arguments that Respondents, with impunity, did not include the racial minority Bureau director (sic) in the screening panel to break state policy as preparation to discriminate against Dr. Oriedo . . .

Complainant included a similar argument in the brief filed after the proposed decision and order was issue. (See pp. 13-15, of brief submitted under cover letter dated April 19, 1999.) The following excerpt is from page 15 of the brief:

. . . [T]he Proposed Decision claimed that ECB did not have racial minorities in the AHQ rating panel because there were no racial minorities qualified to rate the AHQs. That is a reversible and prejudicial misstatement of the facts. This

^B This portion of the discussion section was added

is because at the hearing Dokkens (sic) testified that there was a racial minorities (sic) in ECB who was not in Administrators-Senior Executive job group, but a high ranking official in ECB. However, Respondents' Response brief in this Commission revealed that actually there was a racial minority Bureau Director in ECB at the time the AHQ (sic) were evaluated . . . This means Respondents' (sic) employee, Dokkens (sic), lied under oath during the Commission's hearing. The Proposed Decision should have found that respondents with impunity excluded the racial minority Bureau director in the AHQ screening panel to break state policy with impunity and in preparation to discriminate against Dr. Oriedo.

Mr. Dokken, at oral arguments on June 30, 1999, denied that he had lied under oath as alleged by Mr. Oriedo. The Commission reviewed Mr. Dokken's hearing testimony. Mr. Dokken testified that he did not consult any racial minority about rating the AHQs, because he was unaware of a racial minority who had sufficient knowledge or work experience to qualify as a rater for the particular positions at issue here. Mr. Dokken also testified that he knew racial minorities who worked in the personnel field but those individuals had no technological expertise relating to the vacant positions. Mr. Dokken explained at hearing that his background also was in personnel but since December 1993, his work has been at ECB where he has gained insight into ECB programs and related technologies. Most importantly, Mr. Dokken **was not asked** by anyone at hearing about the racial composition at ECB of specific job groups (such as "senior managers"). It is of great concern to this Commission that complainant has misrepresented what Mr. Dokken was asked at hearing and has alleged **without a basis in fact** that Mr. Dokken "lied at hearing."

Testimony regarding the composition at ECB of specific job groups is in the record through the testimony of Harry Tobie, ECB's Division Administrator, whose responsibilities over the past 20 years include functioning as ECB's affirmative action officer. Mr. Tobie, in response to questions by complainant's representative, testified that there were 5 minorities working at ECB. He further testified that the ECB's top management positions included one executive director, one deputy director, 5 division administrators and 10 bureau directors and that about 10 of these were unclassified positions not included in affirmative action goals. He testified that none of the 5 minorities worked in the "001 - administrators/senior executives" job category used for affirmative action goals. Mr. Tobie clarified, *in response to questions*

posed by Mr. Dokken, that some of the ECB bureau directors are black. Complainant had his opportunity at hearing to probe whether any of the bureau directors who are black were qualified to score the AHQs and complainant failed to do so. It is inappropriate for complainant to attempt to "cure" his failure to ask questions at hearing by later falsely alleging that witnesses lied at hearing.

ORDER

This case is dismissed.

Dated: July 20, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.

Parties:

Micah A. Oriedo
P.O. Box 2604
Madison, WI 53701

Thomas L. Fletemeyer
Exec. Director, ECB
3319 W. Beltline Hwy.
Madison, WI 53713

Peter Fox
Secretary, DER
345 W. Washington Ave.
P.O. Box 7855
Madison, WI 53707-7855

Robert LaVigna
Administrator, DMRS
345 W. Washington Ave
P O Box 7855
Madison, WI 53707-7855

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