

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
ADMINISTRATION,
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

DECISION
AND
ORDER

Case Nos. 99-0001, 0026-PC-ER

These matters were filed as complaints under the Wisconsin Fair Employment Act (FEA). The issues for hearing read as follows:

1. Whether respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities in regard to the following:
 - a. Respondent DOA's investigation of complainant's use of vacation time for participating as a representative in a proceeding before the Commission.
 - b. Respondent DOA's failure to select complainant for the position of Director, Office of Performance and Evaluation, March or April of 1998.
 - c. Respondent DOA's failure to select complainant for the position of Director, Office of Performance and Evaluation, in 1999.
 - d. Respondent DOA's failure to select complainant for the position of Deputy Director, Office of Performance and Evaluation, in approximately May of 1998.
2. Whether the alleged practice of appointing individuals identified by the Office of the Governor to 1998 and 1999 vacancies in the posi-

tions of Director and Deputy Director, Office of Performance and Evaluation, had a disparate impact on racial minorities.

3. Whether the use of the career executive selection process to fill vacancies in the position of Director, Office of Performance and Evaluation, during 1998 and 1999, had a disparate impact on racial minorities.

4. Whether the post-certification selection process utilized by respondent DOA to fill vacancies in the positions of Director and deputy Director, Office of Performance and Evaluation, during 1998 had a disparate impact on racial minorities.¹

The cases focus on three hiring decisions. The first, made in March of 1998, was for the position of Director, Office of Performance and Evaluation (OPE). David Benner was the successful candidate for that vacancy. The next month, respondent Department of Administration (DOA) hired Jennifer Noyes to fill the Deputy Director position. In January of 1999, when Mr. Benner resigned from the position of Director, Ms. Noyes was reassigned to it.

The Commission concludes that complainant has failed to sustain his burden of proof as to all issues.

FINDINGS OF FACT

1. Complainant is black and was born in Tanzania.
2. Complainant received a Certificate in Public Administration and Finance from the Mzumbe School of Management in 1970.
3. Complainant's resume (Resp. Exh. 1) shows that from January of 1971 until December 1972, he was employed as an administrative officer in Maswa County and had the following responsibilities:

Assisted the County Executive in planning and implementation of all County affairs; authorized purchases for the county; deputized the County Executive in review of the county budgets including revenue

¹ The issues for hearing also reflected a claim by complainant that respondent had discriminated against him when it issued e-mail messages that were allegedly critical of complainant. However, the complainant did not mention this as one of the remaining issues in his post-hearing brief. Instead complainant noted that "the other issues were discarded." (Brief, page 4) Therefore, the Commission considers it to have been withdrawn.

budgets; received and reviewed progress reports from all departmental programs and in turn briefed the County Executive on sensitive program issues; supervised staff in the executive branch (300-400); was responsible for hiring, discharge and grievance handling of employee in executive branch.

4. Complainant's resume shows that from January 1973 to June 1975 he worked as an accountant and supervised a staff of 12 or more for the Shirecu Association, a cooperative in Tanzania, and that among his responsibilities, he was "answerable for external audits regarding financial policies and procedures."

5. Complainant's resume shows that for the remainder of 1975, he was the general manager of Kigoma cooperative in Tanzania.

6. Complainant attended the University of Wisconsin-Platteville from 1976 until 1980 and was awarded both a bachelor's degree in Ag-business administration and a master's degree in agriculture management.

7. Complainant began working with DOA in May of 1981 as marketing coordinator for the Federal Property Program.

8. From September of 1985 through the date of the hearing in this matter, complainant has been employed by DOA as a contractual services management assistant in the Bureau of Procurement.

9. Complainant has previously filed one or more Fair Employment Act claims of discrimination with the Personnel Commission.

10. The Office of Performance Evaluation (OPE) was created in 1998. Its function is to provide objective, helpful and prompt evaluations of state programs. OPE conducts program rather than fiscal evaluations. OPE has 8 employes, including a director and deputy director as well as 5 analysts and 1 clerical support position. The Director of OPE reports directly to the Secretary of DOA.

11. DOA chose to select the OPE Director before filling any other positions in that office.

12. Both the Director and Deputy Director positions are part of the Administrator-Senior Executive job group that is underutilized for both minorities and for women. (Resp. Exh. 15)

13. Both the Director and Deputy Director positions are career executive positions.

14. The career executive program is for high level managers in classified state service. The program allows the managers to move freely within the system. Statutory policy of the career executive program is set forth in §ER-MRS 30.01, Wis. Adm. Code, which states, in part:

(1) to provide state agencies with a pool of highly qualified executive candidates for competitive appointment to executive level positions in such a way as to achieve and maintain a balanced work force; to provide employes with the opportunity for advancement as well as flexibility and mobility within and between state agencies; and to make optimum use of employes' managerial and administrative skills.

15. Not all career executive positions are in the Administrator-Senior Executives job group, but all Administrative-Senior Executives are career executives.

16. There are various options available to an appointing authority for filling a vacant career executive position: 1) Option 1 is to use the agency's own (existing) career executive employes to fill the vacancy; 2) Option 2 is to use the existing pool of career executives statewide, from any state agency; 3) Option 3 is to consider all current civil service employes (i.e., in the nature of a service-wide promotional opportunity); and 4) Option 4 opens the competition to the general public.

17. Complainant has taken over 40 career executive exams and has never been hired.

Issue 1.b. (1998 Director position)

18. The position description for the position of Director, OPE, includes the following summary:

Under the general direction of the Department Secretary, this senior manager position will perform a broad range of executive functions on an enterprise wide basis including: 1) manage the examination of program and policy issues across state government at the request of the

Governor or Secretary of the Department of Administration; 2) direct staff in research, analysis and summary of issues for the Governor, Secretary and Cabinet; 3) make effective judgments and practical recommendations about program and policy changes necessary to improve provision of services to state taxpayers; and 4) supervise and direct a professional staff of accounting, information technology and others including development and monitoring of the internal operating budget as well as other special projects.

The work of the Performance Evaluation Office will involve both short term analysis and problem solving as well as longer term research, analysis and recommendations supporting critical change or executive branch reform.

19. There was an open recruitment (career executive recruitment Option 4) to initially fill the Director position. Applications for the position were scored by Richard Chandler, Administrator of DOA's Division of Executive Budget and Finance, and Nathaniel Robinson, Administrator of DOA's Division of Energy and Intra-governmental Relations. Mr. Robinson is a black male.

20. There were 51 applicants. The highest scoring candidates were David Benner (100.00), Orlando Canto (98.75), Don Bezraki (95.00) and Jennifer Noyes (95.00). Complainant received a score of 75.00.

21. The 51 applicants included nine current career executives who had expressed interest in the position. Because of their career executive status, these nine individuals did not have to participate in the examination process in order to be included on the certified list of eligibles. Two of the nine current career executives were employed by respondent DOA. Four of the nine were white females, four were white males and one was a black male. Resp. Exh. 4.

22. All nine of the current career executives as well as all of the other applicants who had received a passing exam score of at least 70.00 were certified as eligible for further consideration in the appointment process.

23. A total of 40 persons were on the certification list.

24. Those persons certified as eligible for further consideration were at least minimally qualified for the position in question, but were not necessarily equally qualified.

25. Among the 40 eligible, certified candidates, five were racial minorities (Mr. Canto, Ms. Snider-Allen, Mr. Herrera, complainant and Mr. Humphrey). Among the eleven candidates found ineligible (and not certified for further consideration), only one was a racial minority (Mr. Harvey). Resp. Exh. 4.

26. The scores and relative rankings of the applicants were not provided to the hiring official or appointing authority.

27. A two-person panel then interviewed the certified candidates by telephone on February 20, 23 and 24, 1999. Chuck McDowell, the Administrator of DOA's Division of Administration, and Linda Seemeyer, the department's Executive Assistant, conducted the interviews. Mr. McDowell is black. Among the 31 candidates who were interviewed, 5 were racial minorities (Mr. Canto, Ms. Snider-Allen, Mr. Herrera, complainant and Mr. Humphrey).

28. Ms. Seemeyer and Mr. McDowell had the resumes of the candidates when they conducted the telephone interviews. They asked all the candidates the same questions and considered only the interviews and the resumes. The interviews were scheduled at 20-minute intervals.

29. After the interviews, Mr. McDowell and Ms. Seemeyer recommended David Benner, Orlando Canto and Jennifer Noyes to the appointing authority, DOA Secretary Mark Bugher. Mr. McDowell and Ms. Seemeyer did not rank the top 3 candidates. However, they did identify a second tier of approximately 7 less-qualified candidates. Complainant was not in the second tier.

30. None of the 3 candidates recommended by Mr. McDowell and Ms. Seemeyer were already employed as career executives.

31. David Benner is a certified public accountant and had been a partner at Price Waterhouse in Milwaukee for the period from 1971 to 1996. During this period he had external client responsibilities in terms of delivering tax and related financial

advice to a variety of Wisconsin organizations, as well as internal office responsibilities for specific projects and for reviewing various office services and practices. Mr. Benner had managed professional employees in a large accounting firm, was very familiar with the process of auditing and, during the interview, articulated a vision of OPE as providing a service to its customers rather than alienating them.

32. Mr. Benner had been active for a number of years with a CPA group and in this context had become acquainted with Secretary Bugher (in Mr. Bugher's capacity at that time as Secretary of the Department of Revenue). Mr. Benner retired from Price Waterhouse in 1996 and informed Mr. Bugher of his interest in working for the State of Wisconsin if a position opened up that was of interest to him. Mr. Benner learned of the OPE Director opening during a conversation with Mr. Bugher.

33. Jennifer Noyes had been employed by the Legislative Audit Bureau of the State of Wisconsin since August of 1987, first as a program analyst and, since March of 1992, as the Program Evaluation Director. Her resume (Resp. Exh. 3) shows that in the latter capacity, she had the following responsibilities:

Jointly manage the activities of the Bureau's 29-person Program Evaluation Division to ensure that relevant, timely program evaluations and other audits of state and public agencies are completed as directed by the Legislature. Direct the efforts of diverse teams to make effective judgments and recommendations about agency performance using a variety of program evaluation methodologies and techniques. Evaluate employee performance and provide constructive criticism in order to enhance performance. Enable staff to work as effectively and efficiently as possible through the coordination of bureau-wide training and information technology activities. Manage external relations for assigned projects, including briefing members of the Legislature and representatives of the media regarding audit findings and conclusions.

The program evaluations conducted by the Legislative Audit Bureau are very similar to the output of OPE, except that the latter office reports to the executive branch while the former reports to the legislative branch.

34. Mr. Canto had extensive experience with State budget and finance and knowledge of various policy areas. His current position was as the chief financial officer for a large state agency with a budget in excess of \$1 billion. He oversaw a divi-

sion with 400 employees and an annual budget of \$32 million. He had participated in the state budget process while employed both at DOA and at the agency level. (Comp. Exh. 11)

35. In the course of his interview and in his written materials, complainant did not describe comparable experience to Mr. Benner, Mr. Canto or Ms. Noyes in terms of the duties of the OPE Director position.

36. Secretary Bugher interviewed the three finalists for Director and selected Mr. Benner because of Mr. Benner's lengthy experience in audit and performance-based evaluation.

37. Secretary Bugher did not consider complainant's protected status when he decided to select Mr. Benner.

38. Secretary Bugher confirmed Mr. Benner's appointment in a letter dated March 2, 1998. (Resp. Exh. 10)

39. When there is under-representation in DOA for a job group in the classified civil service in terms of either females or minorities, and if the person recommended for a position in that job group is not a member of the under-represented group, then there must be a written justification, or "by-pass," submitted.

40. The by-pass process is a review to see if the person identified for hire is more qualified than the target group candidate. If the candidates are reasonably close in qualification, the by-pass candidate is typically not hired.

41. During the relevant time period, bypasses requests in DOA were submitted to Isadore Knox, DOA's Affirmative Action Officer. Chuck McDowell was Mr. Knox's immediate supervisor.

42. Mr. Knox's standard procedure, on receiving a by-pass request, was to contact the people involved, get information, and then meet with Peter Olson, DOA's Personnel Director, to discuss the request. If either Mr. Knox or Mr. Olson do not agree with the by-pass request, the matter goes to the Secretary's office for a final decision.

43. After an employment offer had been extended to Mr Benner, respondent prepared a by-pass request report (Comp. Exh. 11) justifying a recommendation to hire Mr Benner rather than Mr Canto, the highest ranking minority candidate.

44. Because the Director hire had been approved by Secretary Bugher, Mr. McDowell and Ms. Seemeyer, Mr Knox did not substantively review the request. He signed off on the by-pass request as did Peter Olson, respondent's personnel director

Issue 1.d. (1998 Deputy Director position)

45. Approximately 10 days after Mr. Benner was hired, DOA decided to use the register from the 1998 recruitment for the Director position to fill the Deputy Director position.

46. DOA sent letters to all persons who were on the interview list for the Director position stating, in part:

As you are probably aware from our advertisement for the position of Director, Office of Performance Evaluation in the Department of Administration, we had indicated the register from that recruitment might be used to fill other, similar positions.

It is our plan to utilize the results of that recruitment to fill a Deputy Director, Office of Performance Evaluation position. As many of the elements of the Director position are similar to the Deputy position, we are considering your candidacy for the Deputy Director position.

We will be reviewing the results of your initial interview and determining a group of candidates to be invited in for a more in-depth second interview.

47 The position summary from the Deputy Director position reads as follows:

Under the general direction of, and in conjunction with, the Director, Office of Performance Evaluation, this Deputy senior manager position will perform a broad range of executive functions on an enterprise wide basis including: 1) manage the examination of program and policy issues across state government at the request of the Governor or Secretary of the Department of Administration; 2) direct staff in research, analysis and summary of issues for the Governor, Secretary and Cabinet; 3) make effective judgments and practical recommendations about program and policy changes necessary to improve provision of services to state tax-

payers; and 4) supervise and direct a professional staff of accounting, information technology and others including development and monitoring of the internal operating budget as well as other special projects.

The work of the Performance Evaluation Office will involve both short term analysis and problem solving as well as longer term research, analysis and recommendations supporting critical change or executive branch reform.

48. Orlando Canto was not interviewed for the Deputy Director position because he indicated he was not interested.

49. Linda Seemeyer and David Benner interviewed three candidates for the Deputy position: Jennifer Noyes, Shirley Eckes-Meyer and Patricia Lashore. Both Ms. Eckes-Meyer and Ms. Lashore were already employed as career executives in other agencies and had been in the "second tier" of candidates identified by Mr. McDowell and Ms. Seemeyer for the Director position.

50. Complainant was not interviewed for the Deputy Director position.

51. Ms. Seemeyer and Mr. Benner selected Ms. Noyes to fill the vacancy in light of her extensive experience with the Legislative Audit Bureau conducting performance evaluations and directing a staff of performance analysts, which was a very similar function to that of OPE.

52. Secretary Bugher approved of the hire and Ms. Noyes was appointed effective April 27, 1998. (Resp. Exh. 13). No by-pass request was prepared for this vacancy because females were under-represented in the classification group and because Ms. Noyes had been selected.

Issue 1.c. (1999 Director position)

53. Mr. Benner left the Director position in 1999. Ms. Noyes immediately expressed an interest in the vacancy on a permanent basis.

54. Ms. Noyes had received a positive evaluation while working as Deputy Director. Ms. Seemeyer, Secretary Bugher and Deputy Secretary George Lightbourn had all given her very positive feedback regarding her work. She had acted equally

with Mr Benner in getting OPE up and running and she had developed all of the office's policies and procedures.

55. Mr. Bugher considered Ms. Noyes to be extremely well qualified to serve as OPE Director in light of her previous experience with the Legislative Audit Bureau and as Deputy Director of OPE.

56. The human resources staff at DOA informed management that because both the Deputy Director position and the Director position were career executive positions and were in the same pay range, it was possible to reassign Ms. Noyes to the Director position rather than to conduct a more involved selection process.

57 Secretary Bugher decided to appoint Ms. Noyes to the Director position and did so, via career executive reassignment, effective January 31, 1999. (Resp. Exh. 14). Ms. Noyes was not promoted into the position. No DMRS approval was necessary. (Comp. Exh. 31a).

58. No one other than Ms. Noyes was considered to fill the Director position in 1999. The complainant was not considered for the vacancy.

Issue 2 (appointing individuals identified by the Office of the Governor)

59. There was no involvement by the Office of the Governor in the 1998 decisions to select Mr. Benner and Ms. Noyes for the positions of Director and Deputy Director, or in the 1999 decision to reassign Ms. Noyes from the Deputy Director to the Director position.

Issue 1.a. (complainant's use of vacation time for Commission proceedings)

60. At all times relevant to this proceeding, David Vergeront has served as Legal Counsel for respondent DER.

61 Mr. Vergeront represented DER in a proceeding brought by Micah Oriedo before the Wisconsin Personnel Commission.

62. Complainant was listed as a witness in the Oriedo matter but there was also a question as to whether he was serving as Mr Oriedo's representative. The hearing examiner presiding in the case indicated that complainant could not be in pay status if he was appearing as Mr. Oriedo's representative.

63. Mr. Vergeront had previously been advised by legal counsel for other agencies that they had encountered problems with complainant using state resources when he was pursuing his claims.

64. After the first day of the hearing, Mr. Vergeront contacted respondent DOA's Deputy Legal Counsel, Mark Saunders, and advised him that DOA might want to check on whether complainant was taking leave for the time he was in Mr. Oriedo's hearing.

65. Mr. Vergeront had, infrequently, raised similar concerns regarding other state employees serving as representatives in proceedings before the Commission. One such case related to a white employee of the Department of Public Instruction.

66. After receiving the call from Mr. Vergeront, Mr. Saunders contacted complainant's second level supervisor, Jan Hamik, and asked her to check whether complainant had taken leave time for the hearing.

67 Ms. Hamik spoke with Patti Kramer, complainant's supervisor, and concluded that complainant had appropriately taken leave for the Oriedo hearing. Complainant was congratulated for having handled the situation appropriately.

68. Mr Saunders has routinely been called upon to investigate or to recommend an investigation where there have been complaints about a DOA employee who has appeared to be engaged in an activity that is inconsistent with being in pay status. All the DOA employees complained about in the past were white employees.

CONCLUSIONS OF LAW

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

2. It is complainant's burden of proof to show that respondent did not hire him for the three positions in question because of his race/color and/or national origin/ancestry or in retaliation for having engaged in protected activities under the Fair Employment Act. He failed to meet this burden.

3. It is complainant's burden of proof to show that the hiring processes in question somehow discriminated against him because of his race based on a disparate impact theory. He failed to meet this burden.

4. It is complainant's burden of proof to show that respondent DOA investigated his use of vacation time because of his race and/or national origin or in retaliation for having engaged in protected activities under the Fair Employment Act. He failed to meet this burden.

OPINION

As a preliminary matter, the Commission notes there are numerous comments in complainant's post-hearing arguments that are not supported by the record. The Commission has not given any weight to those comments nor to complainant's arguments that are inconsistent with existing law. The Commission also rejects complainant's suggestion that because respondent failed to specifically dispute many of the numerous assertions in complainant's initial brief, complainant's "assertions should be deemed admitted." (Reply brief, page 3). *See, Balale v. DHFS*, 99-0002-PC-ER, 5/31/00; *Balele v. DOR*, 98-0002-PC-ER, 2/24/99; and *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98.

I. Disparate treatment allegations

A. Selection decisions

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 (FEA), 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.

Complainant is protected under the FEA by virtue of his race/color and national origin/ancestry and because he had previously filed complaints of discrimination with the Commission.

He applied for 1998 Director and Deputy Director positions. He met the minimum qualifications as evidenced by his inclusion on the certification list. Complainant established the third element of the prima-facie case with respect to his color/race discrimination claims regarding the 1998 selection decisions because respondent hired candidates who are of a different race than complainant.

While we know who the racial minorities were among the 40 certified candidates for the Director and Deputy Director positions, we don't know the national origin/ancestry of the candidates, other than complainant. As noted below, even if complainant had established that the successful candidates were of a different national origin/ancestry, the facts do not support a finding of discrimination on that basis.

Complainant failed to make out a prima facie case with regard to his retaliation claim arising from the selection decisions in that he did not establish the person(s) responsible for making the hiring decisions were aware of his protected activities under the FEA.

As to the 1999 Director position, the complainant also did not establish a prima facie case. He was not considered for that vacancy, nor was anyone other than Ms. Noyes. There was no selection process, merely a decision to reassign Ms. Noyes.²

² Career executive reassignment is described in §ER-MRS 30.07:

(1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.

The Commission agrees with the analysis of the federal circuit court in *Balele v. Klausser et al.*, Case No. 94-1117 (7th Cir., Jan. 11, 1996), which was quoted by respondents in their post-hearing brief:

Here plaintiff has failed to make out a prima facie case, because he has not shown how the career executive program has a disparate impact on a protected group. As to the AO4 position, Balele failed to prove that the manner in which Whitburn selected Gates had a disparate impact upon blacks who might have been considered for the job. No one other than Gates was considered for the position. Under the career executive program, a lateral reassignment is permitted within DOA without notifying or considering similarly situated [employees] for the position. The DOA did not use the career executive program to *select* someone for the AO4 position. . . [T]he career executive position was used as a *vehicle* to move Gates into the position without opening it to competition. . . .

Here, no one other than Ms. Noyes was considered for the Director position when Mr. Benner left in 1999.

Even assuming the complainant has established a prima facie case of discrimination/retaliation with respect to all three of the hiring decisions in question, complainant has failed to sustain his ultimate burden of proof in this matter. Respondent takes the position that complainant was not as qualified as the successful candidates. The burden shifts to complainant to attempt to establish that respondent's stated reason is a pretext for discrimination. Complainant failed to establish pretext here. Respondents established by a preponderance of the evidence that complainant was not hired and was not considered for the 1998 positions beyond the first round of interviews because his qualifications as compared to the successful candidates were markedly inferior. Respondents also established that Ms. Noyes was hired for the 1999 vacancy because of

(2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employee in a career executive position within the agency to another career executive position in the same or lower classification level for which the employee is qualified, the appointing authority may make such reassignment, provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employee, with the reasons stated therein.

her extensive, highly relevant and highly regarded work experience. Complainant's qualifications were substantially inferior to those of Mr Benner and Ms. Noyes with respect to the duties of both the Director and the Deputy Director of OPE. The complainant simply did not have any comparable performance evaluation experience.³ None of his recent experience was in a supervisory capacity or related to program or fiscal evaluation. Only a minor aspect of his experience with the Shirecu cooperative between 1973 and 1975 was to be "answerable for external audits regarding financial policies and procedures."

B. Complainant's use of vacation time for Commission proceedings (Issue 1.a.)

In response to a telephone call from Mr Vergeront, Legal Counsel for respondent DER, Mark Saunders, DOA's Deputy Legal Counsel, contacted complainant's second level supervisor to make sure that complainant had taken vacation leave for the time complainant had served as the legal representative for another complainant in a hearing before the Commission. The supervisor confirmed that complainant had properly taken leave and complainant was congratulated for having done so. No disciplinary or other adverse action was taken against complainant.

In the context of this claim, a prima facie case of discrimination/retaliation can be established by showing that the complainant is a member of a group protected by the FEA, that complainant suffered an adverse action with regard to his or her conditions or privileges of employment, and that the complainant's protected status was not treated neutrally in the employer's decision. If, during the course of the hearing, the parties have effectively addressed all the issues of a discrimination case, the discussion can by-

³ The Commission has included various findings of fact relating to the by-pass process used by DOA for the 1998 Director position. Mr. Canto, rather than complainant, was the leading racial/ethnic minority candidate for the position. Because the complainant's qualifications were substantially inferior to those of Mr Benner and Mr. Canto (as well as Ms. Noyes), complainant was not affected by the respondent's by-pass decision and the Commission does not address it any further.

pass the prima facie case analysis and move directly to the issue of pretext. *Hagmann v. UW (Eau Claire)*, 95-0044-PC-ER, 4/25/00.

It is undisputed that Mr. Saunders was aware of complainant's protected status and that complainant had previously engaged in protected activities under the FEA.

Complainant testified that he heard that "big people" in the office were looking for him and were seeking to get rid of him from his job. Complainant did not provide any substantiation for this testimony and the testimony of both Mr. Saunders and Mr. Main, DOA's legal counsel, do not provide any support for complainant's testimony. Therefore, the Commission rejects complainant's testimony as not credible.

There is no credible evidence that Mr. Saunders' inquiry as to complainant's use of vacation time was based on complainant's protected status. Mr. Saunders properly responded to Mr. Vergeront's telephone call. The "investigation" of complainant was very brief and was limited in scope to the particulars of Mr. Vergeront's concern. Mr. Saunders acted appropriately given the nature of Mr. Vergeront's inquiry and acted in a manner that was consistent with his responses to inquiries relating to other DOA employees. Complainant has failed to show that DOA's inquiry relating to his use of vacation time was motivated in any way by his protected FEA status.⁴

II. Disparate impact allegations

Under a disparate (or "adverse") impact theory, an employer's facially neutral policy or practice may be unlawful -- even without a showing of discriminatory intent -- because it has a significantly adverse impact on a protected group. Federal case law discussing the disparate impact theory is "relevant and persuasive" in analyzing a claim under Wisconsin's Fair Employment Act. *Racine Unified School Dist. v. LIRC*, 164

⁴ In his objections to the proposed decision, complainant contends that the real reason Mr. Vergeront called DOA was because Mr. Vergeront "had been frustrated by Balele's non-ending requests for discovery from DER and DMRS." This contention mistakenly addresses the possible motivation of Mr. Vergeront in contacting DOA about complainant's conduct. However, the issue for hearing only refers to DOA's action of conducting an investigation. Complainant's allegation regarding Mr. Vergeront is immaterial to the issue before the Commission.

Wis. 2d 567, 595 n. 14, 476 N.W.2d 707 (Ct. of App., 1991). The allocation of the burden of proof in a disparate impact case is as follows:

(1) *The prima facie case*: A court will consider statistical evidence offered by both the plaintiff and the defendant to determine whether, on the basis of those statistics that are most probative, the challenged practice or selection device has a substantial adverse impact on a protected group. The burdens of production and persuasion at this stage are on the plaintiff.

(2) *Business necessity*: If impact is established, the inquiry becomes whether the practice or selection device is "job-related for the position in question and consistent with business necessity." The burdens of production and persuasion at this stage are on the defendant.

(3) *Alternatives with a lesser impact*: To rebut the employer's proof of business necessity, a plaintiff can show that the employer refused to implement an effective alternative practice or selection device that would have a lesser adverse impact. (Footnotes omitted) Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 87 (3^d ed. 1996)

A. Disparate impact: individuals identified by Office of the Governor. (Issue 2)

There was no involvement by the Office of the Governor in the 1998 decisions to select Mr. Benner and Ms. Noyes for the positions of Director and Deputy Director, or in the 1999 decision to reassign Ms. Noyes from the Deputy Director to the Director position. Therefore, complainant has failed to establish a prima facie case of discrimination as to that issue.

B. Disparate impact: career executive selection process (Issue 3)

The complete text of this issue reads as follows:

3. Whether the use of the career executive selection process to fill vacancies in the position of Director, Office of Performance and Evaluation, during 1998 and 1999, had a disparate impact on racial minorities.

The initial question raised by the issue is to identify the "career executive selection process" that was used in 1998 and 1999.⁵ The 1998 process involved opening the Director position to all persons, including those not currently employed by the State of Wisconsin. A panel scored the application materials, a certification list was prepared and another panel conducted phone interviews of the certified candidates. The appointing authority then conducted another set of interviews of the three finalists who had been recommended by the panel. The appointing authority made the final decision. In 1999, the process was simply to reassign another career executive to the vacant Director position. While we know that neither of these two "processes" resulted in the appointment of a racial minority to the Director position, there is no evidence they were the same "process" for the purpose of conducting a disparate impact analysis of career executive appointments. The processes were very dissimilar. They did not include a common "neutral policy or procedure" comparable to requiring all applicants to be of a certain height or to possess a high school diploma, both of which are application requirements that have been analyzed in the context of an adverse impact theory. *Dorthard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)⁶

⁵ In his reply brief (pages 15-17), complainant contends that Mr. Benner was pre-selected for the 1998 vacancy and that this pre-selection had a disparate impact on complainant. This allegation is inconsistent with a disparate impact theory. Pre-selection does not qualify as a neutral policy or practice. In addition, the focus of this particular contention is on one hiring action, rather than on a neutral policy or practice that was applied to numerous hiring decisions so as to be susceptible to the statistical analysis that must be present to succeed on a disparate impact theory. This contention might be appropriately considered as part of an appeal of a civil service hiring decision, filed with the Commission under §230.44(1)(d), Stats., but not as part of a disparate impact claim. Complainant refers to Secretary Bugher's testimony to the effect that he was frequently contacted by persons, such as Mr. Benner, interested in positions with the State of Wisconsin. Complainant also references Secretary Bugher's statement that he was interested in finding a position for Mr. Benner. This testimony does not establish a "systemic pattern of pre-selection" as argued by complainant. (Reply brief, page 18)

⁶ If complainant's focus is on the concept of giving current career executive employees a certain privilege over other persons when a career executive vacancy opens up, then he would have to show what the racial consequences are when the "privilege" is granted and provide statistical evidence relating any adverse results to the personnel practice being questioned. We only know that the persons who filled the Director position in both 1998 and 1999 are white, that, as to the

In his post-hearing brief, complainant recognized this problem and opted to "bifurcate" the issue:

In his complaint Balele identified that post certification practices and pre-selection had disparate impact on him based on his race. In this paragraph and paragraph to follow, complainant will discuss how these practices caused him injury in the positions. Because of the difficulty of lumping all positions in one analysis, Balele will deal with one position at a time. For analysis Balele will bifurcate the first issue to read as follows:

"Whether the post-certification selection process utilized by respondent DOA to fill vacancies of Director, Office of Performance and Evaluation, during 1998 had disparate impact on racial minorities." (Brief, page 19, emphasis added)

Later in his brief, complainant offered the following statistical analysis as support for his disparate impact claim:

The percent of racial minorities who *had actually been certified* in career executive positions was 8.8% (Huett's testimony), whereas the number of racial minorities actually hired were far less than 8.8%. (see analysis below). The obvious conclusion is that racial minorities had been denied positions after certification at a higher rate than their actual percentage availability. On the other [hand] whites had been hired at a higher rate than their percentage availability. (see analysis below). Here below are the statistics as available at the time complainant was denied the positions at issue:

a.	Total # of [career executives] statewide was	871 (Exh. C40 last page)
b.	Total # of [career executive] minorities	46 (Exh. C40, counted)
c.	% of minorities actually certified	8.8% (Exh. C41 last page)
d.	% of whites actually certified	91.2% (Exh. C41 last page).
e.	# of white actually hired	825
f.	# of white should have been hired	794
g.	# of over whites over hired	31

1998 vacancy, the successful candidate was not moving from another career executive position, white Ms. Noyes' status as a career executive permitted respondent to reassign her in 1999.

Therefore the number of racial minorities that should have been hired is (a X c) which is equal to 77. Balele and other racial minorities had been cheated 77-46 which is 31 positions or 41% of the positions. In *Hazelwood school District v. United States*, 433 U.S. 299 (1977) the Supreme Court found that such a percentage was significant. *Id.* Therefore DOA cannot use the bottom line of racial minorities in career executive positions as a defense.

Therefore Balele has proved, using statistical evidence in support of his complaint that interviews and other post certification practices had disparate impact on Balele and other racial minorities. *Id.* (Brief, pages 35-36, emphasis in original)

There is at least some suggestion that complainant is looking at both the 1998 and the 1999 vacancies here, in light of his reference to "statistics as available at the time complainant was denied the positions at issue."

Complainant repeats these numbers in his reply brief (page 23) and adds:

On the other hand, DOA had 66 career executive employees and 3 racial minorities at the time Balele was denied the positions at issue. Therefore racial minorities made [up] only 4.5 percent of the total. The difference to full employment in DOA was $8.8 - 4.5 = 4.3$ or 43 percent. In *Hazelwood school District v. United States*, 433 U.S. 299 (1977) the Supreme Court found that disparity between 3.7% and 15.4% was significant. *Id.*

These references in complainant's post-hearing briefs are the full extent of the statistical analysis offered in support of complainant's disparate impact claims.

There may be disparate impact cases in which expert statistical testimony is unnecessary, but the present case does not fall within that category. Complainant has merely presented several bits of statistical information. He asks the Commission to accept his personal (rather than "expert") statistical arguments and to conclude that he has presented statistical evidence showing that the challenged practice or selection device has a substantial adverse impact on racial minorities.

The statistical information referenced in complainant's written arguments does not satisfy the complainant's burden in this matter.

Complainant's Exhibit 40 is a list of career executive positions, statewide, as of January of 1999. The list shows that 46 of the 871 career executive positions were filled by racial minorities at that time.

Complainant's Exhibit 41 is applicant flow information for career executive staffing transactions that were completed during the 1994 through 1996 fiscal years, i.e. for the three year period ending June 30, 1996. The document includes columns entitled "date anno" and "regr date." These columns presumably refer to the date the vacancies were announced and the date a register of eligible candidates was created.⁷ The document shows, among other things, that racial minorities represented 8.8% of the candidates (140 of the 1595) who passed the career executive examinations during this three year period. However, the document does not cover career executive transactions that were completed during the period in which the two Director vacancies in question were filled. The document also does not indicate the agency in which the position was located.

The complaints before the Commission relate to hiring decisions made by the Department of Administration. While we know the racial composition of career executive positions in DOA as of January 16, 1999,⁸ complainant has failed to provide the hiring statistics for DOA. We don't know how often minorities may have been hired to fill vacancies that had previously been occupied by other racial minorities. If there were only 10 career executive vacancies during 1998 and 1999 in DOA, if one position accounted for 3 of those vacancies and if in each instance a racial minority was hired to fill the vacancy in that position, DOA would be hiring minorities 30% of the time dur-

⁷ It is not clear that the 1999 reassignment decision that is the subject of this hearing would even show up on this list, even if it had included hires made during 1999, because there was no register created for filling the 1999 Director vacancy

⁸ Peter Olson, Personnel Director for DOA, did not know if career executives were underutilized in DOA. Chuck McDowell, Administrator of the DOA's Division of Administrative Services, also did not know if career executives were under-represented based on applicant flow. Secretary Bugher was not aware that racial minorities were underutilized for career executive positions.

ing that period. Complainant's statistics and analysis focus only on workforce composition, and ignore selection rates.⁹

Complainant's statistical analysis also does not address important issues relating to sample size¹⁰ and methodology. Whether or not the "80% rule" is a viable measure of statistical significance, complainant has not made any effort to apply it to the present case, nor to apply a standard deviation analysis. This is not an "inexorable zero" situation where DOA does not employ *any* racial minorities in career executive positions. The record shows that DOA has hired *some* racial minorities into career executive positions. The complainant fails to answer the question of whether the selection rate reflects an adverse impact on racial minorities.

The statistical record in the present case does not hold up when compared to other disparate impact cases. In *Victory v. Hewlett-Packard Co.*, 78 FEP Cases 1718 (DC ENY 1999), the court denied the employer's motion for summary judgment relating to the employee's claim that the employer's promotion policies and practices had a disparate impact on females.

Plaintiff's claim of disparate impact discrimination is based primarily on the comparative statistical evidence. Plaintiff's expert, Jonathan Falk, is a Senior Consultant at National Economic Research Associates, and based upon data supplied during discovery by Defendant, Falk determined that during the years 1986 through 1989, 12 male sales representatives were promoted, yet no women were promoted. Although 83 men were not promoted, all 25 female sales representatives were not pro-

⁹ The EEOC guideline for applying the 80% rule is in 29 C.F.R. §1607.4D (1998):
A *selection rate* for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in *selection rate* may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms. (emphasis added)

¹⁰ Complainant does not respond to respondents' contention, set forth on page 25 of their post-hearing brief, that "if only three more of the DOA career executives were racial or ethnic minorities, the percentage of DOA career executives who were racial or ethnic minorities would be equal to the percentage of racial or ethnic minorities available for career executive positions."

moted. This analysis resulted in a finding that there was only a one in twenty chance that this outcome could have occurred randomly, and therefore, Falk concluded that "while differential rates of performance ratings partially explain this result, there is no explanation for the fact that women received lower promotion rating than men."

The pool of possible candidates for promotion included sales representatives in the New York area and included all promotions during the 1986 to 1989 period. Falk does not recognize a standard benchmark level for determining statistical probability but employed "Fischer's Exact Test" to determine statistical probability.

Defendant's expert, Dr Elizabeth Becker, attacks Falk's analysis because Falk failed to meet the benchmark level of statistical significance which is 0.05. Becker criticizes Falk's inclusion of an employee who geographically was outside the New York area, another employee who was granted a lateral transfer but not a promotion, and the inclusion of employees who were not eligible for promotion to management. .

The Supreme Court has repeatedly countenanced the use of statistical evidence, and evidence of the absence of a single minority employee being hired, labeled the "inexorable zero," would in and of itself support an inference of discrimination. *See Teamsters*, 431 U.S. [at] 342 n.23, 97 S.Ct. at 1858 n. 23 .

Similarly, in the case at bar, HP has failed to refute the troubling fact that nary a single female sales representative has ever been promoted to a managerial position.

Under Rule 402 of the Federal Rules of Evidence "[f]or statistics to be valid and helpful in a discrimination case, 'both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination.'" *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 [44 FEP Cases 418] (6th Cir. 1987)(quoting *Segar v. Smith*, 738 F.2d 1249, 1274 [35 FEP Cases 31] (D.C. Cir. 1984)).

Plaintiff has identified the promotion practice of Hewlett Packard, as implemented through its performance evaluation procedure, as the employment practice which has prevented female participation in management. Although female employees have sporadically received the highest rating in particular categories, none have been promoted. The complete lack of female participation in management is highly persuasive evidence of a disparate impact claim. .

The Court acknowledges that Plaintiff's statistical expert has provided a report that does not contain the thorough exacting analysis that would wholly establish a foundation for a disparate impact claim, nonetheless, the evidence presented survives summary judgment, albeit by a slim margin. 78 FEP Cases 1718, 1721-1729 (emphasis added)

Complainant has not provided any statistical analysis remotely comparable to the information found to be only barely adequate in *Victory v. Hewlett-Packard, (Id.)*.

Complainant contends that the disparities in the present case are comparable to those in *Hazelwood School District v. United States*, 433 U.S. 299, 53 L Ed 2d 768, 97 S.Ct. 2736 (1977). *Hazelwood* involved an allegation that defendants had engaged in a "pattern or practice" of discrimination when it failed to hire blacks as teachers. The Court of Appeals had relied on statistics showing that in 1970, 15.4% of the teachers in the St. Louis County and St. Louis City area were black but in the 1972-73 school year, only 1.4% of the teachers in the Hazelwood School District were black and in the following school year, 1.8% of the teachers were black. The Hazelwood School District covered 78 square miles in the northern part of St. Louis County. Based, in part, on this information, the Court of Appeals had reversed the District Court's finding of no discrimination. The Supreme Court vacated the Court of Appeals' judgment and remanded the case. The Supreme Court explained its decision as follows:

The record in this case showed that for the 1972-1973 school year, Hazelwood hired 282 new teachers, 10 of whom (3.5%) were Negroes; for the following school year it hired 123 new teachers, five of whom (4.1%) were Negroes. Over the two-year period, Negroes constituted a total of 15 of the 405 new teachers hired (3.7%).

What the hiring figures prove obviously depends upon the figures to which they are compared. The Court of Appeals accepted the Government's argument that the relevant comparison was to the labor market area of St. Louis County and the city of St. Louis, in which, according to the 1970 census, 15.4% of all teachers were Negro. The propriety of that comparison was vigorously disputed by the petitioners, who urged that because the city of St. Louis has made special attempts to maintain a 50% Negro teaching staff, inclusion of that school district in the relevant market area distorts the comparison. Were that argument accepted, the percentage of Negro teachers in the relevant labor market area (St. Louis

County alone) as shown in the 1970 census would be 5.7% rather than 15.4%.

The difference between these figures may well be important; the disparity between 3.7% (the percentage of Negro teachers hired by Hazelwood in 1972-1973 and 1973-1974) and 5.7% may be sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% may be sufficiently large to reinforce it. In determining which of the two figures -- or, very possibly, what intermediate figure -- provides the most accurate basis for comparison to the hiring figures at Hazelwood, it will be necessary to evaluate such considerations as (i) whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken; (ii) to what extent those policies have changed the racial composition of that district's teaching staff from what it would otherwise have been; (iii) to what extent St. Louis' recruitment policies have diverted to the city, teachers who might otherwise have applied to Hazelwood; (iv) to what extent Negro teachers employed by the city would prefer employment in other districts such as Hazelwood; and (v) what the experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.

It is thus clear that a determination of the appropriate comparative figures in this case will depend upon further evaluation by the trial court.

Only the trial court is in a position to make the appropriate determination after further findings. And only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial discrimination in its employment practices in violation of the law. 433 U.S. 310-13 (footnotes omitted)

In *Hazelwood*, the Supreme Court found that a disparity between 3.7% and 5.7% "*may be* sufficiently small to weaken the Government's other proof, while the disparity between 3.7% and 15.4% *may be* sufficiently large to reinforce it." The Court did not make a conclusion that either level of disparity would generate a finding of discrimination or no discrimination.

In the present case, complainant suggests that "racial minorities had been cheated 77-46 which is 31 positions or 41% of the positions."¹¹ The Commission understands complainant to argue that the racial composition of career executive position incumbents, statewide, should have included 8.8% minorities in order to reflect the racial composition of the certified, i.e. qualified, candidates. Because there were 825 career executive positions in January of 1999, complainant argues that 8.8% of them, or 77 positions, should have been occupied by minorities. Instead minorities held only 46 of the 871 statewide positions, or 5.3%. This disparity¹² between 5.3% and 8.8% is what should be compared to the disparities referenced by the Court in *Hazelwood*. The disparity between 5.3% and 8.8% is far less than the disparity between 3.7% and 15.4% which is what the Supreme Court in *Hazelwood* said *might be* "sufficiently large to reinforce" the "other proof" supplied by the Government. The present case is not a "pattern or practice" case and there is no "other" statistical proof offered by the complainant. The *Hazelwood* decision does not support the complainant's claims of disparate impact. In other words, if, for the sake of argument, the Commission accepts the comparison of 5.3% and 8.8% as legitimately premised, *Hazelwood* tells us the discrepancy is still one that may be sufficiently small to weaken any other proof (of which there is none in the present case).

B. Disparate impact: post-certification selection process (Issue 4)

The final issue in this matter is a disparate impact analysis of "the post-certification selection process" used to fill the Director and Deputy Director vacancies in 1998. As noted above, five racial minorities were certified and were interviewed by Ms. Seemeyer and Mr. McDowell. One (20%) of those five, Mr Canto, was in the

¹¹ The thirty-one positions must be compared to the total number of career executive positions, rather than to the subset of those positions (77) that complainant feels should be occupied by racial minorities. Therefore, the calculation would be $31 \div 871$ or 3.6% rather than $31 \div 77$ or 40.2%.

¹² This reference to "disparity" does not suggest that the Commission has found the statistics supporting these percentages to be appropriate to this case. For example, these percentages are based on career executive positions statewide, rather than just in DOA.

group of 3 candidates recommended to Mr. Bugher for appointment to the Director position in 1998. In contrast, only 2 (5.7%) of the 35 non-minority candidates were recommended. Although Mr. Canto was not selected by Mr Bugher for the Director position, he was not interested in the Deputy position and withdrew his name from consideration. Ms. Noyes, a white female, was selected.

For the same reasons as those set forth above in the discussion of Issue 3, the Commission concludes that complainant has failed to establish a prima facie case of disparate impact with respect to the process used to fill the Director and Deputy Director positions in 1998.

ORDER

These matters are dismissed.

Dated: August 28, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS: 990001Cdec1.2


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.

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