

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF
REVENUE,**
Respondent.

**FINAL DECISION AND
ORDER**

Case No. 99-0202-PC-ER

Oral arguments were held before the Commission on January 23, 2002, regarding complainant's objections to the proposed decision and order. The Commission adopts the proposed decision with changes denoted herein by alphabetical footnotes. The Commission agreed with the hearing examiner's credibility assessments.

A hearing commenced in the above-noted matter on March 27, 2001 and ended on April 4, 2001. The parties agreed to delay the post-hearing briefing schedule because respondent was willing to pay for preparation of a transcript. A schedule was established after the transcript was available. The final brief was due on September 14, 2001.

The parties agreed to the following statement of the issues for hearing (see Conference Report dated May 9, 2000):

Whether the respondent discriminated against complainant on the basis of race or national origin/ancestry or retaliated against complainant for engaging in fair employment activities with respect to the selection decisions for the Deputy Administrator of the Lottery Division and Revenue Manager-Tax Processing positions. Complainant will rely on both disparate impact and disparate treatment theories.

FINDINGS OF FACT

Deputy Administrator of the Lottery Division

1. Don Walsh was the Acting Administrator of the Lottery when recruitment commenced in December of 1998,¹ to fill the Deputy position. Dianne Donlin, a Human Resource Specialist, staffed the recruitment. (TI: 13)²

2. The vacancy for the Deputy Administrator of the Lottery Division was announcement in the Current Opportunities Bulletin (COB). The announcement indicated that this was a career executive position and recruitment was made on a statewide basis. The advertised job duties and required knowledge and skills are shown below (Exh. R-101):

JOB DUTIES: Under the direction of the Lottery Administrator, assist in managing lottery division operations, including budgets, contract monitoring and analysis of major policy issues; monitor implementation of policy and program changes and conduct research and program evaluations; includes some supervision.

KNOWLEDGE AND SKILLS REQUIRED: Management skills to include work planning and prioritizing, budget development and management, research and analysis, personnel management and supervision; strong oral and written communications; interpersonal skills to include problem solving and decision making with ability to present materials in a public forum; program measurement and general program auditing techniques; staff supervision; general financial principles; crisis management; knowledge of research methodologies.

3. Complainant applied for the position. He is black and from Tanzania, East Africa. He was certified as eligible for further consideration. A 3-person panel, one of which was a racial minority, interviewed eleven applicants, including complainant. Based on the interviews, candidates were placed into one of three groups. The top and middle groups had 5

¹ The transcript recited a date of December 1999, whereas the correct year is 1998. The deadline for submission of application materials for the first announcement was January 19, 1999 (Exh. R-101) and, accordingly, recruitment started in December 1998 (prior to the application deadline).

² "TI: 13" is a reference to page 13, volume I of the transcript. The citations in this decision are not intended as exhaustive (in other words, not every supporting citation is listed).

individuals each and the lowest (least qualified) group had 3 individuals including complainant. (Exh. R-102) After the scores were mailed to the candidates, Walsh resigned. Further steps to fill the position were placed on hold. David Storey later was hired as the Lottery Administrator and waited 6-8 months before deciding to fill the deputy position. He decided that the original certification list might be stale because a long time had passed since the initial application process and he felt the Lottery would benefit from an updated group of candidates. He also felt Walsh's reputation as being difficult to work for may have discouraged applicants as evidenced by the small number of people who previously applied. He hoped more candidates would apply now that Walsh was gone. Storey was never advised of the post-interview rankings of the initial candidates. (TI: 13-17, 20, 27-29, 39, 43-45 74; T2: 41)

4. By letter dated June 17, 1999, respondent notified candidates involved in the first recruitment process that the deputy position would be re-announced in the June 21, 1999 COB. The stated reasons were that Walsh had resigned and Storey was hired to replace him. The letter further indicated that there was no need for these candidates to reapply, as they would be considered along with any new candidates from the second recruitment process. (Exh. R-103). The position was re-announced as planned, stating the same job duties and required skills and knowledge as in the original announcement. (Exh. R-104)

5. Twelve additional candidates were certified from the re-announcement process, including the person ultimately hired, Patricia M. Lashore. (R-108). No one contacted Lashore to encourage her to apply for the position. (TI: 149-151)

6. Storey was notified that 24 candidates were certified. He did not want to interview that many candidates and decided to use a screening device. By letter dated November 4, 1999, the certified applicants were asked to respond to a "situational question" as the first phase of the interview process. (Exh. R-105). Complainant submitted his response (Exh. R-106), as did Lashore (Exh. R-107) and twelve other candidates. Fourteen candidates did not submit a response and were not considered further. (TI: 14-15, 35)

7. Storey developed the situational question with respondent's Personnel Director. The question tested management skills including work planning and prioritizing and, accordingly, was related to the duties of the job. (Exhs. R-104 and R-105). No pre-prepared

benchmarks were used for evaluating responses. Storey asked Brian Hanke³ to independently review the responses and rank the top seven candidates. Storey graded the responses based on how accurately the answers reflected what was being asked and his judgments in this regard were, at least in part, subjective. Storey considered that Hanke's results would provide an objective test against Storey's own review and, in fact, their assessments were similar. (TI: 18, 75-78, 80-83, 99-100, 111)

8. A separate copy of each candidate's response to the situational question was created which did not have the applicant's name on it. These "blinded" copies (Exhs. R-123 and R-124) were reviewed and evaluated by Storey and Hanke who then identified seven candidates to proceed to an in-person interview. Lashore was one of the individuals invited for an interview and complainant was not. (TI: 14-15, 47) (Exh. R-108) Storey did not know complainant prior to reviewing the responses to the situational question. Storey was unaware of complainant's race and national origin. Storey also was unaware that complainant had filed discrimination cases against respondent and other state agencies. (TI: 109-110; TII 85-99)

9. The seven individuals invited to interview included 3 males and 4 females. Six candidates were white and one was black. Lashore (the person selected) is a white female. Ms. Lashore and one other of the seven individuals already were in career executive positions with respondent (Option 1 candidates), three were current state employees but not in career executive positions (Option 3 candidates) and two were not state employees (Option 4 candidates). (Exh. R-108) (TI: 47-48, 219-220; TII: 15)

10. Lashore was hired effective January 24, 2000 (Exh. R-109), as the most qualified candidate. She signed the position description summarizing her duties shortly thereafter (Exh. R-110).

11. Prior to the interviews, Storey knew of Lashore due to her being a DOR employee, but he could not recall ever meeting her before. (TI: 90, 150-151, 162)

³ Mr. Hanke was expected as a hearing witness but was hospitalized and unable to attend. Both parties preserved the right to call him at a later date (T2:100-101). The parties subsequently decided it was unnecessary to have him as a witness (T3:8). Mr. Hanke was the change manager for respondent's Integrated Tax Project and had been employed with respondent for over 25 years. See Rice affidavit dated August 25, 2001.

12. The 24 candidates certified for this position included 11 females and 13 males. Two candidates (including complainant) were black, eleven were white and one did not identify his race on his application form⁴ (Exh. R-108)

13. Storey received a memo from Brady (respondent's Equal Opportunity Officer), dated October 25, 1999 (Exh. C-16). The memo indicated that the position was in a job group underutilized for minorities and that minorities had applied for the job. The following pertinent instructions were given (emphasis in original):

If, after conducting your interviews and hiring deliberations, your decision is to select an individual who is not a target group member for this vacancy, you must contact me at (phone number given) **before you make a job offer** to discuss your justification for not making an affirmative action hire.

14. Storey contacted Brady as instructed. Storey summarized the skills and qualifications of Ms. Lashore. (T2: 16-19)

Revenue Manager-Tax Processing

15. In or about August 1999,⁵ the vacancy for the Revenue Manager – Tax Processing position was announced in the Current Opportunities Bulletin (COB). The announcement indicated that this was a career executive position and recruitment was made on a statewide basis. The advertised job duties and required knowledge and skills are shown below (Exh. R-111) (emphasis in original):

JOB DUTIES: Plan, direct and evaluate programs and develop policy and procedures for the processing of State income, sales and excise tax returns and revenues (6 million documents and \$10 billion in revenue annually); manage program, policy and procedures to ensure rapid deposit of State revenues; develop, implement and oversee efficient, accurate and high volume processing, accounting, shipping, mailing and filing of tax documents; manage and supervise professional and paraprofessional tax processing staff in several

⁴ The final column on Exh. R-108, lists each candidate's sex and ethnic code. Entry "M1" is the code for black male while "F5" is the code for a white female. One entry is "MU" which appears to be the code for a male whose race was unknown.

⁵ The recited date is based on the "September 16" application deadline (no year recited) in the COB announcement (Exh. R-111) and the year (1999) indicated on the interview notes (e.g., Exh. R-113).

different sections to include five subordinate supervisors (about 200 permanent and 115 FTE temporary). **Well-qualified candidates will have several years of experience in program management; accounting, budgeting and a functional tax program; business process reengineering and integration of systems and processes; and supervising staff.** KNOWLEDGE AND SKILLS REQUIRED: Knowledge and skills in accounting and auditing, especially as these relate to tax administration principles and practices of planning, program management, and administration; business process reengineering; staff supervision; computer systems, integration of computer systems and system development methodology; excellent oral, written and interpersonal communication skills; Wisconsin and federal tax laws, rules, policies and regulations; tax enforcement rules, laws, methods and techniques.

16. Complainant applied for the position and was certified for further consideration (Exh. C30a), along with 12 other candidates including the successful candidate, Paul G. Reihemann (Exh. R-112)

17 Complainant and Reihemann were certified under Option 3 (current state employees but not in a career executive position).

18. The certified candidates were invited to interview for the position. Twelve candidates were interviewed in mid-December 1999 (e.g., Exh. R-113), including Reihemann and complainant. Complainant was the only racial minority interviewed. (TI: 173)

19. The interview panel members were Diane Hardt, Administrator of respondent's Division of Income, Sales and Excise Taxes and direct supervisor of the vacant position; Mike Flaherty from the Iowa Department of Revenue and Finance and Tom Ourada, respondent's Executive Assistant. All panel members are white. (TI: 122-123, 166-7, 188, 191)

20. Each candidate was asked the same pre-prepared interview questions. The panel members took notes of candidate's responses during the interview and independently scored each candidate's response against pre-prepared benchmarks. Each panel member consistently scored complainant's responses to the interview questions lower than Reihemann's responses. Flaherty ranked Reihemann as the top candidate (with 111 points) and complainant as the lowest candidate (with 19 points).⁶ Ourada gave Reihemann 207 points and complainant 83 points. Hardt gave Reihemann 179 points and complainant 75 points.

⁶ Flaherty's scoring sheets are not in the record.

Subjective and objective judgments were involved in the scoring process. All interviewers identified Riehemann as the most qualified candidate.⁷ (See Exhs. R-113, R-114 and R-115.)
TI: 125, 128, 142, 190, 199-200)

21. Ourado found Riehemann's responses to the interview questions more complete and informative than complainant's responses. Riehemann, for example, discussed in detail the types of initiatives he would undertake to run a bureau of that size, the kind of leadership and innovation he would bring whereas complainant did not. Neither complainant's race nor national origin was a factor in Ourado's analysis of complainant's response to the interview questions. Ourado was unaware that complainant previously filed discrimination complaints and, accordingly, this was not a factor either. TI: 125, 131, 139-142

22. Hardt previously had held the position and was very familiar with what was needed in terms of management skills, as well as strong technology and process background. She felt Riehemann brought all this to the position. He was very strong in process, business process and business process re-engineering. Complainant did not have as strong a background or recent relevant experience in terms of management and directing the Tax Processing Bureau. (TI: 201-202, 205-206)

23. The first interview question asked candidates to summarize their educational and professional background and to emphasize their job responsibilities as pertinent to the tax processing position. After complainant answered the first question, Hardt commented that he had covered all that the panel members wanted to ask him and despite this, she was going to ask him to respond to the remaining questions anyway. Complainant incorrectly interpreted the comment as meaning he already had hit all the benchmarks for all the interview questions. (Exh. C40, p. 13, admission #12 and #13) (TI: 168-169; TII: 45-49, 55-56)

24. Hardt received a memo from Brady (Equal Opportunity Office), dated October 25, 1999 (Exh. C-26). The memo indicated that the position was in a job group underutilized for minorities and that minorities had applied for the job. The following pertinent instructions were given (emphasis in original):

⁷ Complainant was not one of the identified top two candidates.

If, after conducting your interviews and hiring deliberations, your decision is to select an individual who is not a target group member for this vacancy, you must contact me at (phone number given) **before you make a job offer** to discuss your justification for not making an affirmative action hire.

25. Hardt consulted with Brady as instructed. The candidates' qualifications were discussed, as was the selection choice. A particular focus was on the top two candidates whose qualifications were compared to complainant's qualifications. Brady agreed with the decision to hire Reihemann. Hardt believed Reihemann was the best candidate for the position. (TI: 173-174, 176-179, 191) Hardt appointed Riehmman to the position as the most qualified candidate, effective January 2, 2000 (Exh. R-118).

26. Hardt knew Riehemann before the interview. She was not his supervisor. He worked within the Processing Bureau on process improvement projects in his position for the Division of Administrative Services. He was an Acting Bureau Director for Tax Processing for about 3 months. She does not recall encouraging Reihemann to apply for the position, but he did come to her saying he was interested in the position. (TI: 182-183).

27. Hardt may have been aware prior to interviews that complainant had filed prior cases but not the details. This knowledge did not play a part in her deliberations. Neither complainant's race nor his national origin was considered. T1. 199

Findings Pertinent to Both Positions

28. Respondent's Affirmative Action Equal Opportunity Plan contains the following passage (Exh. C-41, p. 18, final paragraph) (emphasis in original):

RATERS AND INTERVIEW PANELS

All personnel involved in the hiring process must adhere to the Department's policy regarding the inclusion of racial/ethnic minorities, women, and persons with disabilities on oral boards, interview panels, search and screen committees, and as exam raters.

30. The "Department's policy" referenced above is that steps should be taken to extend invitations to minority members to serve as raters and interview panel members.

There is no Department policy that requires rating and interview panels to include a minority member. (T2: 33-34)

31. The State of Wisconsin Equal Employment Opportunity/Affirmative Action Policy and Procedures Manual requires a written justification for hiring a non-minority candidate when a position being filled is in an underutilized for minorities and minority candidates applied. A written justification was not created for either hiring transactions here.^{A 8}

32. The State of Wisconsin Equal Employment Opportunity/Affirmative Action Policy and Procedures Manual requires that when a position is being filled in an underutilized classification that all “agency staff involved in the hiring process must be informed in writing when there is a short-term goal for racial/ethnic minorities, women or both.” (Exh. 37, p. 5, item D.1.) This requirement was met for both hiring transactions (see ¶¶13 and 24 above). This requirement does not mean that the Secretary’s Office must be informed that minority candidates exist for any hiring transaction.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant failed to sustain his burden of showing that respondent’s hiring decisions were based on his race, national origin or his participation in activities protected under the Fair Employment Act.
3. Respondent’s hiring decisions were based on candidate’s qualifications for the positions and not upon any impermissible factors under the Fair Employment Act.

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,

^A Footnote 8 was amended for clarification, as noted below.

⁸ The recollection of respondent’s witnesses was unclear as to whether the required written justification was done. The respondent was unable to produce the documents in response to discovery demands and updated demands at hearing. Accordingly, the hearing examiner drew an inference from the discovery problems and found that the documents were never created.

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).

The Commission will assume for purposes of analysis that complainant established a prima facie case.^B The burden shifts to respondent to articulate a legitimate non-discriminatory reason for not hiring complainant. Respondent met this burden saying that complainant was not as qualified as the hired individuals.

The burden returns to complainant to attempt to show pretext. As to the Deputy position, complainant's main pretext arguments are premised upon contentions unsupported by facts. He first contends that a policy was violated because the panel members who scored the situational exam (Storey and Hanke) were both white. Contrary to his assertion, however, there was no requirement for the scoring panel to include a minority. He also contends that Lashore was preselected for the position. He bases this contention on the unproven assertion that the candidates' responses to the situational question were not blinded. As to the Revenue Manager position, complainant contends that a policy was violated because the panel members were all white. Again, contrary to his assertion, there was no requirement for the panel to include a minority member. As to both positions, complainant contends that a policy was violated because the Secretary's Office was not informed that he or other minority candidates were certified for the positions. Contrary to his assertion, there was no requirement for the Secretary's Office to be so informed.

^B Complainant objected to the prima facie case used in the proposed decision and order. The hearing examiner concluded that complainant did not establish a prima facie case, citing *Malacara v. City of Madison*, 224 F.3d 727 (7th Cir. 2000), as characterized in *Oriedo v. WPC, et al.*, 00-CV-2970 (Dane County 5/29/01). Complainant represented Mr. Oriedo in the cited proceeding. Respondent indicated at oral arguments that establishment of the prima facie case was conceded in post-hearing briefs and, accordingly, respondent felt obliged not to change its position at oral argument. The Commission, therefore, deleted the prima facie case discussion in the proposed decision leaving the issue for resolution in a potential future case.

Complainant has not shown discrimination under a disparate impact theory. The Commission has attempted in prior cases to inform complainant of the required proof under this theory of discrimination. In *Balele v. DNR*, 98-0046-PC-ER, 1/25/00 and *Balele v. UW System*, 98-0159-PC-ER, 10/20/99, he was informed about the need for a sufficient sample size and he was advised that hiring statistics without corresponding information about the applicant pool are insufficient. In *Balele v. DOA, DER & DMRS*, 99-0001, 0026-PC-ER, 8/28/00, guidance was provided as to when it is inappropriate to combine statistics from separate hiring transactions, he was advised that workforce composition statistics without information regarding selection rates were insufficient and that the degree of disparity is also an important consideration. In *Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/01, he was advised that using himself, as a group of one was insufficient to support a disparate impact analysis. Many of the same concepts are discussed in *Balele v. DOA*, 00-0057-PC-ER, 9/20/00; *Balele v. DOC*, 00-0034-PC-ER, 6/13/01 and *Balele v. DOT*, 99-0103-PC-ER, 11/15/00. The Courts also have attempted to inform complainant of what is required. See, e.g., *Balele v. Pers. Comm., et. al.*, 00-CV-1108 (Dane Co. Cir. Ct., 11/20/00); *Balele v. Wis. Pers. Comm. et. al.*, 00CV2876 (Dane Co. Cir. Ct. 7/12/01); *Balele v. Per. Comm. et. al.*, 00CV002877 (Dane Co. Cir. Ct. 8/17/01); *Balele v. Wis. Pers. Comm., et. al.*, 00CV2206 (Dane Co. Cir. Ct. 7/30/01).

Complainant steadfastly refuses to accept the above guidance as correct (TII: 58-59). This does not mean, however, that the Commission or Courts are required to address and analyze complainant's repeated insufficient "evidence" of disparate impact. The Commission finds complainant's arguments rife with insufficiencies he has been told about in prior cases. The Commission further notes that some of complainant's arguments are improperly based upon information not contained in the record. The Commission agrees with the arguments recited in respondent's brief as to why disparate impact has not been shown, as repeated below (see pp. 12-15, brief filed on August 17, 2001):^c

^c This paragraph was changed to set forth the argument adopted by the Commission.

This is primarily a disparate treatment case. There is no persuasive evidence of disparate impact. This is not a case like *Caviale v. State of Wis. Dept. of Health & Soc. S.*, 744 F2d 1289, 1993 (7th Cir. 1984), where limiting applicants to current career executives had an unlawful disparate impact. Both the Lottery Deputy Administrator position and the Tax Processing Bureau Director position were open to career executives and non-career executives.

Paul Riehemann was not a career executive when he was selected for the Tax Processing Bureau Director position (Exs. C-40, p. 5; R-120, p. 5). He was a non-career executive state employee just like Balele and was subject to the same interviewing process as Balele (Tr. I: 125, 179-80, 197-98; Exs. C-19, C-24, C-24a, C-40, p. 5, R-113, R-114, R-115, R-120, p. 5).

Although Lashore was a career executive when she applied for the Lottery Deputy Administrator position (Exs. C-40, p. 5, R-120, p. 5), she had to respond to the same situational question as Balele in order to qualify for an interview. The fact that an applicant was or was not a career executive made no difference in their participation in responding to the situational question, or in the grading of their responses (Tr. I: 47-48). Consequently, Lashore enjoyed no advantage over Balele because she was a career executive.

Nor did the situational question itself have any disparate impact. Among the fourteen persons who responded to the situational question, two were racial minorities (Balele and Frank Humphrey) (Exs. C-12, R-108). One of the two racial minorities (Humphrey) received a high enough grade on his response to the situational question to merit an interview, and six of the twelve non-minorities received a high enough grade on their responses to merit an interview (Tr. I: 15, 19-20, 28-29, 47, 76-78, 80, 98-99; Exs. C-12, R-108). Thus, the percentage of racial minorities and the percentage of non-minorities who received a high enough grade to be interviewed were the same.

During the calendar years 1996-99, DOR hired 18 persons in career executive positions, all of whom were in the administrators-senior executives job group, and one racial minority was among the eighteen persons hired (Exs. C-40, pp. 3, 7, R-120, p. 3, 7). Fifteen racial minorities were among 251 persons certified for positions during that period, but the record does not disclose the number of racial minorities and non-minorities certified for each of the eighteen positions, nor the criteria used to select persons to be appointed to each of the positions, and some persons were certified for more than one position, some persons did not indicate race on their application and, in two cases, DOR used related registers from other agencies where ethnic information was not available (Exs. C-40, pp. 3, 7, R-120, pp. 3, 7). The statewide availability factor for qualified racial minorities in the administrators-senior executives job group was

7.5 percent (Exs. C-40, p. 9, R-120, p. 9). Thus, while only 1.8 percent of the persons hired by DOR in these career executive/administrator-senior executive positions during the calendar years 1996-99 was a racial minority, if only one more racial minority had been hired, the percentage of racial minorities would have been 11 percent or greater than the statewide qualified availability factor.

Finally, in December 1999, DOR had 31 persons employed in administrators-senior executive job group, two (or 6.5 Percent) of whom were racial minorities, and 64 persons in career executive positions, four (or 6.3 percent) of whom were racial minorities (Exs. C-40, pp. 2-3, R-120, pp. 2-3, R-121, R-122). If only one more racial minority were employed in the administrators-senior executives job group or in career executive positions, the percentage of racial minorities would have exceeded the statewide qualified availability factor.

Statistical disparities must be sufficiently substantial and not of limited magnitude to give rise to a claim of disparate impact. *See Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 596 n. 16, 476 N.W.2d 707 (Ct. App. 1991); *Waisome v. Port Authority of New York & New Jersey*, 948 F.2d 1370, 1375-77 (2nd Cir. 1991); *Harper v. Godfrey Co.*, 839 F.Supp. 583, 605 (E.D. Wis. 1993). Courts take a case-by-case approach in judging the significance or substantiality of disparities, and consider not only the statistics but also the surrounding facts and circumstances. *See id.* In determining whether a disparity is too small to find an illegal disparate impact, courts consider the use of hypothetical alterations of a challenged employment practice. *See id.*; *Balele v. UW System*, Case No. 98-0159-PC-ER (Pers. Comm., October 20, 1999), pp. 5-7. In this case, as noted above, if DOR had hired only one more minority, the percentage of racial minorities in DOR career executive/administrator-senior executive positions and in career executive positions would have exceeded the statewide qualified availability factor.

In summary, Balele has failed to sustain his burden of proving disparate impact discrimination.

The Commission wishes to note that respondent was not forthcoming in its response to complainant's discovery. To the extent possible, these problems were cured at hearing with the examiner directing respondent to search for certain documents that witnesses thought existed and that respondent had previously denied existed. Most troubling is that certain documents were destroyed after the complainant in this case was filed. For example, Mr. Hanke destroyed copies of his grading of the situational question in November 2000. T3: 3 It also appears that the written justifications of hire were destroyed and the absence of these

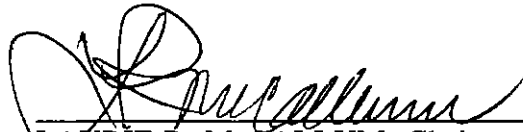
documents resulted in a finding that respondent failed to follow this required procedure (see ¶31, Findings of Fact). The Commission hereby reminds respondent of its obligation to preserve evidence once litigation is commenced and suggests that respondent undertake a review of its related procedures to ensure this is accomplished in future cases.

ORDER

This case is dismissed.

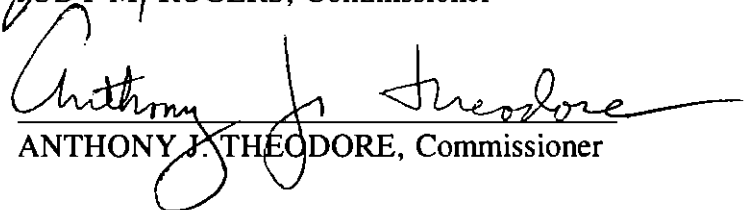
Dated: January 25, 2002.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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

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

authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

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

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

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

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)
2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95