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 DR. P.V.N. ACHARYA, *
 *
 Complainant, *
 *
 v. *
 *
 UNIVERSITY OF WISCONSIN, *
 *
 Respondent. *
 *
 Case No. 78-PC-ER-53 *
 *

ORDER

The Commission adopts as its final decision of this matter the Proposed Decision and Order attached hereto with the following changes to correct oversights:

1. In the last sentence of Finding of Fact #13, "Dr. Coleman" is changed to "Dr. Hartmann."
2. In the first sentence of Finding of Fact #16A, "M.S." is changed to "M.D."

Dated Feb. 13, 1981

STATE PERSONNEL COMMISSION

Parties:

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 UW
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Charlotte M. Higbee
 Charlotte M. Higbee
 Chairperson

Gordon H. Brehm
 Gordon H. Brehm
 Commissioner

Note: Commissioner Murphy abstained because of his employment with the University of Wisconsin at the time this charge was filed.

AJT:mek

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DR. P.V.N. ACHARYA,
 Complainant,
 v.
 UNIVERSITY OF WISCONSIN -
 Madison,
 Respondent.
 Case No. 78-PC-ER-53
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This case involves a complaint of discrimination based on retaliation pursuant to s.230.45(1)(a), Wis. Stats. This matter is before the Commission following a hearing on complainant's appeal of an Initial Determination of "no probable cause" to believe that the respondent had discriminated against the complainant. The parties submitted post-hearing briefs.

FINDINGS OF FACT

1. Sometime prior to February 5, 1975, complainant filed one or more complaints of employment discrimination on the basis of national origin against the respondent in connection with the termination of his employment by the department of pathology.
2. Said complainant or complaints were resolved by a settlement agreement (Complainant's Exhibit 1) executed by the complainant and David Hanson for the University of Wisconsin System Board of Regents dated February 5, 1975.
3. In 1976, the respondent was approached in connection with a proposal that the complainant be employed under the auspices of the Work Incentive Program (WIN), a program whereby the federal government makes available through the State of Wisconsin Department of Industry, Labor and Human Relations,

Employment Security Division, Work Incentive Program, federal funds for the employment of WIN participants.

4. The proposal was that the WIN program would make available \$5000 for the employment of the complainant in the Department of Pathology in a research project for six months, during which the complainant would solicit additional outside funding to provide salary support after the initial period of WIN program supported funding had elapsed.

5. The standard contract language for such WIN employment contains in part the following language:

2. a. The Public Service Employer (Employer) agrees to provide permanent employment in his regular workforce, which shall be financed from funds other than funds from the WIN Program, to all Public Service Employment participants who perform satisfactorily in their respective work assignments by the end of the contract period. This unsubsidized employment shall be at a level of responsibility and pay comparable to that which was provided each respective WIN/PSE participant during the period of subsidized employment under the program.

b. If, however, during the operation of this contract and due to circumstances beyond the control of the Employer, the budgeted positions and/or anticipated turnover does not occur, it is not the intent of the Agency or the U.S. Department of Labor to apply sanctions against the Employer. (Complainant's Exhibit 4).

6. Brian Larson, a DILHR employe in the WIN program, wrote to the chairman of the Department of Pathology, Dr. Inhorn, in part as follows:

"Acceptance of WIN money under these unique circumstances should not be interpreted as imposing a continuing obligation on the Department or on the University should continuing funding prove unavailable, beyond the six month period.

There is a definite obligation to make sincere attempts to procure additional funds and to not replace Dr. Acharya as funding is obtained." (Complainant's Exhibit 24).

7. The complainant, in a letter to Chancellor Young dated March 1, 1976,

stated in part as follows:

" Though acceptance of WIN money implies a moral obligation on the part of the employer to make sincere attempts to obtain additional grants for the continuation of my employment, it is perfectly clear to me that I will not be employed if no grants will be forthcoming."
(Complainant's Exhibit 25).

8. The respondent's legal counsel (Michael Liethen) was concerned that Mr. Larson's statement set forth above, and similar statements expressed by him verbally, did not comport with the contract language, and that under the contract, if there were no funds available in the Pathology Department upon the expiration of the WIN project, the respondent would be required to continue complainant's employment by the use of funds from another department and possibly contrary to the respondent's determination of its needs and priorities.

9. The respondent determined not to accept the WIN project, for the reasons set forth in a letter dated June 18, 1976, from Chancellor Young to the complainant, (Complainant's Exhibit 3), in pertinent part as follows:

To accept these funds the University would have to sign a contract agreeing to give you priority for a full-time, non-subsidized job vacancy after the WIN support ends, if funds were available. A WIN program counselor has suggested, in correspondence with the University, that this obligation would be excused if continuing funding for your position were "unavailable." I understand that you have asserted that this "unavailability" refers only to grant or contract funds to support your research. However, the counselor subsequently stated to a member of my staff that this meant unavailability of any position moneys within the University.

The implication of this for the University is clear. By signing such a contract on behalf of the Board of Regents, the University would guarantee your continued employment in a research capacity using any available money which could be assigned to support your position in the event grant or contract funds from outside sources for your support could not be obtained within six months. This condition is unacceptable; it would in effect set educational priorities and possibly require the diversion of available moneys for support of instructional staff to guarantee your continued employment on the academic staff.

Moreover, the University has consistently pursued the policy of permitting only individuals with an institutional guarantee of support to seek extramural funding--normally tenured or tenure track faculty. The application for extramural funds represents a commitment on the part of the University to complete the work outlined if funding is secured, even if a grant smaller than that required to pay the investigator's full salary and to provide for proper notice of non-retention is awarded. Consequently, sound fiscal and personnel management require that persons who apply for grants and contracts have University assurance of support so that the final stage of an extramural project may be successfully completed without respect to whether or not the grant is able to support the investigator's full salary. The University is not willing to offer you a position containing such an ongoing guarantee of institutional support.

We cannot, therefore, offer you an appointment under the WIN contract.

10. This letter was consistent with the respondent's general policy regarding WIN projects of this nature at that time.

11. In September or October, 1977, Dr. Patrick Coleman, then involved in research work for DILHR, called Dr. Inhorn, the Pathology Department Chairman, to inquire if he could intervene on the complainant's behalf in connection with the complainant's request for laboratory space from the Department of Pathology so that the complainant could apply for a fellowship from the National Institute of Health.

12. Dr. Inhorn indicated that laboratory space would not be available and stated that the complainant had "burned his bridges" with regard to the university.

13. At a meeting of the UW-Madison Pathology Department held on May 2, 1978, chaired by Dr. Clifton, Acting Chairman, Dr. Henrik Hartmann made a motion that the department consider the complainant's proposal that he be appointed to a position as professor to initiate a new discipline in environmental biochemical pathology. Dr. Inborn seconded the motion so that it might be considered. Following the discussion the vote on the motion

was one in favor, (Dr. Coleman), and 16 opposed.

14. At the time of the vote, there were two actual vacancies in the department, both requiring an M.D. degree, which the complainant, whose professional background and qualifications are as set forth in Complainant's Exhibit 22A-C, did not possess.

15. It was not unusual for persons to submit requests for appointments to the department.

16. The practice of the department was in some cases to hire individuals to fill a particular need, such as, for example, the M.D.'s set forth in finding #14, and in other cases to seek to structure or to initiate the creation of positions to fit individuals felt by the department to have particularly outstanding credentials.

17. The procedure followed for faculty appointments to the Department of Pathology has been that the appointments are initiated by the departmental faculty, approved by the dean and the chancellor, with final appointing authority vested in the Board of Regents.

18. At the time that the faculty had before it the matter of the complainant's appointment on May 2, 1978, it had available a curriculum vitae of the complainant which had been prepared in 1972 or 1973 and which had been forwarded to the department by the university affirmative action office on November 28, 1977. (See Complainant's Exhibit 6.) This curriculum vitae was distributed to all of the faculty members present. Also available were copies of some of complainant's manuscripts, which were not consulted by the faculty.

19. With respect to those faculty members who voted against the resolution and who testified at the hearing in this matter, the following summarizes the reasons that they advanced at the hearing for their votes or for the department's

vote:

- A. Inhorn - Aside from the M.S. position vacancies the department had no other positions available and no space to put a new research program. It was felt that the complainant could not meet the needs of the department.
- B. Lalich - The department was not looking for a bio-chemist but rather for a pathologist to enable the department to meet its service and teaching duties.
- C. Bloodworth - The department lacked the space and money for the proposed position, and the priority was for service and teaching ahead of research.
- D. Goldfarb - The department's needs were primarily for teaching and/or service as opposed to research, which the complainant would have provided. Also, the complainant was not the exceptionally well-qualified person that the department might have sought to have hired even in the absence of a substantial need in that person's area of specialization.
- E. Gilchrist - The complainant lacked service and teaching qualifications and lacked the qualifications generally of a full professor.
- F. Allen - The complainant had limited productivity in the area of publications.
- G. Norback - There was no position available for which to have considered the complainant. If there had been such a position, she would have wanted to have considered other persons besides the complainant and thus it would have been premature to have voted at that time. The complainant had not published extensively enough to have been the only outstanding candidate in his field.
- H. Pitot - The complainant lacked sufficient qualifications in environmental toxicology or environmental pathology, the department had no knowledge of his teaching capabilities, and there were space and salary considerations.
- I. Clifton - The complainant did not meet the department's immediate needs which were for board-certified physician pathologists at the junior faculty level. There were no funds for senior faculty. There was no position open in the area of complainant's experience and training.
- J. Zurhein - The department did not have an opening which would have matched the complainant's capabilities. The department's needs were in surgical and pediatric pathology, and, more generally, pathological services and teaching

medical students were higher priorities than research and teaching graduate students.

K. Larson - The department earlier had decided that its highest priority was for a position involved in clinical pathology, and the complainant was not a physician.

L. Huntington - He felt that the highest priority needs of the department were in the area of the provision of clinical services.

M. Burkholder - This witness gave no direct testimony on this point.

N. Jaeschke - The complainant lacked the qualifications for the two pathologist physician positions that actually were open at the time. There was no funding or laboratory facilities available for any other position.

O. Weiss - There was no position available in the department at that time for a biochemist.

P. Barber - There was no position available for someone of complainant's area of expertise, and this area was not a direction in which the department was moving. Also, there were no funds or laboratory space available for the complainant.

20. The majority of the department of pathology had established, through meetings in advance of the May 2, 1978, meeting, that the primary departmental priorities were in the area of medical service, as opposed to research.

21. There had been no communications from the university administration to the department of pathology to the effect that it should not hire complainant or not consider the proposal to appoint him as professor to initiate a new discipline in environmental biochemical pathology.

22. The decision of the department of pathology on May 2, 1978, to deny Dr. Hartmann's motion and not to consider the proposal to appoint complainant was not influenced by then Chancellor Young's denial of the WIN proposal involving complainant in 1976.

23. The majority of the faculty were not aware at the time of the vote of the complainant's prior complaint or complaints against the university,

and this subject was not raised at this meeting.

24. The majority of the faculty were not aware at the time of the vote of the rejection by the university in 1976 of the WIN proposal involving the complainant, and this subject was not raised at this meeting.

25. The reasons advanced by the faculty of the department of pathology for the action on May 2, 1978, denying Dr. Hartmann's motion and not considering the appointment of the complainant were not pretextual.

26. There is not reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief, that complainant was discriminated against on the basis of retaliation by the failure of the department of pathology to hire him and the denial of Dr. Hartmann's motion, on May 2, 1978.

CONCLUSIONS OF LAW

1. This matter is appropriately before the Commission pursuant to s.230.45(1)(b), Stats.

2. The burden of proof was on the complainant to establish that there was probable cause, see s.IND 88.03(2), Wis. Adm. Code, to believe that he was discriminated against by the respondent, because of retaliation on account of having filed a previous charge or charges of national origin discrimination, in connection with the failure of the Department of Pathology on May 2, 1978, to hire complainant and its denial of the motion to consider his proposal.

3. The complainant has failed to sustain his burden.

4. There is not probable cause to believe that complainant was discriminated against by the respondent, because of retaliation on account of having filed a previous charge or charges of national origin discrimination, in connection with the failure of the Department of Pathology on May 2, 1978,

to hire complainant and its denial of the motion to consider his proposal.

OPINION

Section 88.03(2), Wis. Adm. Code, provides as follows:

"Probable cause exists when there is reasonable ground for belief supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that discrimination has been or is being committed."

On this review of the Initial Determination of "no probable cause," the Commission must evaluate against this standard the evidence that was presented.

The Department of Pathology voted 16-1 not to consider the complainant's appointment. It is not altogether clear, but apparently all of the members who voted appeared and testified at the hearing that was held in this matter. The reasons given for the negative vote were to some extent varied and reflective of different interests and perceptions of departmental needs held by the individual faculty members. Also, to some extent, the reasons advanced reflected confusion or misperception of the motion that was before the faculty. For example, there was testimony that the complainant did not have the qualifications for the two pathologist physician positions being recruited for at the time, when the motion had nothing to do with those positions. The complainant in his post-hearing arguments placed a great deal of emphasis on these points.

However, the lack of complete coherence in the individual testimony of the faculty members can not be considered to be unusual. These people have diverse backgrounds, interests and specialties, and exhibited different degrees of understanding of the workings of the department. It is not unexpected that they would not speak as one or with precision. Also, it is noteworthy that the vote and the preponderance of the rationale advanced for it was consistent with the majority view of the faculty of departmental priorities which had

been established at a number of meetings prior to May 2, 1978.

A number of faculty professed the opinion that the complainant was not the type of exceptionally well-qualified scientist for whom they might consider attempting to initiate the creation of a position. Some of this group had limited knowledge of the complainant's background and area of specialization. There was conflicting testimony as to not only the complainant's scientific stature but also as to the relative value of various criteria for evaluating scientific credentials, such as publications in referee journals versus presentations at international scientific conferences.

As indicated, there was some negative, or at least less than positive, commentary by the faculty about complainant's credentials. The complainant called as a witness Emeritus Professor Karl Smith, Psychology and Behavior Cybernetics, who disagreed vehemently with the opinion that publication in referee journals "is the only meaningful scientific material," (T.,V.2,p.63), as he characterized some of the faculty opinion. Professor Smith also testified that the complainant was internationally known and had a number of achievements to his credit.

What emerges from the evidence presented are certain differences of opinion. There is not a preponderance of evidence that should support a finding that the opinions of the faculty with respect to credentials and criteria were pretextual. The faculty certainly could have utilized a more rigorous procedure for evaluating the complainant. Their approach must be evaluated in light of the fact that they were not recruiting to fill a vacancy, but rather had been approached and requested to make an appointment to initiate a program in an area of establishing relatively low priority.

The complainant argues that Dr. Inhorn's remark that the complainant had "burned his bridges" with respect to the university is evidence of retaliation.

The respondent argues that this statement may be interpreted as a reference to behavior by the complainant other than having filed or pursued a complaint or complaints of discrimination. Under the facts and circumstances of this case and the Commission's understanding of the predominant usage of this term, it agrees with the complainant that it is evidence of retaliation. However, the decision in this case was made by sixteen members of the faculty and their vote was in accordance with departmental priorities of relatively long standing.

Only a minority of the faculty voting were aware that the complainant previously had filed a complaint against the university. Furthermore, only a few were aware of the university's denial of the WIN proposal, another factor relied on by the complainant as evidence of retaliation.

With respect to the rejection of the WIN proposal itself, the respondent's concerns in this area were understandable. Although the university had received certain assurances from both the complainant and Mr. Larson of the WIN program regarding their expectations should there be funding problems, this still left a legitimate question about the enforceability of the written contract in a manner that might conflict with faculty-developed priorities. There also was testimony that the university's position on this project was consistent with their general policy on similar projects.

In the opinion of the Commission, in light of all the facts and circumstances of this case, it cannot be found that there is probable cause to believe that the respondent discriminated against the complainant with respect to the May 2, 1978, decision of the pathology department. While there is some evidence that is probative of retaliation, the overriding feature of this case is that it was in essence the complainant who approached the department with a proposal that he be appointed to a professorship to initiate a new discipline in an area that the department had already established as a relatively low

priority. Sixteen of seventeen faculty voting voted not to consider the proposal. Many of the faculty had no knowledge of the fact that the complainant previously had filed a complaint of discrimination.

These facts and circumstances are in themselves so strongly probative of a lack of probable cause that it would have taken a great deal of countervailing evidence to outweigh it, and, on a relative basis, more than might be required with respect to other transactions that might be hypothesized. For example, if the complainant were to have applied for a vacant position in his field of expertise for which the department had been actively recruiting and a negative decision were to have been made solely by the chairman, probably less proof would be required to support a finding of probable cause than in the instant case.

During the course of the hearing, rulings were deferred on the parties' exhibits (Respondent's 1-3 and Complainant's 1-29). These documents have been and are received as part of the record.

ORDER

The Commission having determined that there is no probable cause to believe that the respondent discriminated against the complainant, the complaint of discrimination is dismissed.

Dated _____, 1981

STATE PERSONNEL COMMISSION

Charlotte M. Higbee
Chairperson

Gordon H. Brehm
Commissioner

NOTE: Commissioner Murphy abstained because of his employment with the University at the time this charge was filed.

AJT:mgd

Parties

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