STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD L. PAUL, Appellant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 82-156-PC	DECISION AND ORDER
RONALD L. PAUL, Complainant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 82-PC-ER-69	INTERIM DECISION AND ORDER

This matter is before the Commission following the issuance of a proposed decision by the hearing examiner. The Commission has considered the parties' objections and arguments as to the proposed decision, and has consulted with the examiner.

As part of their submission to the Commission following the issuance of the proposed decision, respondents moved to dismiss Case No. 82-156-PC as to DMRS, on the ground that the appeal was not timely filed. In an

interim decision and order dated March 14, 1986, the Commission denied said motion and directed the parties to file additional arguments as follows:

> In reviewing these cases, an issue has arisen that does not appear to have been addressed by the parties in their previously filed arguments:
>
> > Even if one were to conclude that respondents failed to actually consider the proportion of qualified and available blacks for the MMHI ISD 1 position, could the Commission find, based on the existing record, that the ISD 1 classification was in fact not balanced as set forth in the statutory definition of "balanced work force," and, if so, would this make any difference with respect to the question of the legality of the transaction.
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> The parties should address the following subissues in their arguments but are free to raise and address other subissues on their own:
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> > 1. If one concludes that respondent failed to actually consider the proportion of blacks qualified and available for employment in the ISD 1 position at MMHI, would that failure constitute harmless error?
> > 2. Is the evidence in the record statistically significant for establishing the numbers of qualified and available blacks and the representation of blacks in the ISD 1 classification?
> > 3. Given the facts of this case, is it appropriate to rely on applicant flow data to establish the number of qualified and available blacks?

The parties accordingly submitted additional arguments, and the appellant also submitted an affidavit from a statistician[1]. Before addressing the issues identified by its March 14, 1986, order, the Commission will address the parties' initial arguments that were submitted with respect to the proposed decision and order.

The respondents argue that the appellant failed to sustain his burden of proof because he "... put forth no facts which supported the argument that the general population figures which were used by the respondents were not the same as the labor market qualified and available for work figures...."

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[1] This affidavit has not been considered by the Commission in its decision of this matter.

The proposed decision contains the following finding which was not challenged by either party:

> "11. In determining both whether the ISD 1 classifications and the 'Officers and Administrators' job category were 'balanced,' Ms. Georgi compared the percentage of minority employes with the percentage of minorities in the state population as a whole, or 6.4% in 1982. Had Ms. Georgi determined that there were already more than 6.4% minorities in either the ISD 1 classification or in the "Officers and administrators' job category, she would not have approved the use of expanded certification in filling the vacant ISD 1 classification.

It is clear that in determining to use expanded certification, DHSS did not, as it was required to do by §230.03(4m), Stats., determine whether there existed a disparity between the proportions of minorities in the ISD 1 classification within DHSS and the rate of minority representation in that part of the state labor force qualified and available for employment in such classification. Given that fact, it is not the appellant's burden to go beyond this and establish not only that the respondents failed to comply with the statute, but also that this failure was <u>not</u>, in essence, "harmless error." The argument of "harmless error" amounts to an affirmative defense[2] and respondents have the burden of proof to establish this.[3] Even if it were not the case that respondents have the burden of proof on this point, they certainly would have the burden of proceeding or going forward with the evidence, once it had been established that no

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[2] See, e.g., <u>Armstrong v. Johnson Motor Lines Inc.</u>, 280 A. 2d 24, 29, 12 Md. App. 492 (Md. 1971): "An affirmative defense is one which directly or indirectly concedes the basic position of the opposing party, but which asserts that notwithstanding that concession the opponent is not entitled to prevail for some other reason."

[3] See, e.g., 31A CJS Evidence §104(b): "The burden is on defendant to prove matter in avoidance, special or affirmative defenses, and other new matter urged by him as ground for denying plaintiff relief."

effort was made to comply with §230.03(4m), Stats., to present sufficient evidence to support a finding, if unrebutted, that the failure to have complied with the statutory requirements amounted to harmless error. As will be discussed below, the respondents failed to sustain either burden.

The respondents further argue that it would be inappropriate for the Commission to determine that §ER-Pers 12.05, Wis. Adm. Code, is invalid as in conflict with §230.03(4m), Stats., since the provisions can effectively be harmonized. Even if the Commission took this approach, the transaction in question would still be illegal because it was done in violation of the statute, §230.03(4m), and the rule, §ER-Pers 12.05, as construed. Therefore, the Commission will not address the question of whether §ER-Pers 12.05, Wis. Adm. Code, is void, or whether it can be reconciled with §230.03(4m), Stats., and will withdraw so much of the proposed decision as deals with the validity of §ER-Pers 12.05, Wis. Adm. Code.

Respondents also argue that the passage of 1983 Wisconsin Act 16 and 1983 Wisconsin Act 27 are consistent with §ER-Pers 12.05. This point is adequately covered by the proposed decision.

Finally, respondents argue that pooling of classes for analysis is a reasonable interpretation of the statute and rule.

The Commission cannot agree with the proposition that it is a reasonable interpretation of §230.03(4m), Stats., which defines "balanced work force" by reference to "representation in a classified civil service classification," as consistent with utilizing a pool of classifications. If a classification is balanced, it does not become imbalanced by grouping it with another classification that is imbalanced.[4]

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[4] This decision does not address the question, not presented here, of whether classifications in a progression series can be grouped together consistent with §230.03(4m), Stats.

As indicated above, in its March 14, 1986, interim decision and order, the Commission raised the question of whether it could find "based on the existing record, that the ISD 1 classification was in fact not balanced as set forth in the statutory definition of 'balanced work force,' and, if so, would this make any difference with respect to the question of the legality of this transaction."

The respondents' position on this point may be summarized as follows: As of the time of the transaction, there were only three ISD 1 positions, none of which were filled by minorities. Eight people were certified for the position in question. This included five who were certified through the original competitive process and three who were included by supplemental certification. Section 230.25(1), Stats., provides for certification of the five names at the head of the register if there are 50 names or less on the register. Since there were only five names certified, the maximum number of people on the register -- i.e., the list of those who passed the exam -- had to have been 50. The minimum number of people certified had to have been eight -- the five on the normal certification plus the three certified supplementally. Since there were two minorities certified, the representation of minorities in the group of applicants who passed the exam had to have been between 25% (2/8) and 2% (2/50). In either case, the work force, which contained 0% minorities, would have had to have been in a state of imbalance, since the respondents would equate the qualified available labor pool with the group of applicants who passed the exam.

In the Commission's opinion, this approach is not viable. There is nothing in this record that addresses the question of whether the foregoing numbers are large enough to have statistical significance, and, related to

that, whether the sample of applicants generated by this particular selection process can in fact be considered representative of the qualified available labor force for the ISD 1 classification. As was pointed out in the proposed decision, samples must be large enough to have statistical significance. The position is consistent with the holdings of the courts as exemplified by Dendy v. Washington Hospital Center, 14 FEP Cases 1773, 1774-1775 (D. Columbia 1977), where the court's opinion contained the following:

> To be persuasive, statistical evidence must rest on data large enough to mirror the reality of the employment situation. If, on the one hand, the courts were to ignore broadly based statistical data, that would be manifestly unfair to Title VII complainants. But if, on the other hand, the courts were to rely heavily on statistics drawn from narrow samples, that would inevitably upset legitimate employment practices for reasons of appearance rather than substance....
>
> In the instant matter, the court is convinced that the data offered by plaintiffs represent too slender a reed on which to rest the weighty remedy of preliminary relief. To begin with, the entire sample on which plaintiffs base their prima facie showing consists of a total of 35 employes. With so meager a sample, if just a handful of test results had turned out differently, the comparative percentages of black (44%) and white (100%) success on the exam would have been correspondingly and substantially different....

There was no testimony or other indication in the record that the sample size generated by this single selection process was large enough to be statistically significant.[5] The respondents are not aided by any presumption of official regularity, because they made no connection between the applicant flow data and the qualified available labor force.

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[5] It is also of interest in this regard that when DHSS personnel conducted its analysis prior to deciding to proceed with expanded certification, Ms. Georgi used the EEO job category rather than the ISD 1 classification to determine whether the agency's work force was balanced, once she had determined that there were fewer than 16 incumbents in the classification. As was pointed out in the proposed decision at p. 17, this approach apparently was dictated by the determination that the sample size was too small to be of statistical significance.

Another difficulty with the respondents' position is that, laying to one side the question of the adequacy of the size of the sample, there are other factors which can render applicant flow data unrepresentative of the qualified, available labor pool. See, for example, Carroll v. Sears, Roebuck & Co., 30 FEP Cases 1446, 1454 (W. D. La. 1981). The respondents failed to conduct an analysis of whether the applicant flow data was representative of the qualified available labor pool in the course of the actual selection process. They also did not attempt to demonstrate such a relationship at the hearing. Given the paucity of the record on this point, it would be speculative for the Commission to infer a correlation between the representation of minorities among the actual applicants and the representation of minorities in the qualified available labor pool. Again, respondents are not aided by any presumption of official regularity on this aspect of the matter.

In conclusion, there is insufficient basis on this record to support a finding as to the percentage (or range of percentages) of blacks or minorities in the qualified available state labor force for ISD 1.

While it probably could be concluded that the percentage, whatever the actual figure, was in excess of zero, this still does not lead to a conclusion of harmless error. The operation of §ER-Pers 12.05 is discretionary. It would be speculative to conclude that this discretion would have been exercised to proceed with expanded certification when the representation of minorities in the qualified available work force is unknown, but may have been as little as 2%, or even less, and there were only three positions in the classification in question. Again, it is noted that the respondents utilized an occupational grouping to analyze the DHSS work force because there were less than 16 positions in the ISD 1 classification, apparently because it was felt that such a small number of positions was problematical from a statistical standpoint.

The Wisconsin Legislature has set forth a strong commitment to affirmative action in the state civil service at a number of points in the statutes. However, the Legislature has also set forth a number of specific requirements that must be observed in pursuing an affirmative action program. The most material such requirement for the instant case is §230.03(4m), Stats., which defines "balanced work force" by reference to:

> ... representation in a classified civil service classification in an agency of any racial, ethnic, gender or handicap, group at the rate of that group's representation in that part of the state labor force qualified and available for employment in such classification.

The purpose behind this requirement seems clear -- an agency's work force should not be considered imbalanced if it is employing racial, ethnic, gender, or handicap groups at their rate of representation in that part of the state labor force which is qualified and available for employment in the classifications it utilizes. Perhaps not coincidentally, this requirement parallels the approach taken by the federal judiciary to evaluating whether employers' work forces are balanced in Title VII cases.[6]

The Commission wishes to emphasize that from a policy standpoint it is keenly aware of the social and moral necessity for affirmative action programs. However, such programs must be conducted in accordance with statutory requirements.

One of the first decisions by this Commission following its creation by the legislature was rendered in the case of Christensen v. DHSS, No. 77-68 (9/13/78). In that case, the Commission upheld an affirmative action hiring in the Division of Corrections that involved an effort to increase

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[6] E.g., Hazelwood School District v. US., 433 U.S. 298, 308, 53 L.Ed 2d 768, 777, 97 S. Ct. 2736, n.13 (1977); Lehman v. Yellow Freight System, 651 F.2d 520, 26 FEP Cases 75, 81 (7th Cir. 1981).

the percentage of minority corrections officers at the Wisconsin State Prison. Since that transaction occurred before the effectuation of §§230.01(2), 230.03(2), and 230.03(4m), Stats., the Commission obviously did not have to consider the agency's compliance with those requirements. Agencies must now conduct their affirmative action programs in accordance with these provisions, and in the light of the absence of such compliance in this case, the Commission has no choice but to conclude that the transaction here in question was illegal.

Relief

In a letter dated January 28, 1985, and apparently filed as an objection to the Proposed Decision and Order, the appellant requested that the Commission expressly order the following relief:

> 1. Entitlement to a job identical to or substantially similar to that of Director of Security,
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> 2. at the same Salary Range (SR) allocation with the same or substantially identical fringe package,
>
> 3. [back pay] from July 25, 1982, until the time that said job offer is received,
>
> 4. together with attorneys fees. See Watkins vs. ILHR Dept., 117 Wis.2d 753 (1984).

Appellant stated that his request was made "[i]n light of the Proposed Findings and Proposed Conclusions finding discrimination" and cited Anderson v. LIRC, 111 Wis.2d 245 (1983). In Anderson, the Wisconsin Supreme Court construed the predecessor to §111.39(4)(c), Stats., to authorize payment of interest on back pay awards where unlawful discrimination was found under Wisconsin's Fair Employment Act. In Watkins v. LIRC, 117 Wis.2d 753 (1984), the Court authorized the award of reasonable attorney's fees to a prevailing complainant under the Fair Employment Act.

To the extent that appellant seeks this relief pursuant to his complaint of discrimination (82-PC-ER-69) the request is premature. This order is an interim order as to that case and the finding is one of "probable cause" rather than as to the ultimate issue of whether discrimination occurred.

To the extent that the appellant is seeking this relief pursuant to his appeal under §230.44(1)(d), Stats., the issues of a comparable job and back pay were adequately addressed in the proposed decision. The Commission has on several occasions held that it lacks the authority to award attorney's fees under §§230.43(4) or .44 (4)(c), Stats.

ORDER

Accordingly, the Commission adopts and incorporates by reference as if fully set forth as its disposition of these matters the "PROPOSED DECISION AND ORDER/PROPOSED INTERIM DECISION AND ORDER," a copy of which is attached hereto, except that conclusions #4 and #5 are withdrawn, conclusion #6 is amended by addition of the following language: "because the transaction was not effected in accordance with §230.03(4m)," and §ER-Pers 12.05, Wis. Adm. Code, as that rule might be construed to reconcile it with §230.03(4m), and so much of the opinion as addresses the question of whether §ER-Pers 12.05, Wis. Adm. Code is void as in conflict with §230.03(4m), is withdrawn.

Dated: June 19, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
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STATE OF WISCONSIN PERSONNEL COMMISSION

RONALD PAUL, Appellant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 82-156-PC	PROPOSED DECISION AND ORDER
RONALD PAUL, Complainant, v. Secretary, DEPARTMENT OF HEALTH AND SOCIAL SERVICES and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION, Respondents. Case No. 82-PC-ER-69	PROPOSED INTERIM DECISION AND ORDER

NATURE OF THE CASE

These matters arise out of a decision not to select Mr. Paul (hereafter referred to as the appellant) for the position of Security Director for the Mendota Mental Health Institute in 1982. Appellant filed both an appeal under s. 230.44(1)(d), Stats., (Case No. 82-156-PC) and a complaint of discrimination based on race and color under s. 230.45(1)(b), Stats., (Case No. 82-PC-ER-69) relating to the same transaction. The complaint was amended

in 1984. An investigation of the discrimination complaint generated an initial determination of "no probable cause" to believe that discrimination had occurred.

On August 3, 1984, appellant filed a petition for declaratory ruling and requested that it be consolidated with the appellant's pending cases from 1982. Appellant's petition requested the entry of a declaratory ruling "holding the promulgation development use and/or application of WAC ER-PERS 12.05 unlawful, null and void." Respondents DHSS and DMRS opposed the petition and objected to consolidation. In an interim decision and order dated October 11, 1985, the Commission held that it was authorized to make an initial determination of the validity of s. ER-Pers 12.05, Wis. Adm. Code, but concluded that the Commission's review could be conducted within the context of Case No. 82-156-PC. The Commission then entered the following order:

> The "REQUEST/MOTION FOR DECLARATORY RULING" filed August 3, 1984, No. 84-0158-PC is denied and dismissed without prejudice. The appellant is directed to serve and file a motion (a brief in support of the invalidity of the rule has already been filed) in No. 82-156-PC, within 14 days of the date of this order, requesting a determination by the Commission of the validity of §ER-Pers 12.05, Wis. Adm. Code. The respondents are to respond within 20 days thereafter, and the appellant may reply within 10 days thereafter. Inasmuch as there appears to be no dispute that the Administrator, DMRS, and not the Secretary, DER, has responsibility for the rule in question, the former will be substituted for the latter as a party-respondent.

Appellant filed his motion on October 17th, a hearing in Case Nos. 82-156-PC and 82-PC-ER-69 was scheduled and the following issues were set:

1. Was the failure to appoint the appellant to the Security Director 1 position at Mendota Mental Health Institute illegal or an abuse of discretion.

2. Whether there is probable cause to believe that respondent Department of Health and Social Services discriminated against the complainant in violation of Subch II of ch. 111, Stats. as to race or color with

respect to the decision not to select him for the Security Director 1 position at Mendota Mental Health Institute, and, therefore whether the initial determination of no probable cause must be affirmed or reversed.

Subissues, relating to 1 and 2

a. Whether s. ER-PERS 12.05(1) Wis. Adm. Code is unlawful as written and as applied.

b. Whether respondents violated any of the following statutory provisions: ss. 230.01, .06, .09, .14, .145, .15, .16, .18, .19, .20 or .25, Stats.

Prior to the hearing, appellant filed a motion for an "Order in Limine preventing the introduction of any proof of any kind or nature in support of the justification or necessity for WAC ER-PERS 12.05." The parties subsequently agreed that it was not necessary that a decision be rendered on the latter motion until after the parties had an opportunity to file written arguments on the motion in their post-hearing briefs. As a consequence of that agreement, the examiner withheld ruling as to the admission of respondents' exhibits 1 through 20, 23 and 24. In addition, the examiner reserved ruling on appellant's exhibit #2.

FINDINGS OF FACT

1. The Mendota Mental Health Institution (MMHI) is a specialty hospital in Madison that is operated by the Division of Care and Treatment Facilities in the Department of Health and Social Services (DHSS). MMHI is a treatment facility for the mentally ill and emotionally disturbed and is neither a prison nor a correctional institution. At all times relevant to these cases, Mr. Terrence Schnapp was the Institution Superintendent at MMHI.

2. Approximately 100 residents at MMHI are part of the Forensic Program which functions as a treatment facility for persons convicted of a crime. At all times relevant to this proceeding, Gary Meyer was director of the Forensic Program which was established in 1977 or 1978.

3. Prior to 1982, all maximum security forensic patients were treated at Central State Hospital. However, a decision was made to convert Central State Hospital into a prison and to transfer the maximum security forensic patients to MMHI which, until that time, had only treated minimum and medium security forensic patients.

4. Late in 1981, the position of Institution Security Director (ISD) was created at MMHI to develop policies and procedures for forensic security and to hire a security force for perimeter security of the new maximum security wards. The ISD position reports directly to Institution Director Schnapp and has a collegial relationship with the director of the Forensic Program and with the directors of the other two programs at MMHI.

5. Because the Forensic Program had been established at the same time that there had been cutbacks in the Child and Adolescent Program, MMHI staff was apprehensive that their facility would change from a treatment facility to a correctional facility. As a consequence, it was important for the new security director to be sensitive to those staff concerns and to conduct the security in such a way as not to interfere with the treatment programs.

6. On January 27, 1982, the Division of Personnel, predecessor to respondent DMRS, issued the following job opportunity announcement.

> INSTITUTION SECURITY DIRECTOR 1-STATEWIDE
> First vacancy: Dept. of Health & Social Services, Mendota Mental Health Institute, Madison. Start at $1,937 per month. Develop, implement & maintain the overall Institute security program. Coordinate internal & perimeter security requirements in Forensic maximum security treatment areas; supervise shift security supervisors & building & grounds supervisor. Maintain liaison with State & local law enforcement agencies. KNOWLEDGE REQUIRED: Wisconsin Statutes related to criminal justice & mental health (Chapts. 51,55,880,971,975); legal procedures in Institute security, administrative & supervisory techniques. Apply by February 12 with a State application to Jeanne Neesvig (608-266-1810); DHSS Personnel Room 685; 1 W. Wilson St.; P.O. Box 7850; Madison, WI 53707 7850.

7. The appellant, a white male, applied for the ISD-1 position as did

Warren Young, a black male, who was ultimately selected for the vacancy. An examination was given in Fond du Lac on a Saturday in March of 1982 and a make-up exam was also conducted on the following Monday in Madison. Both Mr. Young and appellant completed the examination. The passing score for the exam was 70. The appellant's grade was 85.65; Mr. Young's score was 72.33. After the exam, the Personnel Manager at MMHI, Dennis Dokken, requested a list of persons eligible for appointment to the ISD position, including expanded certification of minorities.

8. Carol Georgi, of respondent DHSS's Bureau of Personnel and Employment Relations, next certified a list of persons who either through their exam performance or for some other reason were considered eligible for appointment to the vacant position. The initial certification was prepared on April 23, 1982. On the list were ten names, including 1) the persons (including appellant) who had received the five highest exam scores, ranging from 91.31 to 81.66, 2) two persons (including Mr. Young) whose names were placed in the category of "Expanded Certification-Minorities", 3) two persons listed as eligible as a consequence of "Transfers, Voluntary Demotions, Layoffs", and 4) an additional person certified on June 10, 1982 for an undisclosed reason.

9. Expanded certification is an affirmative action technique designed to correct an imbalance of racial, ethnic, gender or handicap groups in state service. Expanded certification adds names of minorities, females and/or handicapped individuals who have passed the qualifying examinations to the list of persons who, because they ranked highest on the exam, are already certified as eligible for appointment to a vacant position. The selection is then made from among all of those persons certified.

10. In deciding whether it was appropriate to utilize expanded certification, Ms. Georgi determined that: 1) the Institution Security

Director classification series was not a progression series, 2) of three ISD 1 positions in DHSS, none of the incumbents were minorities so the ISD 1 classification was "not balanced" in terms of minority representation, 3) there were fewer than 16 ISD 1 positions, and 4) the "Officers and Administrators" job category that included the ISD 1 classification and 61 other classifications was "not balanced" in terms of minority representation because only 15 minorities were employed in the 344 positions that fell within the job category (or 4.3%).

11. In determining both whether the ISD 1 classifications and the "Officers and Administrators" job category were "balanced", Ms. Georgi compared the percentage of minority employes with the percentage of minorities in the state population as a whole, or 6.4% in 1982. Had Ms. Georgi determined that there were already more than 6.4% minorities in either the ISD 1 classification or in the "Officers and Administrators" job category, she would not have approved the use of expanded certification in filling the vacant ISD 1 classification.

12. But for the use of expanded certification, Warren Young would not have been eligible for selection to the vacant ISD 1 position at MMHI.

13. After MMHI received the certification list, Mr. Schnapp conducted interviews of those persons on the list who remained interested in the vacant position. Mr. Schnapp ranked Mr. Young first and the appellant second after completing the interviews.

14. The appellant's employment record showed that from April of 1978 until March of 1982 he worked as an Officer 5, or lieutenant, at the Kettle Moraine Correctional Institution (a medium security adult correctional institution) and the Wisconsin Correction Institution at Oakhill. Beginning in March of 1982, appellant was a captain at KMCI and was in charge of security for one shift at that facility. The interview established that

while the appellant had excellent security experience and ability, he was not tactful in dealing with other employes.

15. Mr. Young's relevant work experience was in teaching math, social studies, civics and English to the KMCI population. He lacked security and direct supervisory experience but exhibited strong interpersonal skills during the interview.

16. Mr. Schnapp then contacted persons familiar with the appellant and Mr. Young or had his staff make those contacts.

17. The reference checks reinforced the information brought out in the interviews. Mr. Schnapp was informed 1) that the director of KMCI (Paul Prast) would feel comfortable with the appellant at the ISD 1 position at MMHI although the appellant needed to improve in the area of interpersonal relations; 2) that Mr. Prast gave a good recommendation of Mr. Young's performance as a teacher but had some concern regarding his lack of security experience; 3) that Steve Kronzer, Assistant to the Administrator of the Division of Corrections (DOC) employe, recommended Mr. Young very highly based on contacts with him through a DOC internship program and expected that any weakness in the security area could be eliminated during the months between the hiring date and the arrival of the first maximum security residents by having Mr. Young consult with various DOC resources; 4) that Mr. Kronzer felt appellant had an excellent security background but also had a tendency to show poor judgment at times; 5) that Darryl Kolb, Deputy Director of the Bureau of Institutions, felt that the appellant had a good security background but some interpersonal problems dealing with staff and was not always tactful.

18. Based on this information, Mr. Schnapp offered the ISD 1 position to Mr. Young who accepted it and began work on or about July 25, 1982.

CONCLUSIONS OF LAW

1. These matters are properly before the Commission pursuant to ss. 230.44(1)(a), (d) and .45 (1)(b), Stats., (1982).

2. The appellant has the burden of showing that respondents acted illegally or abused their discretion in the matter or that there is probable cause to believe that discrimination occurred.

3. The appellant has met his burden of proof as to certain of his claims.

4. Section ER-Pers 12.05(1), Wis. Adm. Code, is invalid.

5. Therefore, respondents' certification action that was based upon s. ER-Pers. 12.05(1), Wis. Adm. Code, was invalid.

6. The decision to appoint Mr. Young rather than the appellant to the position of ISD 1 at the MMHI was illegal.

7. The decision to appoint Mr. Young rather than the appellant to the position of ISD 1 at the MMHI was not an abuse of discretion.

8. There is probable cause to believe that respondents discriminated against the appellant in violation of Subch. II of Ch. 111, Stats., as to race and color with respect to the decision not to select him for the ISD 1 position at MMHI and, therefore, the initial determination of no probable cause must be reversed.

OPINION

I. Evidentiary Rulings

Before reaching the merits of these cases, the following rulings are made with respect to objections to the admission of certain documents or to certain testimony:

1. Appellant's objections to the admission of respondents' exhibits 1 through 5 and 9 are sustained. These documents are individual Affirmative Action reports for various 12 month periods ending

before July of 1979, and a report covering the period from July 1982 to June 1984. They provide data unrelated to the selection decision being reviewed herein. In addition, the data in exhibits 1 through 5 predate the enactment of the expanded certification rule (February, 1981) while exhibit 9 postdates that rule.

2. Appellant's objections to the admission of respondents' exhibits 6, 7 and 8 are overruled. The 1980 report provides data reflecting the state work force immediately prior to the promulgation of s. ER-PERS 12.05 (1), Wis. Adm. Code. Respondents' exhibits 7 and 8 provide information relevant to the decisions to use expanded certification in issue here.
3. Appellent's objections to the admission of respondents' exhibits 10 through 20 are overruled. These documents reflect the steps taken to properly promulgate s. ER-Pers. 12.05(1), Wis. Adm. Code.
4. Appellant's objections to the admission of respondents' exhibits 23 and 24 are overruled. These documents are the notes taken by Mr. Schnapp during the interviews of Mr. Young and the appellant. Appellant contended that respondents had failed to produce the documents pursuant to an agreement reached during the deposition of Mr. Schnapp on February 28, 1984. Respondents did provide a copy to appellant three days prior to the hearing pursuant to s. PC. 2.01, Wis. Adm. Code. Given the appellant's failure to seek a motion to compel discovery of the documents and the absence of any showing of hardship, appellant's objection must be overruled.
5. Respondents' objection to the admission of appellant's exhibit 2 is overruled. Contrary to respondents' contentions, testimony was given indicating the position description for the ISD 1 position at Wisconsin Resource Center (exhibit 2) was "fairly similar" to the

position description of the ISD 1 position at MMHI which was not introduced.

6. Appellant's objections as to portions of Mr. Indalecia's testimony are also overruled.

II. Merits

Central to these cases is the question of the validity of the expanded certification process utilized for certain appointments in the state civil service. The cases focus on s. ER-Pers 12.05(1), Wis. Adm. Code, an administrative rule effective as of March 1, 1981. In order to properly understand that rule, an explanation of its statutory basis is necessary.

Chapter 196, Laws of 1977 recognized affirmative action responsibilities by creating a policy statement, definitional statements, and specific methods for taking affirmative action. The relevant provisions are listed below:

> 230.01 (2) It is the policy of the state and the responsibility of the secretary and the administrator to maintain a system of personnel management which fills positions in the classified service through methods which apply the merit principle, with adequate civil service safeguards. It is the policy of this state to provide for equal employment opportunity by ensuring that all personnel actions including hire, tenure or term, and condition or privilege of employment be based on the ability to perform the duties and responsibilities assigned to the particular position without regard to age, race, creed or religion, color, handicap, sex, national origin, ancestry or political affiliation. <u>If there are substantial disparities between the proportions of members of racial, ethnic, gender, or handicap groups in a classified civil service classification in an agency and the proportions of such groups in this state, it is the policy of this state to take affirmative action which is not in conflict with other provisions of this subchapter to correct the imbalances and to eliminate the present effects of past discrimination</u>. It is the policy of the state to ensure its employes opportunities for satisfying careers and fair treatment based on the value of each employe's services. (Emphasis added)

> 230.03 Definitions. In this chapter, unless the context otherwise requires:

* * *

> (2) "Affirmative action" means specific actions in employment which are designed and taken for the purpose of ensuring equal opportunity and eliminating present effects of past discrimination.
>
> * * *
>
> (4m) "Balanced work force" means representation in a classified civil service classification in an agency of any racial, ethnic, gender or handicap group at the rate of that group's representation in that part of the state labor force qualified and available for employment in such classification. (Emphasis added)

Elsewhere in ch. 230. Stats., the term "balanced work force" was used in describing appropriate recruitment procedures (s. 230.14(1), Stats.), promotional opportunities (s. 230.19(1), Stats.) and the procedure to be used for filling career executive vacancies (s. 230.24(2), Stats.).

The statutory basis for certifying eligibles for appointment is found in s. 230.25, Stats:

> 230.25 Certification, appointments and registers. (1) Appointing authorities shall give written notice to the administrator of any vacancy to be filled in any position in the classified service. The administrator shall certify, under this subchapter and the rules of the administrator, from the register of eligibles appropriate for the kind and type of employment, the grade and class in which the position is classified, the 5 names at the head thereof. . . . Certification under this subsection shall be made before granting any preference under s. 230.16(7).
>
> (1m) After certifying names under sub. (1), additional names shall be certified in rank order of those who with the combination of veterans preference points awarded under s. 230.16(7) and examination score earn a total score equal to or higher than the lowest score of those certified on the basis of examination only. The number of veterans added to the list may not exceed the number of names certified under sub. (1).
>
> (2) Unless otherwise provided in this subchapter and rules pursuant thereto, appointments shall be made by appointing authorities to all positions in the classified service from among those certified to them in accordance with sub. (1). . .

Pursuant to s. 230.05(5), Stats., the Administrator of the Division of Personnel promulgated rules including s. ER-Pers 12.05, Wis. Adm. Code, that

were effective as of March 1, 1981:

> ER-Pers 12.05 Expanded certification. The administrator may, when necessary to achieve a balanced work force or to hire persons with disabilities, provide for certifications as a supplement to certifications made under the provisions of s. 230.24(1) or 230.25(1) and (1m), Stats., as follows:
>
> (1) Expanded certification of up to 3 additional names to achieve a balanced work force on the basis of racial or ethnic group or gender may be authorized by the administrator at the request of an agency when there is a disparity between the proportions of women or total racial or ethnic minorities in a classification or classification progression series in an employing unit of the agency and the proportions of such groups in the state population. (Emphasis added)

The administrative rule includes the phrase "balanced work force" which was specifically defined in s. 230.03 (4m), Stats., as being determined by comparing a group's representation in a given civil service classification to that same group's representation among persons "qualified and available" for employment in that classification. Nevertheless, the administrative rule's calculation of balance is a comparison of a group's representation "in the state population." Not all racial and ethnic groups are equally distributed throughout the State of Wisconsin. That fact will presumably have an impact on the availability of a given group for employment classifications whose positions are also not equally distributed throughout the state. It is also reasonable to assume that not all of the various racial and ethnic groups have precisely the same percentage of persons qualified for employment in a given classification. For example, a relatively higher percentage of the state's Hispanic population would presumably be qualified for a classification requiring fluency in Spanish in comparison to the state population as a whole.

Approximately six months after the effective date of the Administrator's rule, Chapter 20, Laws of 1981 redefined "affirmative action" in s. 230.03(2), Stats., to read:

> "Affirmative action" means specific actions in employment which are designed and taken for the purposes of ensuring equal opportunity and a balanced work force and of eliminating present effects of past discrimination.

Elsewhere, Chapter 20 created an affirmative action office with the responsibility, inter alia, of ensuring a balanced work force. However one result of Chapter 20's amendment of the definition of "affirmative action" was to connect the definition of "balanced work force" to the policy statement in s. 230.01(2), Stats., by way of the policy statement's reference to "affirmative action."

Subsequent to the 1982 selection decision that is at issue here, other legislation has been approved that is helpful when reviewing the Administrator's rule. In 1983 Wisconsin Act 16 (effective May 12, 1983) and 1983 Wisconsin Act 27 (effective July 2, 1983), the legislature directed that two new correctional institutions be established in Milwaukee. The enabling legislation required the appointing authority of each institution to use "the expanded certification program under rules of" the Administrator of the Division of Personnel (or his successor, the Administrator of the Division of Merit Recruitment and Selection) "to ensure that employes of the institution reflect the general population of the surrounding community in the. . .city in which the institution is located." This requirement is consistent with the term "available" labor force used in the definition of "balanced work force" in s. 230.03(4m), Stats., but is inconsistent with the reference in s. ER-Pers 12.05(1), Wis. Adm. Code, to the "proportions of. . .groups in the state population."

Finally, 1985 Wisconsin Act 29, effective July 20, 1985 created new statutory language explicitly permitting expanded certification "to achieve a balanced work force":

> 230.25(1n)(a) After certifying names under sub. (1) and (1m),

> the administrator may engage in expanded certification by doing one or more of the following:
>
> 1. Certifying up to 3 names of persons belonging to at least one of one or more specified racial or ethnic groups.
>
> 2. Certifying up to 3 names of persons of a specified gender.
>
> 3. Certifying up to 3 names of persons with a handicap.
>
> (b) The administrator may certify names under par. (a) 1 or 2 only if an agency requests expanded certification in order to achieve a balanced work force within that agency. The administrator may certify names under par. (a) 3 only if an agency requests expanded certification in order to hire persons with a handicap.

This history indicates that the rule in question, s. ER-Pers 12.05, Wis. Adm. Code, was, at the time of the certification action and the selection decision at issue here, inconsistent with the underlying statutory provisions. When it was written, the rule sought to use the term "balanced work force" in a manner that conflicted with the statutory definition found in s. 230.03(4m), Stats. Even if respondent could successfully argue that its authority for promulgating the rule was the policy statement in s. 230.01(2), Stats., which referred to "proportions of such groups <u>in this state</u>," the policy statement was effectively amended by Chapter 20, Laws of 1981, a few months after the expanded certification rule went into effect. Chapter 20 changed the definitions of the term "affirmative action" to specifically refer to ensuring a "balanced work force." As of the date of the certification for the ISD-1 positions at MMHI, the state's policy to take "affirmative action" as set forth in s. 230.01(2), Stats., applied to employment actions taken "for the purposes of ensuring equal opportunity and <u>a balanced work force</u> and of eliminating present effects of past discrimination." While the Administrator's rule also refers to achieving a "balanced work force," its method of calculating a "balance" would rely on statewide population figures rather than on the proportions of "qualified and available" members of the state labor force.

To the extent one could argue there was a conflict between the reference s. 230.01(1), Stats. to "the proportions of such groups in this state," and s. 230.03(2) and (4m), Stats., the latter provisions would be deemed controlling: s. 230.01(2) is only a statement of policy, and also is more general. Also, 230.01(2) specifically provides ". . .it is the policy of this state to take affirmative action which is not in conflict with other provisions of this subchapter. . ." Further, this conclusion is consistent with other civil service statutes, for example s.230.19(1):

> The administrator shall provide employes with reasonable opportunities for career advancement, within a classified service structure designed to achieve and maintain a highly competent, balanced work force. (emphasis added)

Legislation enacted subsequent to the 1982 selection decision at issue here does nothing to support the language in s. ER-Pers 12.05, Wis. Adm. Code. In both 1983 Wisconsin Act 16 and 27, the legislature focussed on the population of the surrounding community rather than the statewide population. In 1985 Wisconsin Act 29, the legislature specifically authorized expanded certification in order to achieve a balanced work force.

The conflict between s. ER-Pers 12.05(1), Wis. Adm. Code, and s. 230.03(4m), Stats., compels the conclusion that the rule was invalid at the time it was invoked in the present case.[1] Having reached that general conclusion, the Commission considers each of these two cases separately.

A. Case No. 82-156-PC

This appeal has two jurisdictional bases, ss. 230.44(1)(a), and (d), Stats. (1982). The first grants the Commission the authority to review

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[1] In its Interim Decision and Order dated October 11, 1984, the Commission held that it had "reasonably clear authority for the Commission to consider the validity of" s. ER-Pers 12.05, Wis. Adm. Code, in the context of Case No. 82-156-PC.

actions delegated by the Administrator of the Division of Personnel[2], including certification actions. The second authorizes the Commission to review post-certification actions related to the hiring process. In this case, the appellant has alleged both that the certification process (delegated to DHSS) and the selection decision (also carried out by DHSS) were improper. The appellant has also directly attacked the expanded certification rule promulgated by the Administrator of the Division of Personnel.

The Commission has already analyzed the conflict between ER-Pers 12.05, Wis. Adm. Code and relevant statutory provisions. The findings of fact set out above establish that in deciding whether it was appropriate to use expanded certification (i.e. whether the work force was already balanced), Ms. Georgi of DHSS compared both the proportion of minority incumbents in the ISD-1 classification and in the "Officers and Administrators" job category to the proportion of minorities in the state population as a whole. Respondents were unaware of the percentage of minorities from amongst all those persons who were "qualified and available" for hire in the ISD-1 classification. Without that information, Ms. Georgi's decision to utilize expanded certification under s. ER-Pers 12.05(1), Wis. Adm. Code, contravened s. 230.03(4m), Stats.

Ms. Georgi testified that she asked herself four questions on receipt of a request for expanded certification: 1) Is the class a progression series? 2) Is the classification balanced? 3) Are there at least 16 incumbents in

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[2] Although technically, given the date of the certification action, the Administrator of the Division of Personnel should be the named respondent, his responsibilities in this area were assumed by the Administrator of the Division of Merit Recruitment and Selection upon the reorganization of DER effectuated by 1983 Wis. Act 27, effective July 2, 1983.

the classification? 4) Is the appropriate Equal Employment Opportunity job category balanced? In the present case, Ms. Georgi determined that neither the classification (ISD-1) nor the job category (Officers and Administrators) were balanced, but she never explained the purpose of question #3. One could speculate that with fewer than 16 incumbents, the percentage of the total represented by any one individual would be greater than the 6.4% figure that represents minority population statewide. As a sample size decreases, the reliability of statistical inferences decreases along with it. Courts applying Title VII have often, in the context of disparate impact cases, rejected statistical evidence as unreliable due to small sample size. E.g. Lubanks v. Pickens-Bond Const. Co., 635 F. 2d 1341, 1349 (8th Cir, 1980); Carton v. Trustees of Tufts College, 25 FEP 1114, 1123 (D. Mass 1981). Here, the small sample size apparently required Ms. Georgi to rely on an analysis based on job category rather than an individual classification. Neither s. ER-Pers 12.05, Wis. Adm. Code, nor SS. 230.01(2) or .03(4m), Stats., provide for a work force analysis based on job category instead of a classification (or progression series). The respondents' action therefore violated the statutes (and rule) in this regard as well.

But for the illegal action of certifying Mr. Young's name as eligible for appointment, Mr. Young could not have been selected for appointment. S. 230.25(2), Stats. Therefore, the decision of DHSS to appoint Mr. Young to the ISD-1 position at MMHI was also illegal.

Appellant's third major contention is that even if Mr. Young's name had been properly included within the list of eligibles, the decision to select Mr. Young rather than the appellant was an abuse of discretion.

In Lundeen v. DOA, 79-208-PC (6/3/81), the Commission defined abuse of discretion as "a discretion exercised to an end or purpose not justified by and clearly against reason and evidence." The question before the Commission

is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, based on the record, the appointing authority's decision was "clearly against reason and evidence." Harbort v. DILHR, 81-74-PC (4/2/82).

The job opportunity announcement for the ISD-1 position statewide lists knowledge required for the position as "Wisconsin Statutes related to criminal justice & mental health; legal procedures in Institute security, administrative & supervisory techniques." Mr. Schnapp, MMHI Institution Superintendent, testified that it was also very important that the security director be sensitive to staff concerns regarding the institution's role as a treatment facility and not a correctional facility. Given this emphasis on maintaining a good working relationship with the treatment staff as well as the security staff, Mr. Schnapp was justified placing heavy weight on the various candidates' interpersonal skills.

The interviews of Mr. Young and the appellant as well as the reference checks indicated that the appellant had far better security and supervisor experience while Mr. Young had superior interpersonal skills. These facts are somewhat similar to those in Harbort v. DILHR, 81-74-PC (4/2/82), where the Commission upheld a decision to not to select the appellant to a vacant Management Information Technician 4-Lead Worker position even though her technical skills were superior to the successful applicant. In Harbort, the appellant had six years of MIT 3 experience including seven months on an acting basis in the position in question. However, the appellant also had various difficulties in the areas of interpersonal relationships and communications, which were important in the lead worker position. The successful candidate had three years of experience as an MIT 3.

The present case is made difficult by Mr. Young's lack of security and supervisory experience. However, Mr. Schnapp was advised by Steven Kronzer that Mr. Young would be able to pick up the necessary security knowledge during the interval between the hiring decision and the date the first maximum security patients arrived. This information, coupled with Mr. Young's superior interpersonal skills causes the Commission to conclude that the selection of Mr. Young rather than the appellant was not an abuse of discretion.

In subissue 2 of the issues for hearing in these matters, the appellant listed other statutes that he felt were violated by the respondents. The Commission finds those provisions were not violated other than as discussed above.

Having found that the certification of Mr. Young was illegal (although the selection decision was not an abuse of discretion), the next issue is as to the appropriate remedy. In Pearson v. UW, 84-0219-PC (9/16/85), the Commission held that in a successful appeal under s. 230.44(1)(d), Stats. it lacked the authority to remove an incumbent (see s. 230.44(4)(d), Stats.) but ordered the respondent to "appoint the appellant, if still qualified, to the disputed position (or comparable promotional position) upon its next vacancy." The Commission went on to reject the appellant's request for back pay because the appointment decision did not have the "direct and immediate impact of removing her (him) from employment," distinguishing Yanta v. Montgomery Ward and Co., 66 Wis. 2d 53, 61 (1974).

The facts in Pearson appear analogous to those in the present case and the Commission enters an identical order here. Everything in this record indicates that if Mr. Young had not been eligible for appointment to the ISD-1 position at MMHI, the appellant would have been so appointed.

B. Case No. 82-PC-ER-69

On July 19, 1982 appellant filed a charge of discrimination based on race and color in regard to selection/appointment. On April 2, 1984, appellant amended his complaint, alleging that the "examination written for the Security Director 1 position was not written by Warren Young who was selected for the Position."[3] There are three issues, then, that are raised by this case: 1) Whether Mr. Young wrote his own ISD-1 exam; 2) whether the use of expanded certification was discriminatory; and 3) whether the final hiring decision was discriminatory.

It is important to remember that this case is being reviewed in terms of whether there is probable cause to believe that discrimination occurred and not as to the ultimate issue of whether discrimination actually occurred.

Appellant first contends that he was discriminated against because he was required to take the ISD-1 examination while Mr. Young was not. In support of this contention appellant testified that he did not see Mr. Young at the exam site when the exam for the MMHI position was given. Mr. Young was unsure of the exam location but testified that he had taken more than one ISD exam. Jeanne Neesvig, a Personnel Specialist with DHSS, testified that there was an exam attributable to Mr. Young in the exam file that generated the certification list for the MMHI position. Ms. Neesvig's testimony is compelling. In order for the appellant to overcome the presumption of administrative regularity, he would have had to either establish that no exam attributable to Mr. Young ever reached the exam file or that the exam attributed to Mr. Young was not written by him. He has done neither, so the Commission has found that Mr. Young did, in fact, take (and pass) the ISD exam for the MMHI position.

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[3] This contention only appears to have been raised by the appellant in the context of Case No. 82-PC-ER-69.

The appellant's second contention relates to expanded certification. Elsewhere in this decision, the Commission has analyzed the expanded certification rule in the context of the provisions of Ch. 230, Stats. In Case No. 82-PC-ER-69, the rule must also be analyzed in terms of the Fair Employment Act, Subch. II, Ch. 111, Stats.

The Fair Employment Act provides that hiring decisions are to be made without consideration of the race of the candidates. However, as noted above, affirmative action in state employment is specifically provided for in Ch. 230, Stats. A strong argument can be made that the legislature intended that these provisions would not be in conflict with the Fair Employment Law, and that transactions consistent with these provisions would not violate the Fair Employment Law. If the personnel actions in issue here fell within the definition of affirmative action in s. 230.03, Stats., and were carried out consistently with the remaining provisions of Ch. 230, Stats., and the rules promulgated thereunder, the actions would presumably also be consistent with the Fair Employment Act. Here the certification action was outside the scope of permissible affirmative action as specified in Ch. 230, Stats.

If the challenged certification decision and subsequent selection were made pursuant to a legitimate affirmative action plan, there also will be no violation of the Fair Employment Act. See, e.g., Dougherty v. Barry, 37 FEP Cases at 1211; Hammon v. Barry, 37 FEP Cases 609, 615 (U.S. D.C. Dist. Col. 1985); Bratton v. City of Detroit, 31 FEP Cases 465, 467 (6th Cir. 1983); Janowiak v. City of South Bend, 36 FEP Cases 737, 741 (7th Cir. 1984). Wisconsin courts have frequently looked to federal court decisions under Title VII to interpret Wisconsin Law.

In Johnson v. Transportation Agency, 36 FEP Cases 725, 728 (9th Cir. 1984), the court outlined the elements of an affirmative action plan

involving race-conscious hiring decisions that is permissible under Title VII as follows:

> The plan (1) was designed to break down old patterns of racial segregation and hierarchy, (2) did not unnecessarily trammel the interests of white employes, (3) did not create an absolute bar to the advancement of white employes, (4) was a temporary measure, 'not intended to maintain racial balance but simply to eliminate a manifest racial imbalance.'

The first criterion is that the affirmative action plan be "designed to break down old patterns of racial segregation and hierarchy." The lower federal court decisions are split as to whether this requires that the employer have made actual findings of past discrimination, see, e.g., Janowiak v. City of South Bend, 36 FEP Cases 737 (7th Cir. 1984), as opposed to relying only on a statistical showing of a disparity between the representation of minorities in the employer's work force and in the relevant labor force, see, e.g., Johnson v. Transportation Agency, 36 FEP Cases 725 (9th Cir. 1984).

In the present case, the Commission will construe Ms. Georgi's statistical analysis to have been carried out pursuant to an affirmative action plan. Ms. Georgi's analysis was based on a comparison between the minority representation either in the IDS-1 classification or the vocational group and the state population generally. Even if the Commission were to follow the holding in Johnson, the affirmative action plan here would still not be premised on an adequate statistical analysis. The statistical method utilized in this case, which was based on the statewide minority population, does not meet statistical standards developed in the prevailing federal case law under Title VII for proving disparate impact.

As pointed out by Schlei and Grossman in Employment Discrimination Law (2nd Ed.), general population figures that fail to reflect qualifications for a particular job are typically inadequate:

> Recent cases have made it clear that for other than entry level jobs, "qualified labor market" data should be utilized for population/work force comparisons. While the Supreme Court permitted the use of general population data for entry jobs in Teamsters [v. U.S., 431 U.S. 324, 339-40 n. 20, (1977).], it also cautioned that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant." In Hazelwood, the Supreme Court was even more emphatic, stating that:
>
> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. Hazelwood School Dist. v. U.S., 433 U.S. 299, 308 n. 13 (1977)
>
> Employment Discrimination Law, p. 1356.

Also in Title VII disparate impact cases, the geographic scope of the "qualified labor market" should be established with an objective of defining the area from which applicants are likely to come absent any discrimination. See, generally, Employment Discrimination Law, p. 1361. These citations are not explicitly applicable to affirmative action statistics. However, they do explain what type of statistical information is felt to be necessary in disparate impact cases in order to establish reliability. Geographic scope has been considered one criterion in upholding an affirmative action program. A statistical disparity between minority compositions of the local labor force and the employers own work force was also held to be a necessary prerequisite to implementation of an affirmative action plan in Lehman v. Yellow Freight System, 651 F. 2d 520 (7th Cir. 1981). Also, in Johnson v. Transportation Agency, 36 FEP Cases 725 (9th Cir. 1984) (Concurring and Dissenting Opinion), geographic scope was discussed:

> These statistical studies, of course, should adjust for demographically relevant variables in their comparisons between the work force and local labor pool.

In the instant case, there is no assurance that the relevant labor

pool for the ISD-1 classification was coextensive with the population of the entire state.

The second criterion is that the plan must not unnecessarily trammel the interests of white employes. Some courts have held that a race-conscious hiring program pursuant to an affirmative action plan that results in hiring unqualified minorities runs afoul of this criterion. See Bratton v. City of Detroit, 31 FEP Cases 465, 474-475 (6th Cir. 1983):

> . . .where those hired or promoted by operation of affirmative action are qualified for the position in which they are placed, no constitutionally impermissible stigma attaches. Valentine v. Smith [26 FEP Cases 518 (8th Cir. 1981)].
>
> * * *
>
> . . .we are convinced by the record evidence that, from 1974 to date, only well-qualified blacks were promoted to the lieutenant corps. In such instances we find that no stigma of a constitutional magnitude attaches to either those claiming to be adversely impacted by the plan or its beneficiaries.
>
> * * *
>
> If a party is not qualified for a position in the first instance, affirmative action considerations do not come into play.

In the present case, Mr. Young passed the qualifying examination for the position which was graded without consideration of the examinee's race. That in itself is sufficient evidence that he possessed the minimum qualifications for appointment. Therefore, the second criterion identified in Johnson has been satisfied.

The third criterion is that the plan not create an absolute bar to the advancement of white employes. The concept of expanded certification as used in the present case is that it ensures that qualified minorities are considered for appointment to vacancies. Expanded certification does not exclude non-minority applicants from consideration, it merely extends the number of qualified applicants under consideration. Therefore, the

affirmative action plan utilized here to invoke expanded certification meets the third criterion identified in Johnson.

The fourth criterion is that the plan is a temporary measure, not intended to maintain a racial balance, but rather to eliminate a racial imbalance. The plan does appear to satisfy the fourth criterion as such, although obviously to the extent that the minority representation in the relevant labor pool is less than the 6.4% of the state population, the program of race-conscious hiring would continue beyond the point it was otherwise necessary.

The instant plan therefore fails to meet one of the four criteria mandated by Title VII as enunciated in Johnson. The plan is also inconsistent with applicable statutory requirements. Therefore, there is probable cause to conclude that the respondent's actions in using expanded certification to add Mr. Young's name to the list of eligible was discriminatory.

The third issue raised by the appellant in the context of this case is whether the final hiring decision was discriminatory. To the extent that Mr. Young would not have been eligible for appointment absent the certification decision for which probable cause has already been found, the subsequent decision to select Mr. Young was also discriminatory. However, if the certification procedure was upheld, no probable cause would be found as to the selection decision in light of the respondent's articulation of non-discriminatory reasons for hiring Mr. Young. A comparison of the appellant's qualifications with Mr. Young's indicates that these non-discriminatory reasons were not pretextual and would generate a conclusion of no probable cause.

For the reasons set out above, the initial determination of no probable cause must be reversed.

ORDER

Case No. 82-156-PC

The decision of the respondent in not appointing the appellant to the position of Institution Security Director 1 at the Mendota Mental Health Institute is rejected and this matter is remanded for action in accordance with this decision.

Case No. 82-PC-ER-69

The initial determination of no probable cause is reversed in part and affirmed in part and the parties will be contacted for the purpose of scheduling a conciliation/prehearing conference.

Dated: ______________________________, 1986

STATE PERSONNEL COMMISSION

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DENNIS P. McGILLIGAN, Chairperson

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DONALD R. MURPHY, Commissioner

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LAURIE R. McCALLUM, Commissioner

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