

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

CHARLES BROWNLEE, \*

Complainant, \*

v. \*

State Public Defender, OFFICE \*

OF PUBLIC DEFENDER, \*

Respondent. \*

Case No. 83-0107-PC-ER \*

\* \* \* \* \*

DECISION  
AND  
ORDER

The proposed decision and order in this matter was issued on August 1, 1985 and the complainant filed objections and requested oral arguments. At the request of the complainant, oral arguments were rescheduled to December 4, 1985 at 11:00 a.m. and the parties were so advised by letter dated September 25, 1985.

On October 25, 1985, the complainant filed a motion to disqualify Commissioner Laurie McCallum, who had acted as the hearing examiner in the case, stating:

It is clear to complainant that Commissioner McCallum has formed some prejudgments of the issues of fact and law to be presented in the appeal before the full Commission.

The complainant did not appear at the scheduled oral arguments and did not contact the Commission to explain his absence. An effort to reach the complainant at his most recent telephone number was unsuccessful. Therefore, after waiting over two hours for the complainant to appear, the Commission proceeded to consider complainant's motion as well as the merits of the case.

Motion to Disqualify

The complainant appears to suggest that because Commissioner McCallum presided at the hearing and prepared a proposed decision and order favorable to the respondent, she must be prejudiced and may not participate in rendering the final decision of the Commission. Commissioner McCallum's proposed decision was based on the record of the case, the same record that serves as the basis for the Commission's final decision. If the complainant's motion was granted, the Commission would be prevented from having Commissioners serve as examiners in any contested case where the Commission itself is to make the final administrative decision. The complainant has failed to show either that Commissioner McCallum was biased with respect to the complainant's case as reflected by the record, or that the procedure utilized by the Commission is contrary to statute. Section 227.09(1), Stats., authorizes the appointment of "an official of the agency or an employe on its staff" as a hearing examiner.

Therefore, the complainant's motion to disqualify is hereby denied.

Merits

After considering the record in this matter and consulting with the hearing examiner, the Commission adopts the proposed decision and order in this matter except as noted below.

The first sentence in the first full paragraph on page 9 is amended to read:

Complainant also contends that Mr. Voorhees' comments during complainant's interview to the effect that he was not generally impressed with the legal work of "jailhouse lawyers" demonstrates pretext.


The new language better reflects the record in this matter.

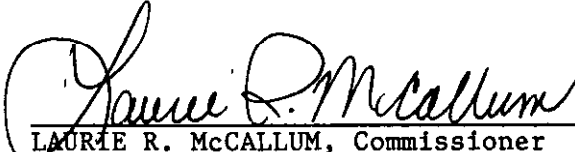
ORDER

The complainant's motion is denied and the Commission adopts the proposed decision and order with the modifications noted above.

Dated: December 6, 1985 STATE PERSONNEL COMMISSION

  
DENNIS P. MCGILLIGAN, Chairperson

  
DONALD R. MURPHY, Commissioner

  
LAURIE R. McCALLUM, Commissioner

KMS:jmf  
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Attachment

Parties:

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STATE OF WISCONSIN

PERSONNEL COMMISSION

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 CHARLES BROWNLEE,  
                     Complainant,  
 v.  
 State Public Defender, OFFICE  
 OF PUBLIC DEFENDER,  
                     Respondent.  
 Case No. 83-0107-PC-ER  
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PROPOSED  
 DECISION  
 AND  
 ORDER

NATURE OF THE CASE

On September 19, 1983, complainant filed a charge of discrimination alleging that he had been discriminated against on the basis of his race and arrest/conviction record in regard to a particular hiring decision made by respondent. In an Initial Determination dated July 27, 1984, one of the Commission's Equal Rights Officers determined that there was No Probable Cause to believe that complainant had been discriminated against as alleged. On August 13, 1984, complainant appealed such Initial Determination. A hearing was held before Laurie R. McCallum, Commissioner, on May 21, 1985. The hearing record was closed on July 11, 1985.

FINDINGS OF FACT

1. Complainant is a black male and has a conviction record.
2. During 1983, respondent recruited for a vacant Investigator 2 position in its Wausau office. This position was responsible primarily for locating and interviewing defendants, witnesses, and others having knowledge of the case under investigation; locating, gathering, examining, and analyzing physical evidence related to the case under investigation;

writing reports summarizing the investigator's findings and making recommendations regarding the defense of the case; testifying as an expert or otherwise. The investigator must exercise independent judgment in building a case. This position required extensive contact with the Indian tribes in the area.

3. An examination for this Investigator 2 position was administered by the Department of Employment Relations (DER) which developed a list of certified applicants. This list included the following:

<u>Score</u>	<u>Ranking</u>	<u>Name</u>	
90.00	1	Parker, Donald K.	
89.60	2	Feinen Jr., Robert W.	
89.20	94.20	3	Stene, John O.
86.80	91.80	4	Pomeroy, Richard W.
86.00	5	Meuske, Karen L.	
85.60	6	Gorst, Cathy J.	

<u>Veterans Preference</u>	<u>Name</u>
77.20      87.20	Wysocki, Mark E.

<u>Handicapped Expanded Certification</u>	<u>Name</u>
77.20	Brownlee, Charles E.
74.8      84.80	Burton, Robert O.
74.40	Herbst, Donald

4. Interviews with the certified applicants were scheduled for August 31, 1983. The interviews were conducted by John Voorhees, office supervisor of respondent's Rhinelander office, and John Leonard, Regional Defender in respondent's Wausau office. Mr. Voorhees and Mr. Leonard made the subject hiring decision. John Reid, an attorney in respondent's Wausau office, also sat in as an observer during part of the interviews. Although the subject position was assigned to the Wausau office, it did occasional work for the Rhinelander office. The interviewers asked the same general questions of each applicant interviewed. These questions related to: the

applicant's experience as an investigator; the applicant's experience with the criminal justice system; the applicant's relevant training; the applicant's knowledge of investigative tools and techniques, e.g., ballistics, forensics, photography, fingerprinting; the applicant's experience with certain types of cases, e.g., homicide, sexual assault, drug cases; and the applicant's experience working with racial minorities, particularly Indians.

5. During complainant's interview, Mr. Voorhees stated his impression that Indians were prejudiced against blacks and asked complainant how he would handle this prejudice. Mr. Voorhees also stated, in relation to complainant's status as an ex-offender that he was not generally impressed with the legal work done by "jailhouse lawyers," i.e., those inmates of correctional institutions who assist other inmates in prosecuting legal actions.

6. During complainant's interview, Mr. Leonard stated, in relation to complainant's status as an ex-offender, that most of the crimes defended by respondent's Wausau office, were "Twinkie thefts" committed by "white farm boys" and that the experience complainant had gained as an offender and an ex-offender would be more useful in areas where the majority of the crimes defended were more sophisticated crimes.

7. During complainant's interview, complainant summarized his experience assisting other inmates in prosecuting legal actions; his experience for three years in the late 1960's and early 1970's as an investigator in Chicago for three private detective agencies; his eight college credits in criminal justice from Carthage College; his study of behavioral sciences at the University of Wisconsin - Whitewater and the University of Wisconsin - Parkside; his one and one-half years of experience

as a juvenile counselor and doing home and placement investigations in juvenile cases; and his experience dealing with people of all races and social levels.

8. During complainant's interview, complainant read from a prepared statement after he was granted permission to do so by the interviewers and the interviewers felt that, even though they tried to redirect the interview, complainant persisted in offering the information he wanted to offer rather than being responsive to the interviewers' questions.

9. The successful applicant was Donald Parker, a white male. Mr. Parker had worked as a licensed private investigator for one year prior to the date of the subject hiring decision and, during this year, he had done investigations for respondent's Rhinelander and Wausau offices on a contract basis; had worked for seven and one half years with the Racine County Sheriff's Department -- three or four of these years as a deputy sheriff with patrol, initial investigation, communications, jail, and desk sergeant duties and the remaining years as a detective in the major crime unit, investigating drug, vice, and major felony offenses; had worked for one and one-half years for the Village of Palmyra police department with patrol and initial investigation duties; had worked for the Township of Waterford (Racine County) police department for a total of four years, during which time he performed patrol, traffic control, initial investigation, and boat patrol duties; was a municipal judge for one year; was a graduate of the Milwaukee Police Academy; and had attended training sessions in drug investigations, burglary investigations, sexual offense investigations, traffic offenses, and communications.

10. Mr. Parker was acquainted with both Mr. Voorhees and Mr. Leonard prior to the interview. Both inquired of Mr. Parker whether he intended to

apply for the subject position. They made the same inquiry of other contract investigators. Neither Mr. Voorhees nor Mr. Leonard disclosed to Mr. Parker prior to the exam or interview the content of the written exam or the questions to be asked in the oral interview. During Mr. Parker's interview, Mr. Voorhees stated that Indians were prejudiced against non-Indians and asked Mr. Parker how he would handle this. In response, Mr. Parker discussed his experience with racial minorities while he was in law enforcement.

11. The record is not clear as to whether the interviewers took notes. Mr. Parker testified that both interviewers took occasional notes. Mr. Voorhees testified that he did not take any notes. Respondent has stated that there were no interview notes in their records.

12. The record is also not clear as to whether the interviewers reviewed written resumes or letters of reference submitted by those interviewed. Mr. Parker testified that he didn't recall submitting a written resume. Mr. Voorhees testified that he did not review written resumes or letters of reference. Mr. Leonard testified that he did recall reviewing resumes and letters of reference.

13. Respondent did have an approved affirmative action plan in effect at the time the subject hiring decision was made. For the classification which included the investigator positions, the plan established as the ethnic/racial minority goal a level of 18.8%. The plan also indicates there was no underutilization of ethnic/racial minorities in this classification because the actual level at the time was 18.8%.

14. The selection criteria used by Mr. Voorhees and Mr. Leonard were: relevant training and experience; knowledge of investigative tools and techniques; good communication skills; good attitude toward the position,



i.e., enthusiasm about the position. Mr. Leonard also felt complainant's status as an ex-offender was a positive asset but did not give it as much weight as actual investigative experience.

15. The interviewers felt Mr. Parker was better qualified for the subject position than complainant because Mr. Parker had a wider range of investigatory experience and a great deal more experience in investigation and law enforcement than complainant; Mr. Parker had experience with search and seizure issues which complainant did not have; and Mr. Parker had better communication skills than complainant.

16. Respondent's decision not to hire complainant for the subject position was based on the comparison of the qualifications of the candidates, not on complainant's race or conviction record.

#### CONCLUSIONS OF LAW

1. The Commission has the authority to hear and decide this matter pursuant to §230.45(1)(b), Stats.

2. The burden of persuasion is on the complainant to show the existence of probable cause, as probable cause is defined in §PC 4.03(2), Wis. Adm. Code.

3. The complainant has failed to carry his burden of persuasion.

4. There is no probable cause to believe that complainant was discriminated against on the basis of race or conviction record with respect to the subject hiring decision.

#### OPINION

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973), the Supreme Court established the basic allocation of burdens and order of presentation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie

case by a preponderance of the evidence. This may be accomplished by showing: 1) that he belongs to a protected group; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that despite his qualifications he was rejected under circumstances which give rise to an inference of unlawful discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981). If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Once this is accomplished, the complainant must then be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the rejection were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent employer intentionally discriminated against the complainant remains at all times with the complainant, Burdine, supra, at 1094.

Although the evidentiary standard in a probable cause proceeding such as the one before us is not as rigorous as that applied in reaching a decision on the merits, it is nonetheless useful to use the McDonnell-Douglas format in analyzing the record before the Commission in this complaint.

Complainant did make out a prima facie case: as both a black and a person with a conviction record, complainant is a member of a protected group under the Wisconsin Fair Employment Act; complainant applied for and, as a result of being certified, was qualified for the subject position; complainant was not hired for the position; and, due to the fact that a white male was hired for the subject position, an inference of unlawful discrimination could be drawn.

The respondent did articulate legitimate, non-discriminatory reasons for its hiring decision. The selection criteria summarized in Finding of Fact #14 were reasonable in view of the duties of the position and were, on their face, non-discriminatory. There is no evidence from which to conclude these criteria were not uniformly applied. It is clear from the record that Mr. Parker had a wider range of and a great deal more relevant experience than complainant. It was also not unreasonable for the interviewers to conclude that Mr. Parker's oral communication skills were more suited to the demands of the subject position than complainant's, particularly in view of complainant's reading of a prepared statement at an interview at least partially designed to assess an applicant's ability to think on his feet and to be able to respond to a variety of situations which can't be predicted with any degree of certainty as is the case in many situations an investigator may encounter.

The burden then shifts to the complainant to show that the reasons articulated by respondent were pretextual.

Complainant contends that the discussion during his interview relating to Indians (see Findings of Fact #4, 5) demonstrates pretext. In view of the fact that the applicants selected for the subject position would frequently have to deal with the Indian community and that a similar discussion was held with each applicant interviewed, the discussion appears reasonably job-related and uniformly administered and, as a result, not pretextual.

Complainant further contends that the discussion during his interview regarding "Twinkie thefts" by "white farm boys" (see Finding of Fact #6) demonstrates pretext. However, it appears more likely, from the context of such discussion, that it was an attempt by Mr. Leonard to describe the

primary nature of the case load in the Rhinelander and Wausau offices and to explain why complainant's knowledge of the criminal justice system resulting from his status as an offender and ex-offender would be more useful in an area where a larger number of more sophisticated crimes were committed. Mr. Leonard certainly could have selected more appropriate language in which to couch his message but, given the context of the discussion, the Commission concludes that Mr. Leonard's intent was not to discriminate against complainant but to explain how he viewed complainant's status as an ex-offender as an asset, particularly in those areas of the state where a larger number of sophisticated crimes occur. The Commission concludes that this discussion does not demonstrate pretext.

Complainant also contends that Mr. Voorhees' comments during complainant's interview to the effect that he was not generally impressed with the work of "jailhouse lawyers" demonstrates pretext. This comment was also made in the context of the discussion relating to complainant's status as an ex-offender. A weighing of the evidence supports the conclusion that the interviewers actually felt that complainant's status as an ex-offender was more of an asset than a liability. Complainant has failed to demonstrate pretext in this regard.

Complainant contends that the fact that Mr. Parker knew the interviewers prior to the interview (see Finding of Fact #10) and that they discussed his application for the subject position with him prior to the examination demonstrates pretext. In view of the fact that the interviewers had the same discussion with other contract investigators and that the interviewers did not discuss the contents of the written exam, nor the oral interview with Mr. Parker, complainant's contention regarding the discussion is not convincing. Furthermore, the discussion regarding Mr.

Parker's application for the subject position occurred prior to the establishment of the certification list, i.e., since the interviewers were not aware at the time the discussion took place that complainant had been certified for or had even applied for the position, how could their action be based on complainant's race and/or conviction record? The fact the interviewers were acquainted with Mr. Parker prior to the interview again predates the interviewers' awareness of complainant's certification for the position and cannot be interpreted as evidence of discriminatory intent.

Complainant contends that the ambiguities in the record regarding the existence of interview notes and the interviewers' review of written resumes or letters of reference demonstrates pretext. The evidence regarding the resumes and letters of reference reveals only that Mr. Voorhees doesn't recall receiving such but Mr. Leonard does. This is not unreasonable as long as it was the procedure followed in regard to each applicant interviewed and there is no evidence to show it was not. The Commission fails to see how this procedure demonstrates discriminatory intent. The evidence regarding the interview notes reveals that Mr. Parker recalled the interviewers taking occasional notes. Mr. Voorhees testified that he did not take notes and Mr. Leonard was not asked this question. This apparent inconsistency would be more convincing if it was possible that such interview notes, if they ever existed, would reveal the complainant's interview performance was superior to or even equivalent to that of Mr. Parker. On the basis of the record before the Commission, there is no question that the interviewers clearly were of the opinion at the time of the interviews that Mr. Parker's qualifications and interview performance were far superior to complainant's. Furthermore, since Mr. Parker never saw the notes he recalled seeing the interviewers take, it's possible the interviewers were

not accurately recording their impressions of the performance of the applicants being interviewed but perhaps checking off the areas they wanted to cover or just doodling. There is no clear evidence that notes summarizing or assessing the interviews ever existed or were destroyed as part of some cover-up, and it is not reasonable to so conclude from the evidence presented. Complainant has failed to demonstrate pretext in this regard.

Finally, complainant elicited testimony regarding respondent's affirmative action plan. It is important to note in this regard that the plan did not and could not require respondent to hire complainant because of his race or conviction record if there were other better qualified applicants. It is also important to note that there was no under utilization of ethnic/racial minorities in the classification to which the subject position was assigned.

The Commission concludes that the subject hiring decision was based on the comparison of the qualifications of the applicants and not on complainant's race or conviction record.

ORDER

This complaint is dismissed.

Dated: \_\_\_\_\_, 1985      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
DENNIS P. MCGILLIGAN, Chairperson

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DONALD R. MURPHY, Commissioner

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