STATE OF WISCONSIN PERSONNEL COMMISSION

ROBERT P. KESTERSON,

Appellant/Complainant,

v.

Secretary, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS and Administrator, DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.

Case Nos. 85-0081-PC
85-0105-PC-ER

DECISION
AND
ORDER

This matter is before the Commission following issuance of a proposed decision and order by the hearing examiner. The Commission has considered the parties' objections and arguments with respect to the proposed decision and has consulted with the examiner. The Commission adopts the proposed decision and order as its final disposition of this matter, with certain changes, for the reasons set forth hereafter. The Commission also will address certain arguments raised after the promulgation of the proposed decision.

Respondent DILHR argues that the Commission should adopt something akin to a "harmless error" approach to this hiring transaction and rule that it was not illegal. Although at the time of the transaction there was no analysis conducted to determine the minority representation in the "state labor force qualified and available for employment in such classification" as required by §230.03(4m), Stats., prior to taking affirmative

action to balance the work force, it is argued that had this been done, the result would not have been any different.

In connection with this argument, the respondent asserts that the proposed decision is in error on page 12 where it states "... there is nothing in the record to indicate that said register [Respondent's Exhibit 4, a statewide register dated May 2, 1986, and containing statistics for the Boiler Safety Inspector 1 classification] reflected the situation where the disputed hire was made in May of 1985...." In fact, the transcript excerpt attached to respondent's objections to the proposed decision establishes that this register did reflect the situation as of May, 1985, and the Commission agrees the proposed decision is in error on this point and should be changed. However, this does not alter the legal analysis set forth in the proposed decision rejecting respondent's "harmless error" approach.

In addition to the aforesaid analysis, it should be noted that there are two separate aspects to this transaction. One is the decision to use expanded certification. The other is the decision, made after the expanded certification, to appoint Mr. Sheets instead of the complainant, Mr. Kesterson. Both these decisions require that the appointing authority exercise judgment and discretion. Section ER-Pers 12.05(1), Wis. Adm. Code, provides that expanded certification to achieve a balanced work force "may be authorized... when there is a disparity...." (emphasis supplied) The appointing authority's decision on the appointment itself obviously involves the exercise of discretion. See, e.g., State ex rel Buell v. Frear, 146 Wis. 291, 302-303 (1911). There is of necessity a considerable degree of speculation involved in attempting to determine, after the fact, whether the exercise of discretion, which occurred in the first instance in

a particular factual context, would have been the same had that context been different. This is particularly the case with respect to the actual appointment decision.

As was set forth in the proposed decision, state law requires that affirmative action plans be applied with respect to all appointments in state service. The appointing authority was operating under a divisional affirmative action plan which reflected minority representation in the vocational grouping of "protective service" of three employes or 2.6%, as compared to a minority representation in the population of 6.4%, and a goal of employing eight minority employes, or 6.0%. If that plan had been prepared on the basis of the actual "state labor force qualified and available for employment in such classification," §230.04(4m), Stats., one can only conjecture what the goal, if any, would have been for hiring Boiler Inspectors, when there were only four such positions in the agency and hiring one minority inspector would have resulted in a 25% utilization rate.

The Commission also makes two observations with respect to the analysis of "abuse of discretion" as to Case No. 85-0081-PC on pp. 20-21 of the proposed decision. First, the conclusion that there was no abuse of discretion occurs in isolation from the illegality involved by DILHR's failure to comply with the legal prerequisites for taking affirmative action in an effort towards balancing the work force. Second, while it is not improper per se to consider the performance of an appointee in evaluating the decision made prior to the appointment, other factors usually carry more weight in that evaluation, and care must be exercised because of the danger that scrutiny of post-appointment performance can lead to an extensive, time-consuming "sideshow", whose costs may exceed its value to the adjudicative process.

The Commission adds the following footnote to the quotation from Dendy v. Washington Hospital Center, 14 FEP Cases 1773, 1774-75 (D. Columbia, 1977) set forth at the top of page 13:

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* The district court decision in Dendy was remanded by the Court of Appeals, 17 FEP Cases 1227, 581 F.2d 990 (D.C.Cir. 1978), for further proceedings. The Court of Appeals noted that the District Court ignored without explanation the undisputed testimony of an expert witness that the numbers involved reflected a discriminatory impact that could not be attributed to chance alone. However, in the instant case, the sample size is much smaller (one of twelve) and there was no testimony regarding its statistical significance.

Also on page 13, the reference in the last paragraph to "a register of only 6 people (5 white males, 1 black male)" should be changed to "a register of only 12 people (11 white males, 1 black male) who were interested in the position in question" to conform to Respondent's Exhibit 4. The proposed decision apparently was referring to the certification as opposed to the register at this point.

The "order" at p. 23 with respect to No. 85-0105-PC-ER reads "The initial determination of probable cause is affirmed and the matter is remanded for action in accordance with this decision." It should read "Based on the aforesaid determination that complainant was discriminated against on the basis of race in violation of the Fair Employment Act, this matter is remanded for action in accordance with this decision."

Finally, DILHR has argued that DER should be required to bear more of the costs because DILHR's actions in this matter were in accordance with DER rules and policy. The Commission will address this argument when it reaches the costs aspect of this proceeding.

ORDER

With the aforesaid changes, the attached proposed decision and order is incorporated by reference and adopted as the final disposition of this matter except as to fees and costs.

Dated: December 29, 1986 STATE PERSONNEL COMMISSION

DENNIS P. McGILLIGAN, Chairperson

DONALD R. MURPHY, Commissioner

LAURIE R. McCALLUM, Commissioner

AJT:jmf
ID11/2

Attachment

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Case No. 85-0105-PC-ER

PROPOSED DECISION AND ORDER

NATURE OF THE CASE

These matters arise out of a decision not to select Robert Kesterson (hereinafter referred to as the appellant) for the position of Boiler Safety Inspector 1, Boiler Section, Bureau of Technical Services, Safety and Building Division, Department of Industry, Labor and Human Relations (DILHR) in 1985. Appellant filed both an appeal under §230.44(1)(d), Stats., (Case No. 85-0081-PC) and a complainant of discrimination based on race under §230.45(1)(b), Stats., (Case No. 85-0105-PC-ER) relating to the same transaction. An investigation of the discrimination complaint generated an

initial determination of "probable cause" to believe that discrimination had occurred.

At a prehearing conference held on June 16, 1985, before Dennis P. McGilligan, Chairperson, the parties were unable to agree upon an issue regarding the appeal case. The Examiner finds that the issue noted below as framed by respondent is appropriate to decide the appeal:

> Whether the non-selection of Robert Kesterson for the position of Boiler Inspector I was an illegal act or an abuse of discretion?

At a prehearing conference held on February 7, 1986, before Anthony J. Theodore, Legal Counsel, the parties agreed to the following issues with respect to the complaint case:

> Whether the respondent discriminated against the complainant on the basis of race in violation of the Fair Employment Act in failing or refusing to appoint him to the position in question?
>
> > Subissue: 1) Whether the requirements of state law with respect to affirmative action were violated. 2) Whether §ER-Pers 12.05, Wis. Adm. Code, is lawful.

Hearing in the matters was held on May 7, 1986 before Dennis P. McGilligan. The parties completed their briefing schedule on June 27, 1986.

The parties stipulated at hearing that the Findings of Fact contained in the aforesaid initial determination "Investigative Summary" were to be admitted into the record of this proceeding as substantive evidence. Accordingly, the Commission adopts the following Findings of Fact Numbers 1 - 17 from the investigative summary of the initial determination for purposes of the Proposed Decision and Order.

FINDINGS OF FACT

1. Following the development of a vacancy in a classified civil service position classified as Boiler Inspector I (for entry purposes) in the Boiler Section, Bureau of Technical Services, Safety and Buildings Division,

DILHR, located in Janesville, the respondent decided to fill the position on an open competitive basis, and it was announced in the Current Employment Opportunities Bulletin with an application deadline of January 4, 1985. DILHR personnel was responsible on a delegated basis pursuant to §230.05(2)(a), Stats., for the staffing of this position.

2. The announcement contained the following description of the position and the "Knowledge Required":

> This position performs inspections of boilers, pressure vessels, power piping, refrigeration systems, and liquified petroleum storage tanks to assure compliance with the Wisconsin Boiler and Pressure Vessel Code. Determine safe working pressure of boilers and pressure vessels. Enforce code rules and order such changes and repairs that will place the vessel in a safe working condition. Provide inspection service at the plant location during the construction of boiler and pressure vessels. KNOWLEDGE REQUIRED: Boilermaking and repairing techniques; boiler operations, provisions of the Wisconsin Boiler and Pressure Vessel Code; American Society of Mechanical Engineers Code, addenda, and related cases; steam power plant operations. Special Note: The candidate must obtain, within six months after the date of appointment, a National Board Commission as a Boiler and Pressure Vessel Inspector issued in the National Board of Boiler and Pressure Vessel Inspectors.

3. DILHR personnel developed and administered a multiple choice examination for the position. Both the complainant and Mr. Sheets, the ultimate appointee, had applied, and took and passed the exam. The complainant ranked first on the resultant register with a score of 90 while Mr. Sheets ranked thirteenth with a score of 73.75.

4. A total of 15 applicants passed the exam and were on the register. Pursuant to §230.25(1), Stats., since there were less than 50 names on the register, normally the top five names would have been certified.

5. Pursuant to §ER-Pers 12.05 "Expanded Certification," the appointing authority requested an expanded certification for minorities.

6. The foregoing request was premised on the following factors: within the employing unit of the Safety and Buildings Division statewide Employing Unit, there were four filled positions within the progression series of Boiler Safety Inspector 1 and 2, of which all were non-minorities, constituting an imbalance of minorities when compared to the percentage of minorities in the Wisconsin population at large (6.4%).

7. In response to this request, there followed an expanded certification which included Mr. Sheets, a black, in addition to the five highest-ranking applicants, all of whom were white males.

8. Mr. Helmeid, the bureau director, and Mr. Duffy, the section chief, interviewed the six certified candidates and ranked them, solely on the basis of their qualifications for the position. They ranked the complainant first and Mr. Sheets third. They recommended a "suggested offering order" to Mr. McClain, the division administrator and effective appointing authority for this position, that placed the complaint first and Mr. Sheets third.

9. The division affirmative action plan for the period July 1, 1983 - June 30, 1985, shows that as of July 1, 1983, the division employed 225 employes, of whom five, or 2.2%, were members of "racial/ethnic groups," as compared to 6.4% of the total state population. The goal as of June 30, 1985, was 20 racial ethnic group employes, or 8.1% of the work force. There were 114 protective service employes, of whom three, or 2.6%, were members of racial/ethnic groups, again as compared to 6.4% of the total population. The goal as of June 30, 1985, was eight racial/ethnic group employes, or 6.0%. As to both categories -- total employes and protective service -- the affirmative action plan indicated there was an "underutilization" as to

"RACIAL/ETHNIC GROUPS" based on an existing percentage less than that found in the state population.

10. The departmental and divisional affirmative action plans provided in part as follows:

> DEPARTMENTAL:
>
> If a non-protected class person is selected for recommendation to be hired, promoted, or permissively transferred to fill a vacant position and a protected class person is certified as eligible, a written statement of justification for the recommendation is to be sent to the division administrator or designee. The administrator or designee, division AA representative and departmental affirmative action officer (for Job Service, the EEO supervisor) will review any recommendations to hire a non-protected class person before any commitment to hire, etc., is made. The justification must include the relative qualifications of the candidates.
>
> This action will be required until the Plan of Service goals for the division and area percentages of protected classes in the work force are met. This action is required only if the unit's plan of service or affirmative action goals have not been attained.
>
> Divisional:
>
> 3. Any decision, by a program manager, to not make an affirmative action hire when the opportunity is available must be justified to the administrator.

11. Pursuant to the aforesaid plan, Mr. McClain requested of Mr. Helmeid a written justification for this recommendation. Mr. Helmeid responded by memo of April 9, 1985, which contained, in relevant part, the following:

> The two non-protected applicants have superior training and experience.
>
> In the following, I have summarized the training and experience of the ... applicants in question:
>
> Robert P. Kesterson - The applicant has twenty-six years experience in the inspection of boilers and pressure vessels. The experience has been with insurance companies doing business in the State of Wisconsin. Mr. Kesterson has been submitting inspection reports to the Department for many years. The applicant has

qualified under the requirements of the National Board of Boiler and Pressure Vessel Inspectors since 1958 and holds a Certificate of Competency in Wisconsin.

Very little time and money would be required to train Mr. Kesterson. He would be considered productive almost immediately.

We recommend that he be employed as Boiler Safety Inspector II because of his qualifications.

* * *

Anthony Sheets - Presently a Boiler Operator at the University of Wisconsin - Whitewater, where he has been employed for two years. Anthony gained his boiler background in the U.S. Navy. He has had several Navy training courses related to boilers.

Anthony served nine years in the Navy with approximately 50% of the time working with boilers. He holds a Stationary Engineers License issued by the City of Chicago. Trained as an apprentice plumber at Vocational High School in Chicago.

Copies of resumes for each applicant are attached.

12. Mr. McClain rejected this justification in a memo to Mr. Helmeid dated April 12, 1985, which stated as follows:

I have reviewed your "justification" memo on this subject.

As per the revised "suggested offering order" on the "Hiring Check List," please offer this position to Anthony Sheets.

This is an opening for a Boiler Inspector I. Not Boiler Inspector II.

According to the test results and your own ranking based on interviews, Mr. Sheets is qualified for this position.

The work force in your bureau is not balanced. The only reason/excuse I have heard that "justified" that imbalance was that you had to hire through the approved channels, which usually require hiring from a "list," and you never got any nontraditional names on those lists. You now have a list that includes a nontraditional name. Please use this opportunity to begin correcting your work force imbalance.

13. According to Mr. McClain's understanding of the affirmative action plan, in order to justify hiring a non-minority when there is underutilization, there would have had to have been a showing either that the

minority candidate was not qualified for the position or that the non-minority candidate could provide to the section talents that were unique and that at the same time could be viewed as falling within the normal purview of a Boiler Inspector I.

14. A prerequisite to performing boiler inspections is certification as a Boiler and Pressure Vessel Inspector by the National Board of Boiler and Pressure Vessel Inspectors. According to Mr. Helmeid, a requirement of passing probation after six months in this position is to have passed this exam. Much of the first six months in the job is spent in training and preparing for the exam. Because no independent boiler inspection can be carried out before being certified, there is little actually productive work that can be expected of an employe until after the employe passes the exam. It is not unusual for employes to fail the exam and in such cases the respondent typically will extend probation once or even twice. It is unusual for someone who is already certified, like the complainant, to apply for employment as a Boiler Safety Inspector I. According to Mr. Duffy, it normally takes up to two years to fully utilize a person hired as a Boiler Safety Inspector I without certification. Due to his years of experience and possession of a certification, the complainant probably would have been able to have been working at a full utilization level immediately. Both Mr. Helmeid and Mr. Duffy felt that Mr. Sheets met the minimum qualifications for hiring as a Boiler Safety Inspector I.

15. Mr. McClain directed that Mr. Sheets be given the first offer for the position. His reasons for this decision were that he felt both Mr. Sheets and the complainant were qualified for the job; there was no showing that the complainant was uniquely qualified for the position in the context

set forth above in paragraph #14; although Mr. Kesterson was a certified inspector while Mr. Sheets was not, the agency typically hired non-certified individuals and expected them to obtain certification within 6 - 12 months; the division was underutilized for minorities in the protected service category, as set forth above in paragraph 10, the division had a history of generally hiring white males, due apparently to the unavailability of qualified minorities or females on certification lists, and he wanted to take advantage of this opportunity to make an affirmative action hire.

16. Pursuant to Mr. McClain's direction, Mr. Sheets was offered and accepted appointment to the position, effective May 26, 1985.

17. The instant complaint was filed with this Commission June 26, 1986.

In addition, the Commission makes the following Finding of Fact:

18. The justification requirement section of the DILHR Affirmative Action plan was intended to allow the hiring authority to decide whether the particular skills offered by an applicant outweighed the desirability to the agency of hiring a balanced workforce in accordance with the plan.

CONCLUSIONS OF LAW

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

2. The appellant has the burden of showing that respondent acted illegally or abused its discretion in the matter or that the respondent discriminated against appellant on the basis of race in violation of the Fair Employment Act in failing to appoint him to this position in question.

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

4. The decision to appoint Mr. Sheets rather than the appellant to the position of Boiler Inspector I was illegal because the transaction was not effected in accordance with §230.03(4m), Stats.

5. The decision to appoint Mr. Sheets rather than the appellant to the position of Boiler Inspector I was not an abuse of discretion.

6. Respondent discriminated against appellant in violation of the Fair Employment Act as to race with respect to the decision of failing to appoint him to the Boiler Inspector I position.

OPINION

A. Case No. 85-0105-PC-ER

Under the Fair Employment Act, Subchapter II, Chapter 111, Stats., hiring decisions normally must be made without consideration of the race of the candidates. One exception to this general rule is that race may be taken into consideration under a lawful affirmative action plan. While this exception is not specifically set forth in the Fair Employment Act itself, the Wisconsin Legislature has set forth a strong commitment to affirmative action in the state civil service in Chapter 230, State Employment Relations, and the principle has been recognized with approval by the Personnel Commission in the context of §16.14, Stats. (1975) (now §230.18), which prohibits discrimination in state civil service hiring, see Christensen v. DHSS, No. 77-62 (9/13/78)[1], and in numerous federal court decisions under Title VII (42 U.S. Code §2000e), see, e.g., Steelworkers v. Weber, 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721, 20 FEP Cases 1 (1979).

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[1] It should be noted that under the law in effect at the time of the hiring in that case, neither §§230.01(2), "Statement of policy", 230.03 (2) defining "affirmative action", nor 230.03 (4m) defining "Balanced work force", nor any similar provisions, were in effect.

The Commission recently reiterated "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." Paul v. DHSS/DMRS, 82-156-PC and Paul v. DHSS/DMRS, 82-PC-ER-69 (6/19/86).

In this case, there is no dispute that race was a consideration in the appointment to the position in question, which was made under the departmental and divisional affirmative action plans. The question is whether the appointment met the criteria for a lawful affirmative action hire under the Fair Employment Act.

As noted in the Initial Determination there are three major aspects to an evaluation of this transaction. The first is to evaluate the transaction and underlying affirmative action plan under the state statutes which deal with affirmative action in the state civil service. The second is to evaluate whether the specific hiring action was in compliance with the agency's own affirmative action plan. The third is to evaluate the transaction and underlying affirmative action plan under the case law developed by the federal courts under Title VII, as Wisconsin courts frequently have looked to those decisions for guidance. See Hiegel v. LIRC, 121 Wis. 2d 205, 217, 359 N.W. 2d 405 (1984); Bucyrus-Erie Co. v. ILHR Dept., 90 Wis. 2d 408, 421, n.6, 280 N.W. 2d 142 (1979), Ray-O-Vac v. ILHR Dept., 70 Wis. 2d 919, 236 N.W. 2d 209 (1975).

The initial question involves an evaluation of the transaction and underlying affirmative action plan under the state statutes which deal with affirmative action in the state civil service noted above. The law applicable to this matter was determined by the Commission in Paul v.

DHSS/DMRS, supra. In Paul the Commission noted that the Legislature has 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, as in Paul, 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.

Therefore, before an agency can take a specific action in employment in order to ensure a balanced work force pursuant to §§230.01 and 230.03(2), Stats., there must be an imbalance between a group's representation in a civil service classification in an agency, and that group's representation in that part of the state labor force qualified and available for employment in such classification. This requirement is in keeping with the prevailing federal case law under Title VII, which typically relies on an analysis of the qualified available labor force, as opposed to more general population statistics, in determining whether there is an imbalance in the employer's work force. See, e.g., Hazelwood School District v. U.S., 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, FEP Cases 75, 81 (7th Cir. 1981).

The record indicates that the instant transaction, which involved a race-conscious promotion under an affirmative action plan as part of an effort to reach a balanced work force, was not in compliance with §230.03(4m), Stats., in at least one key respect - the plan did not determine the rate of representation of minorities in "that part of the state labor force qualified and available for employment in such classification,"

§230.03(4m) (emphasis added), but rather based the finding of underutilization on a comparison to the minority percentage of the total state population -- i.e., 6.4%.

Respondent argues that if the decision had been based on a comparison of minority representation in the boiler inspector classification to minority representation in that part of the state labor force qualified and available for employment in the boiler inspector classification, the decision on expanded certification would have been the same citing Respondent's Exhibit Number 4, a statewide register containing labor market representation statistics for Boiler Safety Inspector 1, in support thereof. However, this register is dated May 2, 1986, and there is nothing in the record to indicate that said register, assuming arguendo that it supports the respondent's proposition, reflected the situation when the disputed hire was made in May of 1985. Consequently, the Commission rejects this argument of respondent.

Respondent also argues that the error in its approach was immaterial since it was aware that there were no black boiler inspectors and because it knew that the portion of the state labor force qualified and available for employment as boiler inspectors included at least one black person. The Commission rejected this approach in Paul v. DHSS/DMRS, supra at page 5. The Commission noted therein:

> 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 ISD 1 classification. As was pointed out in the proposed decision, samples must be large enough to have statistical significance. This 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 facia 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 persuasive testimony or other indication in the record that the sample size generated by the instant selection process was large enough to be statistically significant.

It also might be possible to look at this case from a "harmless error" standpoint, and reason that since the department had no minority Boiler Safety Inspectors 1, out of four positions in the state, there had to have been underutilization regardless of how one defined the labor pool, and hence a race conscious hire would have been indicated in any event. This approach must be rejected for several reasons.

First, it would be speculative to assume what the Affirmative Action plan would require of the respondent with respect to a hiring goal where, as here, there was a register of only 6 people (5 white males, 1 black male) and a classification involving only four positions, where the options presumably would be 0% utilization or 25% utilization. The problem is that none of these numbers (as well as the number of minorities in the state labor force qualified and available for employment in such classification) are addressed in the respondent's AA plan as required by state law. Absent persuasive

evidence to the contrary, it seems highly unlikely that a plan would call for a hire reflecting a 25% utilization rate.

Second, such an approach essentially permits an ad hoc approach to race conscious hiring, which the courts generally have not countenanced. See, e.g., Dougherty v. Barry, 37 FEP Cases 1201, 1213 (U.S. Dist. Ct. Dist. Co.. 1985); Lehman v. Yellow Freight System, 26 FEP Cases 75, 81, n.5 (7th Cir. 1981):

> While a particular affirmative action decision may be consistent with the spirit of the Weber decision, we believe that the substantive and procedural safeguards discussed in Weber must be part of the affirmative action process. In this way, safeguards and checks are built into the system to ensure fairness and consistency....

Third, state law parallels this holding in requiring adherence to established affirmative action plans. §230.04(9), Stats:

> (9) The secretary shall...:
>
> (a) Establish standards for affirmative action plans to be prepared by all agencies and applied to all employes in and applicants for employment in the unclassified and classified services...." (emphasis added)

See also §ER 43.03, Wis. Adm. Code.

This decision must also consider whether the transaction was effected in accordance with the affirmative action plan itself.

Ed McClain, the Division Administrator, testified that the justification requirement section of the DILHR Affirmative Action plan described in Finding of Fact Number 10 above was intended to allow the hiring authority to determine whether the particular skills offered by an applicant outweighed the desirability to the agency of hiring a woman or minority in accordance

with the plan.[2] The Commission finds that it was an appropriate exercise of McClain's discretion to determine that the need for a highly-experienced employe was not so great as to outweigh the desirability of complying with the existing affirmative action goals for boiler inspector. This conclusion is supported by the record evidence which is undisputed that there is a long history of hiring only white males in the boiler inspector classification, and that the Boiler Section and Bureau of Technical Services, Safety and Buildings Division have shown a lack of support for affirmative action efforts. McClain also testified unrebutted by appellant that Helmeid, the bureau director, had said the reason for work force imbalances in the past among boiler inspectors was the lack of opportunity to hire qualified applicants. McClain was only trying to remedy this. It is clear that Mr. Sheets met the basic qualifications for hiring as a Boiler Safety Inspector 1. It is also clear that while appellant had not only the basic qualifications for hiring in the disputed position, but also the certification requirements to independently conduct boiler inspections. However, it was the typical agency experience to hire an applicant who did not possess the requisite certification and have them train until he or she could pass the required test. This is exactly what happened with Mr. Sheets.

The last aspect of this inquiry is to consider the case law developed under Title VII, the federal analogue of the Wisconsin Fair Employment Act. Wisconsin Courts have frequently looked to federal court decisions under Title VII to interpret the Wisconsin law.

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[2] In the Commission's view, this interpretation is consistent with Secretary Bellman's memo to "DILHR managers and Supervisors" dated April 19, 1985, regarding the proper interpretation of the requirement of a written justification for a non-minority hire described at footnote 4, page 16 of the aforesaid Kesterson ID.

In the instant case, there is a prima facie case of race discrimination, because the appellant was qualified for the position but was rejected by the appointing authority, based at least in part on appellant's race. See Dougherty v. Barry, 37 FEP Cases 1201, 1209, (U.S. D.C. Dist. Col. 1985). The respondent admits that race was not only a factor in the decision to hire Mr. Sheets rather than appellant, but also the determinative factor, since clearly appellant would have been hired rather than Mr. Sheets, if the decision had not taken race into consideration.

Notwithstanding that the challenged certification decision and subsequent selection were based on race, if said decisions were made pursuant to a legitimate affirmative action plan there 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).

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).

The record indicates that the affirmative action plan used by respondent, and particularly the established goals, were based on a comparison between minority representation in the division's work force and in the state population generally. Therefore, even if one assumed that the first Title VII criterion could be satisfied by statistical analysis alone, this affirmative action plan would still not meet this criterion because of the nature of its statistical analysis. The cases establish that the only meaningful comparison is between the representation of a minority group in the appropriate category in an employer's work force and representation in the available work force. This means available both in the sense of being qualified and being in reasonable geographic proximity to the locations of the position being filled. See, e.g., Hazelwood School District v. United States, 433 U.S. 298, 308, 53 L.Ed. 2d 768, 777, 97 S.Ct. 2736, N.13 (1977): "Where 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 ..."; Johnson v. Transportation Agency, 36 FEP Cases 725, 735 (9th Cir. 1984) (Concurring and Dissenting Opinion):

> 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 can be no assurance that the relevant labor pool for this relatively skilled classification of Boiler Safety Inspector 1 is coextensive with the population of the entire state.

Respondent contends that its failure to follow the appropriate procedures was "harmless error." Respondent argues that since no Boiler Inspectors were minorities and at least one minority was available and qualified, there was per se underrepresentation of minority Boiler Inspectors.

However, as noted previously both the Federal courts and the Commission have refused to allow such haphazard applications of affirmative action programs.

The second criterion is that the plan must not unnecessarily trammel the interests of white employees. 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 instant case, there is no question about the minimum qualifications of the appointee. It must be concluded that the second criterion has been satisfied.

The third criterion is that the plan not create an absolute bar to the advancement of white employees. While the appointing authority's application of the plan's justification requirement makes it difficult for white employees to obtain positions, there were many instances cited where this had occurred. Cf. Johnson v. Transportation District, 36 FEP Cases at 731:

> When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees.

Therefore, it appears that the plan satisfies the third criterion.

The fourth criterion is that the plan be 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.

Since the plan apparently does not meet one of the four criteria mandated by Title VII, and probably also by the state Fair Employment Law, and since the plan does not appear to be in conformity with §§230.01, 230.03(2) and 230.03(4m), Stats., the Commission finds that respondent discriminated against appellant based on race in violation of the Fair Employment Act in failing to appoint him to the position in question. Assuming that §ER-Pers 12.05, Wis. Adm. Code could be harmonized with the

statutes, the hiring was still not done in accordance with the statutes. Therefore, it is unnecessary to determine whether said rule is lawful.

B. Case No. 85-0081-PC

As noted above, the issue here is whether the non-selection of appellant for the position of Boiler Inspector 1 was an illegal act or an abuse of discretion.

As discussed previously respondent's action selecting Mr. Sheets over appellant for the disputed position violated certain statutes relating to affirmative action and the Fair Employment Act. The record is undisputed that but for the illegal action of appointing Mr. Sheets as Boiler Inspector 1, appellant would have been selected for appointment. Therefore, the decision of respondent not to appoint appellant to the Boiler Inspector 1 position was also illegal.

Laying that to one side, a question remains as to whether the decision to select Mr. Sheets 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).

It is clear that Mr. Sheets met the basic qualifications for hiring as a Boiler Safety Inspector 1. Mr. Kesterson had not only the basic

qualifications for hiring as a Boiler Safety Inspector 1, but also the certification requirements to independently conduct boiler inspections. In this sense Kesterson was uniquely qualified for the job because he could begin working at the full performance level almost immediately, whereas an employee (like Mr. Sheets) without such certification would have to spend six months or more in a training capacity until he or she could pass the required test. Since no independent boiler inspection can be carried out before being certified, little actually productive work can be expected of an employee until after the employee passes the exam. However, it was the typical agency experience to hire an applicant who did not possess the requisite certification. In addition, respondent determined that based on its affirmative action goals, the fact that white males had always occupied the position in question and resistance from the aforesaid division to affirmative action considerations in the past as well as the fact there was a qualified minority available for selection it would select Mr. Sheets for the position. Finally, Mr. Sheets got certified in a normal period of time, successfully completed probation and compared favorably to others hired in the Boiler Inspector 1 position in the performance of duties of duties.

Based on all of the above, the Commission finds that the decision to select Mr. Sheets rather than the appellant was not an abuse of discretion.

Relief

Respondent is ordered to offer appellant the next available Boiler Inspector 1 position or an equivalent position and to give him all rights, benefits and privileges to which he would have been entitled from May 26, 1985, the first date on which he could have begun employment with respondent, until the time he is offered the same or equivalent position by respondent or

until he indicates he is no longer interested in a position, or until the time he becomes unavailable to accept a position, whichever occurs first.

Interim earnings or amounts earnable with reasonable diligence shall reduce the back pay otherwise allowable. Any amounts received by appellant in unemployment benefits shall not reduce the back pay otherwise allowable, but shall be withheld from the person discriminated against and immediately paid to the unemployment reserve fund as set out in §111.39(4)(c), Stats.

The Commission has the authority to award reasonable attorney's fees to a prevailing complainant under the Fair Employment Act. Watkins v. LIRC, 117 Wis 2d 753, 765, 345 N.W. 2d 482 (1984); Ray v. UW-LaCrosse, 84-0073-PC-ER and Gray v. UW-LaCrosse, 84-0086-PC-ER (5/9/85). Any such request by appellant should be made by motion and include an itemized application along with all appropriate documentation and should be submitted to the Commission and to the opposing party no later than 30 days from the date of this order. The losing party then has 20 working days from the date of receipt to respond in writing to the motion.

In addition, prejudgment interest on back pay awards was specifically approved under the Fair Employment Act in Anderson v. Labor & Industry Review Commission, 111 Wis 2d 245, 260 (Supreme Court, 1983). There the court adopted a rate of seven percent per annum. However, in Wilmot Union High School District, Case IX, Decision No. 18820-B (December 12, 1983), the Wisconsin Employment Relations Commission concluded that the interest rate cited by the court in the Anderson case was based on §814.04(4), Stats., a statutory rate of interest which had subsequently been changed to 12% per annum. In s. Ind 88.18(4), Wis. Adm. Code, the Department of Industry, Labor & Human Relations has adopted a rule setting an annual rate of 12% simple

interest for computing interest payable in Fair Employment Act proceedings processed by the Equal Rights Division:

> (4) COMPUTATION OF INTEREST. Interest on any award made pursuant to this subchapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter. Interest shall begin to accrue on the last day of each calendar quarter, or portion thereof in the back pay period on the amount of back pay attributable to that calendar quarter, or portion thereof, after statutory set-offs or other amounts actually received during that calendar quarter, or portion thereof, and shall continue to accrue until the date of compliance with the back pay order.

The Commission applied a 12% annual interest rate for computing interest in Hollinger v. UW-Milwaukee, 84-0061-PC-ER (7/11/86) which involved a complaint of retaliation under Subch. III, Ch. 230, Stats., (the "whistleblower law").

Based on the foregoing, the Commission will also apply a 12% annual interest rate in the present case.

ORDER

Case No. 85-0081-PC

The decision of the respondent in not appointing the appellant to the position of Boiler Inspector 1 is rejected and this matter is remanded for action in accordance with this decision.

Case No. 85-0105-PC-ER

The initial determination of probable cause is affirmed and the matter is remanded for action in accordance with this decision.

Dated: _____, 1986 STATE PERSONNEL COMMISSION

_____
DENNIS P. McGILLIGAN, Chairperson

_____
DONALD R. MURPHY, Commissioner

_____
LAURIE R. McCALLUM, Commissioner

DPM:jgf
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