

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *
RAE JONES
Complainant,
v.
Secretary, DEPARTMENT OF
AGRICULTURE, TRADE AND
CONSUMER PROTECTION, and
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS,
Respondents.
Case Nos. 86-0067-PC-ER
86-0151-PC-ER
* * * * *

ORDER

I.

The Commission, after reviewing the proposed decision and order, the objections of the parties, and the record, and after consulting with the hearing examiner, adopts the proposed decisions and order with the following changes:

1. The following finding of fact is added:

On one of the several occasions during her employment at Market News that complainant was crying at work, Rick Tanger remarked that he didn't know how to handle a woman his mother's age crying.

2. The following paragraph is added to the discussion section;

Complainant alleges that Mr. Tanger's remark that he didn't know how to handle a woman his mother's age crying provides direct evidence of age discrimination. While this remark could be construed as direct evidence of age discrimination, it adds little weight to complainant's case. It was an isolated remark which had no relationship to any of the transactions in question.

Complainant objects to the fact that the proposed decision and order does not discuss her allegations that she was required to work overtime at Market News but was not paid for it. However, this was not one of the numerous

agreed to by the parties. In addition, there is no evidence in the record from which to conclude that any such action on the part of respondent was related to complainant's age. /

II.


Complainant alleges the examiner made certain off-the-record comments about a black person which were inconsistent with "an open, unbiased mind..." (complainant's letter dated March 16, 1989). Complainant was asked to elaborate concerning the specifics of this remark. This was provided in a letter dated April 15, 1989. In the Commission's view, it is not necessary to conduct an evidentiary hearing and make findings concerning this matter because, taking complainant's factual assertions at face value, they do not show racial bias, much less age bias (these cases involve complaints of discrimination on the bases of age and retaliation; complainant is not a racial minority).

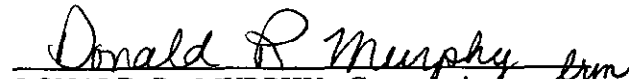
III.

Complainant requested information necessary to file perjury charges against two of the witnesses who testified at the hearing. The Commission has no jurisdiction in this area, and complainant should contact the appropriate District Attorney's office if she wishes to pursue this.

Dated: April 28, 1989

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson 1


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

LRM:lrn

Parties:

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1.

Chairperson McCallum, who served as hearing examiner, did not participate in Part II of this decision.

PERSONNEL COMMISSION

* * * * *

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* * * * *

**PROPOSED
DECISION
AND
ORDER**

Nature of the Case

These are appeals of Initial Determinations of No Probable Cause to believe that age discrimination and/or retaliation occurred as alleged. A hearing was held on June 28, 1988, and October 13 and 14, 1988, before Laurie R. McCallum, Commissioner. The briefing schedule was completed on January 19, 1989.

Findings of Fact

1. Complainant's date of birth is August 29, 1931.
2. Complainant began her employment with respondent on March 5, 1984, as a Clerical Assistant 2 (CA 2) in the Division of Trade and Consumer Protection (hereinafter: "Trade").
3. The duties and responsibilities of complainant's CA 2 position in Trade were accurately described in a position description dated January 26, 1984, as follows, in pertinent part:
 - 40% A. Record Control of State and City Weights and Measures Activity
 - A-1 Edit and Code inspection reports weekly and process to the computer.

A-2 Bill and receive money for testing performed at the Weights and Measures Laboratory. Maintain ledger for audit control.

A-3 Bill and receive money from contract cities and maintain ledger for audit control.

A-4 Edit and code private vehicle scale reports and process to computer.

A-5 Coordinate requests for printouts on inspection reports and vehicle scale reports from computer bank.

A-6 Maintain ledger and file on scale installation permits.

40% B. Provision of Clerical Support

20% C. Performance of Other Duties

C-1 Backup Hotline and division telephones. Referring or taking messages.....

C-2 Do other administrative duties when requested.

4. In March of 1985, complainant requested a reclassification of her position to the Program Assistant 1 (PA 1) level. The position description accompanying such request accurately described the duties and responsibilities of complainant's position and was identical to that dated January 26, 1984, except as follows:

- a. Worker activity A-5 was deleted.
- b. Worker activity B-5 was deleted.
- c. Worker activity C-1 was rephrased as follows:

C-1 Second backup for Hotline phones. Analyze telephone complaints and inquiries. Forward those requiring further action to appropriate staff member. Send out complaint questionnaires. Refer complaints or inquiries involving another agency to that agency by providing phone numbers and/or addresses.

5. Worker activity A-5 on the 1984 position description involved the entry of information on a data base terminal (CRT). In order to carry out this

task, only limited on-the-job training would be required in view of the fact that the CRT program involved was a relatively simple one and there was a manual for its use. When this worker activity was removed from complainant's position description, it was assigned to a limited term employee younger than complainant.

6. The change in worker activity C-1 represented a change from third backup on the Hotline to second backup and an increase in the percentage of time spent on such worker activity. Complainant alleges that her duties as second backup consumed 35% of her time. The nature of the responsibility did not change although, as complainant became more familiar with the Hotline, she made fewer referrals and handled more inquiries on her own.

7. The position standard for the Clerical Assistant series provides, as follows, in pertinent part:

Clerical Assistant 2

This is lead and/or advanced clerical work of moderate difficulty in completing a variety of assigned clerical tasks consistent with established policies and procedures. Positions allocated to this level have some freedom of selection or choice among learned things, which generally follow a well-defined pattern. However, positions at this level are distinguished from the Program Assistant 1 level by the limited degree of personal or procedural control over the nature and scope of the tasks which they perform. The variety and complexity of decisions made at this level are limited. Positions may function as lead workers, directing lower-level positions as well as performing a variety of the more complex clerical operations. Receptionist positions which serve in an informative capacity as the primary or sole public contact for a state facility(s) are allocated to this level. A variety of secretarial functions may be incidentally performed for the professional staff for a small percentage of the time. Work is performed under general supervision. The Program Assistant 1 position spends the majority of time providing support and assistance to supervisory, professional and administrative staff as described in the following classification definition.

Program Assistant 1

This is work of moderate difficulty providing program support assistance to supervisory, professional or administrative staff. Positions allocated to this level serve as the principal support staff within a specific defined program or a significant segment of a program. Positions at this level are distinguished from the Clerical Assistant 2 level by their identified accountability for the implementation and consequences of program activities over which they have decision-making control. Therefore, although the actual tasks performed at this level may in many respects be similar to those performed at the Clerical Assistant 2 level, the greater variety, scope and complexity of the problem-solving, the greater independence of action, and the greater degree of personal or procedural control over the program activities differentiates the Program Assistant functions. The degree of programmatic accountability and involvement is measured on the basis of the size and scope of the area impacted by the decision and the consequence of error in making such decisions, which increases with each successive level in the Program Assistant series. Work is performed under general supervision.

9. Respondent denied complainant's reclassification request in a letter dated January 17, 1986. The basis for the denial was respondent's conclusion that the clear majority of complainant's duties and responsibilities involved clerical work of moderate difficulty governed by well-established policies and procedures, and did not involve decision-making control over or accountability for the implementation and consequences of program activities as required for classification at the PA 1 level. Complainant did not file an appeal of such denial.

10. The first-line supervisor of complainant's position was Dolores Sagami. In a performance evaluation dated May 21, 1984, Ms. Sagami indicated that complainant's rate of learning, work quality, team work and cooperation, judgment, and following of instructions were questionable; and commented that complainant had a tendency not to listen to and heed advice given by her supervisor and by veteran staff members, and that complainant should shorten her conversations and cease giving out advice on Hotline call. In a performance evaluation dated July 22, 1985, Ms. Sagami commented that

complainant should strive to shorten calls on the Hotline. Also in such evaluation, complainant stated, as follows, in response to Ms. Sagami's comments: "Have requested training on computer several times, and am again requesting this training as it is used in keeping vehicle scale printouts up to date."

II. Effective March 16, 1986, complainant transferred to a CA 2 position in the Market News Section of respondent's Marketing Division. The primary duties and responsibilities of complainant's position were accurately described in a position description signed by Judy Heiser, complainant's first-line supervisor, on August 29, 1986, as follows:

75% Goal A - Collection and dissemination of market news information for livestock, grain and other agricultural commodities.

A1 - Collect information as requested via telephone , teletype and/or from field reports.

A2 - Disseminate information as requested via telephone, code-a-phone and microcomputer to the public, members of the industry and media contacts according to defined timetable.

A-3 - Type/print and proofread various agricultural reports and copy for distribution for other agriculture department personnel and media outlets.

A-4 - Through use of micro-computers, telecommunicate market news information to various media contacts, UW-Extension, etc.

A-5 - Update grain code-a-phone report twice daily.

A-6 - When necessary, provide back-up for market news reporters through the use of public information as established by program (data collection and handling.)

10% Goal B - Performance of clerical duties for Market News area.

5% Goal C - Dissemination of apple market news report.

5% Goal D - Preparation of tobacco market news reports.

5% Goal E - Performance of typing/clerical assistance to dairy market news area.

12. In performing the duties of such position, complainant worked closely with two Market News Reporters, Rick Tanger and Rick Whipp.

13. On or around August 11, 1986, complainant filed with Ms. Heiser a request for the reclassification of her position from CA 2 to PA 1 or PA 2. Mr. Tanger was asked to observe complainant's activities for several days to determine what tasks she was actually performing and how much time she was devoting to each task. Mr. Tanger completed this assignment and submitted his results to Ms. Heiser.

14. Respondent denied complainant's reclassification request in a letter dated October 16, 1986. The basis for the denial was respondent's conclusion that:

"There is no evidence that your position has changed in duties and responsibilities since April, 1986, when you signed your position description and began work in the Market News Section. Your report preparation consists of recording of public price and volume quotations from industry sources or electronic media on a form as reported by various marketing organizations. Your communications with the public and industry involve the giving or receiving of public market information that is provided to you by another source. You do not have the responsibility to modify, correct, challenge, edit or otherwise alter the information received or transmitted."

15. In her testimony, complainant indicated that she did not feel that her position with Market News should have been reclassified into the PA series. In a memo dated August 28, 1986, complainant indicated that the duties and responsibilities of her position seemed to be quite well represented in the August 29, 1986, position description except that she felt the position description should indicate the position's flex-time exemption and the fact that "over 90% of the work is done without supervision."

16. Neither Ms. Heiser, Mr. Tanger, nor Mr. Whipp felt that complainant's performance in her Market News position was entirely satisfactory. They felt that complainant on occasion failed to follow instructions and failed to complete her work in an accurate and timely manner, and that complainant spent a significant amount of her time and energy and theirs questioning their decisions and those of management. The following examples were cited in support of this:

a. Complainant made a computer error while accessing a main frame computer at the University of Wisconsin and, although instructed by Mr. Tanger to immediately stop working on the computer, failed to do so until he had told her to stop three times. Mr. Tanger had feared that the error itself or continuing after the error had been made could affect the integrity of another agency's files in the main frame.

b. When a problem arose regarding the transmission of information to the Wisconsin State Journal, Mr. Tanger instructed complainant not to handle the problem but she went ahead and did so anyway.

c. On one occasion, complainant was not at her work station and was not involved in the performance of the duties and responsibilities of her position when Mr. Whipp needed her to generate a report. Mr. Whipp located her and instructed her to return to her work station to generate the report but she failed to do so after his first request and he was forced to locate her a second time and issue a second instruction that she return to her work station and generate the report. Mr. Whipp became very angry at complainant in regard to this incident and shouted at her.

d. On one occasion, Ms. Heiser observed Mr. Tanger ask complainant to get a report out in 15 minutes but complainant ignored him and did not follow his instructions.

17. In a memo dated September 15, 1986, Mr. Tanger and Mr. Whipp notified their supervisor, Mike Lester, of an incident which occurred on September 12, 1986, in which complainant accused them of not doing their job properly, questioned their methods of reporting markets, questioned the reliability and validity of the Wisconsin Grain Market Report, stated that they were doing a disservice to the agricultural community by reporting the markets in the established manner, questioned their integrity and sincerity as Market News Reporters, and stated that she would do their jobs differently.

The memo went to state about complainant:

"The employees (sic) general attitude toward the program and staff appears to be negative in nature. The individual frequently challenges the established method in which the work assignments are to be carried out. When minor disagreements occur the employee often becomes uncooperative, uncompromising and argumentative to a point where the work activities of all staff, including USDA personnel, are disrupted. Due to a recent decision made by the marketing division concerning a reclassification request the employee views the market news reporters as adversaries.

The employees (sic) unwillingness to operate in accordance with the established procedures involving the micro-computer has jeopardized information in computers which have telecommunication links with market news.

18. Effective March 16, 1987, complainant was transferred out of her position in Market News.

19. During 1985, complainant applied for and was interviewed for a Program Assistant 3-Supervisor-Confidential position in respondent's Operations Division. The position's primary responsibilities were to provide

program support for the Division Administrator and for the Department's Personnel Director. The successful candidate was Nancy Haak who was appointed to the position effective August 4, 1985. Ms. Haak had several years of personnel-related experience. The hiring decision was based on respondent's opinion that Ms. Haak's qualifications and interview presentation were superior to those of the other candidates.

20. During 1985, complainant applied for and was interviewed for a Program Assistant-Supervisor-Confidential position in respondent's Animal Health Division. The successful candidate was Anne Wawrzyniak who was appointed to the position effective in September of 1985. Ms. Wawrzyniak had several years of experience working with respondent's Central Animal Health Laboratory programs and had lead work experience. The hiring decision was based on respondent's opinion that Ms. Wawrzyniak's qualifications and interview presentations were superior to those of the other candidates.

21. During 1985, complainant applied for and was interviewed for a Program Assistant 3 Supervisor-Confidential position in respondent's Division of Agricultural Resources Management. The primary responsibility of the position was to serve as office manager for the Division. The successful candidate for the position was Barbara Stalker who was appointed to the position effective December 8, 1985. The hiring decision was based on respondent's opinion that the successful candidate's ability to handle supervisory duties, her experience, her knowledge of the programs of the Division as a result of her employment with the Division since 1980, and her interview performance were superior to those of the other candidates.

22. During 1985, complainant applied for and was interviewed for a Program Assistant 1 position in respondent's Central Animal Health Laboratory. Complainant was not the successful candidate for this position which was filled effective November 24, 1985. The only information regarding this hiring decision in the record is the testimony of Erwin A. Sholts, respondent's personnel director, that he reviewed this hiring decision and was satisfied that the proper procedure was followed.

23. During 1985, complainant applied for and was interviewed for a Program Assistant 1 position in respondent's Division of Agricultural Resources Management. The primary duties and responsibilities of this position involved clerical support for the Farmland Preservation Section, particularly for those functions related to the application for and execution of farmland preservation agreements. This position required great accuracy and attention to detail. The successful candidate for the position was Brenda Brugger who was appointed effective November 11, 1985. Ms. Brugger had been employed by respondent since 1983 and had been a typist in the Farmland Preservation Section since May of 1985. The interview notes regarding Ms. Brugger included comments that she had excellent experience related to processing and screening contracts and dealing with complex details in that area, that she demonstrated good interpersonal relationship skills, that she was very competitive in all technical and skills areas except statutes and writing experience, that her answers were short but that she did answer questions with confidence, and that she demonstrated a strong motivation and interest in the position. The interview notes regarding complainant commented positively on her experience in dealing with contracts, land

descriptions, abstracts, etc., while working in a law office; that she answered questions with confidence but that she was a "talker" and did not seem like a person who likes to deal with details; that she appeared to be good at working with the public; that she was a strong competitor in technical aspects but that she was weaker in clerical and procedural aspects, e.g., she did not have any word processing experience; and that her motivation and interest in the job was not as strong as that of other candidates. The hiring decision was based on a comparison of those qualities summarized in the interview notes.

24. During late 1985 or early 1986, complainant applied for and was interviewed for a Program Assistant 1 position in the Division of Agricultural Resources Management. Major emphases of the duties and responsibilities of this position were auditing and the use of computers. The successful candidate for this position was Margie Sprecher who was appointed to the position effective February 26, 1986. The basis for the hiring decision was respondent's opinion that the successful candidate's experience, particularly that relating to auditing; her familiarity with the relevant program through her work with the Central Animal Health Laboratory; and her interview performance, particularly her enthusiasm for the position, were superior to those of the other candidates. The individual who made the effective hiring decision, Barbara Stalker, who functioned as an office manager, was not aware at the time the hiring decision was made that complainant had filed an equal rights complainant against respondent.

25. During late 1985 or early 1986, complainant applied for and was interviewed for a Program Assistant 1 position in the Marketing Division. This was a lead worker position which primarily involved program support for the

county and district fair program. The successful candidate was Kay Corwith who was appointed effective March 2, 1986. The hiring decision was based on respondent's opinion that Ms. Corwith's supervisory experience and interview performance were superior to those of the other candidates.

26. During 1986, complainant applied for and was interviewed for a Program Assistant 1 position in the Marketing Division. After the interviews of the candidates were conducted, an employee of respondent's named Jane Luxem requested transfer to this position and, under the terms of the applicable collective bargaining agreement, it was required that such a transfer be effected. She was appointed to the position effective March 3, 1986.

27. During 1986, complainant applied for and was interviewed for a Program Assistant 3 - Supervisor - Confidential position in respondent's Trade and Consumer Protection Division. Complainant was not the successful candidate. The successful candidate was appointed effective October 1986. This position functioned as the office manager for the division, supervising seven clerical positions in the central office. The hiring decision was based on respondent's opinion that the successful candidate's experience, including supervisory experience, and her interview performance, were superior to those of the other candidates.

28. During 1986, complainant applied for and was certified for a Program Assistant 2 position in the Division of Agricultural Resources Management. This position provided program support for the division administrator, the assistant division administrator, and a bureau director, and handled procurement for the division. The successful candidate for this position was Joanne Dibelius who was appointed to the position effective

October 12, 1986. The hiring decision was based on respondent's opinion that the successful candidate's experience, training, and interview performance were superior to complainant's. Barbara Stalker, who made the effective hiring decision, was not aware at the time the hiring decision was made that complainant had filed an equal rights complainant against respondent.

29. During 1986, complainant applied for and was interviewed for a Program Assistant 2 position in the Food Division. The successful candidate for this position was Patricia Hoppe who was appointed to the position effective October 13, 1986. The position required typing, knowledge of the programs of the Food Division, duties related to licensing, contact with patrons, record-keeping, and good organizational skills. The basis for the hiring decision was respondent's opinion that the successful candidate's experience, knowledge, content of answers, interest, confidence, and interview performance were superior to those of the other candidates.

30. The successful candidates for the position vacancies described in Findings of Fact 19 through 29, above, were either under the age of 40 or significantly younger than complainant at the time the relevant hiring decisions were made.

31. Prior to her employment with respondent, complainant had served as a school board member and community volunteer, had worked part-time for the Oneida County Credit Bureau putting out a weekly credit bulletin (1971-72), had worked as a legal secretary and office manager for a small law office (1958-64), and had worked as a secretary for the personnel department of a paper company (1949-53).

32. During the period 1984-1986, there were 27 employees promoted by respondent from among 129 certified candidates (including several, like complainant, who were certified multiple times) as follows:

<u>AGE</u>	<u>NOT SELECTED</u>	<u>SELECTED</u>	<u>TOTAL</u>
39 & under	67	20	87
40 - 44	13	5	18
45 - 49	10	1	11
50 - 54	6	1	7
55 +	6	0	6

33. The Mann-Whitney-Wilcoxon ranked sum test was applied to this data. This statistical test involves ascertaining the sum of the average ranks (in terms of age) of the promoted employees and comparing this to the results that could be expected if promotions were made at random from the eligible employees.

34. When the Mann-Whitney-Wilcoxon ranked sum test was applied to the data in Finding of Fact 32, above, the probability was approximately 13% that a rank sum as low as that obtained would occur by chance.

35. This test was applied to a second set of data obtained by factoring out the candidates categorized as "not interested" or "declined," on the theory that these candidates had not been turned down by management, but had in effect "self-selected" out of the process. In relation to this second set of data, the probability was approximately 4% that a rank sum as low as that obtained would occur by chance.

36. This test was applied to a third set of data obtained by factoring out the candidates categorized as "not interested" or "declined" as well as the complainant for the purpose of ascertaining if age discrimination had occurred independent of complainant. In relation to this set of data, the probability was approximately 17% that a rank sum as low as that obtained would occur by chance.

37. The training provision in the applicable collective bargaining agreement which would be relevant to the subject requests for computer training made by complainant states:

When an employee's attendance at job related educational activities is directed by the Employer such attendance, including travel time, will be without loss of pay and at the Employer's expense. Job related educational activities are those activities which aid the employee to acquire, improve or update a skill which is needed in her/his current position and necessary to acceptable job performance.

38. While employed at Trade, complainant was given training on micro-computers. There were no micro-computers in the unit in which she was employed at the time. Toward the end of complainant's tenure at Trade, Ms. Sagami spent some time training complainant on the data base terminal (CRT) located in complainant's unit. While employed in Market News, complainant was given training on computerized telecommunications equipment utilized in her unit. There was no data base terminal (CRT) in the unit at the time.

39. On May 5, 1986, complainant filed a charge of discrimination with the Commission alleging that respondent had discriminated against her on the basis of age in relation to the hiring decisions described in Findings of Fact 19 through 26, above. On November 10, 1986, complainant filed an amendment to such charge alleging that respondent had discriminated against her on the

basis of age in relation to the denial of the request for reclassification of her position and the denial of her requests for computer training while she was employed at Trade. On December 9, 1986, complainant filed a second charge of discrimination with the Commission alleging that respondent had discriminated against her on the basis of age and Fair Employment Act retaliation in regard to the hiring decisions described in Findings of Fact 27 through 29, above, the denial of the request for reclassification of her Market News position, and critical memos about her performance, particularly the September 15, 1986, memo described in Finding of Fact 17, above.

40. During the course of the hearing, complainant offered for receipt into the record a document marked for identification purposes as Complainant's Exhibit G. The document is a typewritten summary of complainant's version of certain events which occurred on January 21, 1987; January 27, 1987; and January 2, 1987; and which complainant prepared from handwritten notes she had made at the time the events occurred. At the hearing, respondent objected to the receipt of such document into the record. Complainant agreed to locate her original handwritten notes and substitute those for the typewritten document. Complainant has been unable to locate such handwritten notes. The hearing examiner reserved ruling on the motion.

Conclusions of Law

1. This matter is properly before the Commission pursuant to §§230.45(1)(b), and Ill.33(2), Stats.,
2. Complainant has the burden to show that there is probable cause to believe that respondent discriminated against her on the basis of her age

and/or in retaliation for her Fair Employment Activities as she alleged in her complaints.

3. Complainant has failed to sustain her burden.

4. There is no probable cause to believe that respondent discriminated against complainant as alleged.

Decision

Procedural Issue

Respondent's objection to the receipt of Exhibit G is based upon the argument that the typewritten transcription of complainant's handwritten notes is not the best evidence of what complainant observed and heard in relation to the events described by complainant in the subject document. In addition, respondent cites complainant's failure to produce her handwritten notes as she had agreed during the hearing. More significant, however, is the fact that the document relates to events which allegedly occurred in January and February of 1987, i.e., several months after complainant had filed the second of her complaints. As a result, the Commission rules that the document marked for identification purposes as Exhibit G is not relevant to the matters at issue here because the events reported therein did not allegedly occur until after the subject complaints were filed with the Commission, i.e., after December 9, 1986.

Denial of Promotions

The issue in these cases is whether probable cause exists to believe that discrimination occurred as alleged. At this stage, the evidentiary standard by which the complaint is evaluated is less demanding than at a hearing on the merits. §PC 1.02(16), Wis. Adm. Code. In cases such as these, the Commission

normally uses the method of analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973). Under this method of analysis, it first must be determined whether there is a prima facie case, i.e., circumstances which, if unexplained, are inferential of discrimination. If there is, the employers' burden is to articulate a legitimate, non-discriminatory rationale for its position, which complainant then can attempt to establish is a pretext for unlawful discrimination.

In an age discrimination case involving a non-hire, a prima facie case results from a showing that the complainant is a member of a protected class, that she applied for and was qualified for a position for which the employer was seeking applicants, and that, despite her qualifications, the employer hired a person either not in the protected category or significantly younger than complainant.

In the instant cases, complainant has established a prima facie case as to each of the hiring transactions described in Findings of Fact 19 through 29, above. As a result of her age, complainant was in a protected category at the time each of the subject hiring decisions was made. Complainant applied for each of the subject vacancies. In view of the fact that complainant was interviewed for each of these vacant positions, it must be presumed that she was qualified for each of these positions. This presumption is based on the fact that, under the merit recruitment and selection system for filling positions in state service, a candidate may be interviewed for a position vacancy only if that candidate is certified or certifiable for such position, and a candidate who is certified or certifiable for a position is deemed to be qualified for such position.

Respondent has specifically offered a legitimate, nondiscriminatory reason for each of the subject hiring decisions except that described in Finding of Fact 22. These reasons are specified in the respective findings and, in view of the fact that each is related to the qualifications and interview performance of the candidates, each is clearly legitimate and non-discriminatory on its face. In regard to Finding of Fact 22, the record indicates that Mr. Sholts, respondent's Personnel Director, was of the opinion that the subject hiring decision accorded with all the requirements for a proper hire. A requirement for any proper hire would be that the candidate deemed best qualified for the subject position by the individual(s) with effective hiring authority was selected. Although it would have been far preferable for complainant and respondent to have made a record regarding the specifics of this hire, the Commission cannot conclude, in view of Ms. Sholts' testimony, that respondent failed to offer a legitimate, non-discriminatory reason for respondent's actions in regard to such hire.

The burden then shifts to complainant to show that the reasons offered by respondent were a pretext for discrimination. In regard to the hiring decisions described in Findings of Fact 19 through 22, 24, 25, and 26 through 29, above, the reasons offered by respondent for the hiring decisions related to the successful candidate's superior experience, either in a program area or as a supervisor or lead worker; knowledge of a program area or a technical skill; interest and motivation; and/or performance on the interview. Complainant failed to show in regard to these hiring decisions that her experience, knowledge, interest and motivation, or interview performance were actually superior to those of the successful candidates, that the hiring criteria were not

properly related to the duties and responsibilities of the subject position, or that the criteria were not properly applied by the individual(s) with effective hiring authority. Complainant has clearly failed to demonstrate pretext in regard to these hiring transactions.

In regard to the hiring decision described in Finding of Fact 23, above, complainant argues that she was better qualified for the position than the successful candidate. The primary duties and responsibilities of this position involved clerical support for the Farmland Preservation Section, particularly for those functions related to the application for and execution of farmland preservation agreements. The record shows that Brenda Brugger, the successful candidate, had more recent experience working with contracts than complainant, and that she had greater familiarity than complainant with the program area in view of her then current employment in the Farmland Preservation Section. The record also indicates that the interviewers felt that Ms. Brugger was stronger in the clerical and procedural area than complainant but weaker in the technical and skills area, that both were regarded as possessing good interpersonal skills, but that Ms. Brugger's interest and motivation and interview performance were superior to complainant's. Complainant has failed to show that these criteria were not proper in view of the duties and responsibilities of the position, that these criteria were not uniformly applied by the interviewers or the individual(s) with effective hiring authority, or that the hiring decision was not based on the uniform application of these criteria to the information available to the interviewers or individual(s) with effective hiring authority. The interview notes accurately reflect complainant's work experience and skills and those of

Ms. Brugger and there is no question that Ms. Brugger had more recent contract experience and greater familiarity with the program than complainant and that this experience and skill is relevant to the duties and responsibilities of this position. The assessment of complainant's interview performance is consistent with that of other interviewers for other positions for which complainant has been a candidate and with complainant's own testimony that she tends to be a "talker." It is apparent from the interview notes that the interviewers were aware of complainant's relevant experience and skills and took them into consideration but that, on balance, they considered Ms. Brugger's to be superior. This is certainly not inconsistent with the information which was available to them at the time and with the requirements of the position. Complainant has failed to demonstrate pretext in this regard.

In regard to the hiring decision described in Finding of Fact 27, above, complainant has offered no evidence in the record to show that respondent's conclusion that the terms of the applicable collective bargaining agreement required respondent to transfer Ms. Luxem into the position upon her request was incorrect or subject to a different interpretation. In the absence of such evidence, the Commission concludes that complainant has failed to demonstrate pretext in this regard.

Finally, complainant has attempted to demonstrate pretext through the use of statistics. The raw data upon which she relied is specified in Finding of Fact 32, above, and the results of the application of the Mann-Whitney-Wilcoxon ranked sum test to such data in Findings of Fact 33, 34, and 35, above.

With respect to each set of data, the rank sum was below the number that could be expected from a completely random process. Therefore, this data was analyzed to determine the probability that the differentials would occur by chance. The usual rule of thumb for ruling out chance in a statistical comparison is a probability of 5% or less.

As to the first set of data, which included all candidates, the probability was approximately 13% that a rank sum as low as the result found here would occur by chance. Since this is above 5%, it would not be considered significant.

As to the second set of data, which deleted the "not interested" and "declines," but which included complainant, the probability was approximately 4% that a rank sum as low as the result found here would occur by chance. Since this is below 5%, it could be considered significant.

As to the third set of data, which excluded the "not interested," "declined," and complainant, the probability was approximately 17% that a rank sum as low as the one found here would occur by chance. Since this is above 5%, it would not be considered significant.

The findings as to the second and third sets of data may suggest that characteristics of the complainant other than age may be influencing her non-selection, as the significant difference does not hold up when complainant is removed from the data set.

In conclusion, while analysis of the second data set provides some statistical evidence of age discrimination, the overall statistical analysis presents a mixed picture at best. When the entire circumstances are considered, there is little to suggest pretext.

Complainant began employment with respondent in 1984 as a CA 2, and began applying for higher level positions the following year. At that time, she was 53 years old. The people against whom she was competing were substantially younger, but they tended to have had more extensive experience with respondent.

Most of the hiring decisions for these positions follow a recurrent pattern--respondent tended to appoint candidates who had experience with respondent, often within the unit and program in which the vacancy was located and often of a supervisory or lead work nature. It does not appear from the record that complainant was being passed over on the basis of marginal or essentially subjective distinctions between the candidates. The successful candidates, although younger than complainant, tended to have more experience with respondent than complainant and experience as a supervisor or lead worker which complainant did not have. Complainant began employment in the clerical ranks with respondent at a later age than most of her co-workers, and had less seniority within the agency when competing with them for promotion. Therefore, the statistical picture is consistent with the underlying personnel practice at respondent, and provides little evidence of pretext.

Reclassification Denials

With respect to the reclassification denials, it will be presumed that there are prima facie cases as to age. Respondent has articulated legitimate, non-discriminatory reasons for the denials which are summarized in Findings of Fact 9 and 14, above. The burden then shifts to complainant to demonstrate pretext.

In regard to the denial of the request for reclassification of complainant's position at Trade, the duties and responsibilities of complainant's position appear to be well-described by the language of the position standard for the CA 2 classification. The duties and responsibilities of complainant's position do not appear to meet the requirements for classification at the PA 1 level, i.e., they do not appear to involve the type of independent decision-making or accountability for a program function required for classification as a PA 1. Complainant's basis for arguing that such position should be classified as a PA 1 is based on her opinion that the Hotline backup duty was a PA 1 level duty and consumed 35% of the position's time. However, in order to support classification at the PA 1 level, such a higher-level duty would have to consume a majority of the position's time so, even if complainant's argument on this issue were adopted, the Commission would still not be able to conclude that the subject position should be classified at the higher level. Complainant has failed to demonstrate pretext in this regard.

In regard to the denial of the request for reclassification of complainant's Market News position, the duties and responsibilities of complainant's position clearly do not involve the type of independent decision-making and accountability for program functions required for classification as a PA 1. Complainant's position was involved in the reporting and transmission of information already compiled by someone else, in a manner and using a format prescribed by someone else. Complainant offers no basis for her argument that her request was wrongly denied and even acknowledges that the position did not merit classification at the PA 1 level. Complainant has failed to demonstrate pretext in this regard.

Training Requests

It will be presumed that complainant has established a prima facie case as to age discrimination in regard to her allegations that she was improperly denied requested training while employed at Trade. Respondent has offered as the reason for such denial the following: Complainant was offered and did receive micro-computer training while employed at Trade even though there were no micro-computers in complainant's unit at the time; the training on the data base terminal only required limited on-the-job training by complainant's supervisor which was provided to complainant after she had learned other skills and when her supervisor had the time to provide it; and the applicable collective bargaining agreement provision did not require respondent to provide training to complainant which respondent did not regard as necessary for the performance of the duties and responsibilities of complainant's position. The burden then shifts to complainant to demonstrate pretext. Complainant's only argument in this regard is that a younger employee was assigned the task from complainant's position description which required use of the data base terminal. However, there is no evidence in the record to indicate whether this employee received the training on the data base terminal after the duty had been assigned to her which complainant had been denied. In the absence of such evidence, it is not possible to draw a conclusion of pretext in this regard. Complainant's position in this regard is especially difficult to sustain given the fact that respondent provided her with computer training of a sort not required for her position and more easily transferrable to other positions, i.e., the requested data base terminal training

was more job-specific than the micro-computer training provided to complainant. Complainant has failed to demonstrate pretext in this regard.

Retaliation-Denial of Promotions

Complainant has alleged retaliation in regard to those hiring decisions described in Findings of Fact 27 through 29, above. The same analysis would apply as that already discussed in regard to complainant's allegations of age discrimination in relation to these hiring decisions. In addition, it should be noted in this regard that there is no evidence in the record from which it is possible to infer that the individual(s) who had the effective authority to make these hiring decisions knew or had any reason to know that complainant had filed a discrimination complaint against respondent.

Retaliation-Denial of Reclassification Requests

Complainant has further alleged retaliation in regard to the denial of her request for reclassification of her Market News position. The same analysis would apply as that discussed above in relation to the allegations of age discrimination in regard to such denial. It is important to note again in this regard that complainant acknowledged in the hearing record that, in her opinion, her Market News position did not merit classification at the PA 1 level.

Retaliation-Critical Memos Regarding Complainant's Work Performance

It will be presumed that complainant has established a prima facie case of retaliation in regard to the September 15, 1986, memo described in Findings of Fact 17, above (the only memo cited in the record in support of this allegation). Respondent has offered as a reason for such memo the testimony of two of complainant's co-workers regarding her work performance, the testimony of complainant's supervisor at Market News, and the testimony of

complainant's supervisor at Trade. Such testimony supports respondent's argument in this regard that complainant had a history of problems following directions and accepting supervision and supports the representations regarding complainant's work performance specified in the subject memo. The burden then shifts to complainant to demonstrate pretext in this regard. Although complainant offered the testimony of other co-workers who indicated that they were unaware of the problems cited in the memo, these co-workers had no reason to know of the problems cited in the memo or the problems complainant allegedly had taking directions or accepting supervision, i.e., they did not supervise complainant and were not privy to information relating to complainant's response to directions or ability to accept supervision. The fact that problems such as those cited in the memo were ongoing and had been observed and reported by a previous supervisor in a separate division and by more than one co-worker and by a supervisor in Market News militate against a conclusion that the reasons offered by respondent were pretextual.

Order

These complaints are dismissed.

Dated: _____, 1989

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

LRM:lrn

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