

4/17/89

STATE OF WISCONSIN

PERSONNEL COMMISSION

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ALI A. WALI,

Appellant/Complainant

v.

PUBLIC SERVICE COMMISSION,

Respondent.

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Case Nos. 87-0081-PC  
87-0080-PC-ER

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DECISION  
AND  
ORDER

Nature of the Case

This is a complaint of discrimination on the basis of national origin and an appeal of a decision by respondent not to hire appellant/complainant for a Program and Planning Analyst position in 1987. A hearing was held on September 1 and 2, 1988, before Laurie R. McCallum, Commissioner, and the briefing schedule was completed on February 20, 1989.

Findings of Fact

1. As a result of the promotion of the position incumbent, a Program and Planning Analyst (PPA) position in respondent's Bureau of Environmental Analysis, Division of Systems Planning, Environmental Review and Consumer Affairs (SPERCA), was vacated in early 1987. The vacancy was announced at the PPA 1, 2, or 3 level in March of 1987 as a service-wide transfer. The announcement included the following, in pertinent part:

JOB DESCRIPTION: This position is responsible for conducting environmental analyses of proposed utility actions; evaluation of environmental aspects of utilities' Advance Plan submittals and preparation of the staff assessment; preparation and review of environmental impact statements (EISs) and other environmental documents to assure agency compliance with the

Wisconsin Environmental Policy Act; and preparation and presentation of expert written and oral testimony at public hearings.

**KNOWLEDGE REQUIRED:** Considerable knowledge of environmental sciences; considerable knowledge of land use and environmental law; working knowledge of energy issues; considerable knowledge of current techniques in completing complex and comprehensive agency planning program; considerable knowledge of biological sciences; and ability to communicate effectively both in writing and verbally in a clear, concise, and correct manner.

2. It was more common for respondent to announce a vacancy at a single classification level than at more than one classification level. It was done in this instance to permit the respondent to tailor the classification level to the level of knowledge and experience of the candidates.

3. Respondent publishes and disseminates an internal newsletter called Update. Between July of 1986 and April of 1988, Update contained 14 transfer announcements for professional positions at the Public Service Commission. All of these provided for agency-wide transfer, not service-wide transfer; and all announced the positions at a single classification level. The record does not indicate how transfer opportunities are selected for inclusion in the Update. The record contains Exhibit 14 which summarizes respondent's hiring transactions from early 1983 through early 1988. It is reasonable to conclude from Exhibit 14 that, between approximately July of 1986 and April of 1988, respondent filled many more than 14 vacancies in professional positions through transfer or voluntary demotion, i.e., announced many more than 14 vacancies as transfer opportunities.

4. Upon seeing the announcement described in Finding 2, above, appellant/complainant inquired of Michael John Jaeger, Director of the Bureau of Environmental Analysis, and David Schoengold, Director of the Bureau of Systems Analysis, whether he would be eligible to compete for the

subject position. There is no other evidence in the record upon which to base a finding that Mr. Jaeger or Mr. Schoengold were actually aware of appellant/complainant's interest in the subject position prior to the time of this incident.

5. Respondent announced the subject position as a servicewide transfer instead of an agency-wide transfer for the following reasons:

a. It would permit the vacancy to be filled in less time than if it were filled on an open competition basis;

b. There were other agencies, e.g., the Department of Natural Resources and the Department of Agriculture, Trade, and Consumer Protection, which had positions performing similar duties and responsibilities to those of the subject position; and

c. Limiting competition to the Public Service Commission (PSC) would result in too limited a pool of candidates since there are a relatively small number of positions at the PSC which perform similar duties and responsibilities to those of the subject position.

6. Mr. Jaeger was the previous incumbent of the subject position and had been classified at the PPA 4 level at the time that he vacated the position.

7. Respondent received 11 applications for the subject vacancy. Of these, 2 were judged not to meet minimal qualifications for the position. The other 9 were invited to interview and 2 declined. The remaining 7, including appellant/complainant, were interviewed by Mr. Jaeger and Mr. Schoengold. Appellant/complainant was the only candidate of those interviewed who was employed by the PSC at the time of the interview. The interview questions were prepared prior to the interviews and reviewed and approved by Mr. Jaeger; Mr. Schoengold; Jerry Mendl, Administrator of the Division of SPERCA; and Al Spears of respondent's personnel unit.

8. The interview questions were as follows:

1. Why are you interested in this position?
2. Imagine a range of jobs with purely technical responsibilities defining one end and purely policy responsibilities defining the other. Where on that scale would your preferred type of job be?
3. How would you define your own work style? Do you like close supervision or to work independently? Group and team projects or work alone? One project at a time or concurrent multiple projects?
4. A utility is planning to route a high voltage transmission line to connect point A and B as shown on the accompanying map. The utility selected the route shown to minimize cost. It is your job to identify and evaluate routes to ensure that the environment is being adequately protected. Take 2 minutes to review the map. What opportunities for, and barriers to, routing would you include in your evaluation of this proposed project?
5. Describe any education or work experiences that would help you evaluate environmental impacts.
6. Part of the responsibilities of the job involve the implementation of the "Wisconsin Environmental Policy Act. In what ways have you been involved in, or are you familiar with, the environmental impact statement process?
7. Describe the nature, extent and purpose of your personal contacts within the scope of your past work experiences. Specify media, governmental agency, customer/public, interdepartmental/interagency, legislative and other appropriate contacts you have had. Indicate the nature (cooperative, adversarial, or informational) and frequency of those contacts.
8. A good deal of our work involves communicating information and evaluations to other people, both within and outside of the agency. Discuss the nature and extent of your experience relative to significant written and oral presentations. How would you rate your skills in this area?
9. Describe any experience you may have in preparing, presenting and defending testimony in hearings.
10. Describe what training and experience you have had in the manipulation and analysis of quantitative information.
11. Is there additional information we haven't discussed that we should consider in determining why we should hire you for this position?

9. Mr. Jaeger and Mr. Schoengold were of the opinion prior to conducting the interviews that question 4 was the most important question, questions 5, 6, 7, 8, and 10 were of medium importance, and the remainder of lesser importance.

10. After the interviews were completed, Mr. Jaeger and Mr. Schoengold ranked the candidates independently and then compared rankings. They agreed that Nina Berkani was clearly the number one candidate and appellant/complainant does not challenge this assessment. Mr. Jaeger and Mr. Schoengold also agreed that Julie Worel should be ranked number two, Paul Rahn as number 3, and appellant/complainant as number 4.

11. In a memo dated April 23, 1987, Mr. Jaeger summarized the bases for the rankings:

Nina Berkani--Appeared to possess the most relevant knowledge and experience in evaluating utility projects for land use and other environmental impacts. She is currently the Director of the Environmental Evaluation Section of DATCP, where she has produced about 60 Agriculture Impact Statements. Some of these have been on utility electric and natural gas facilities and have been incorporated into PSC and DNR environmental reviews. She was the only candidate with any direct, significant experience with the WEPA process. She has worked with utilities and with the sections of other state agencies relevant to the vacancy's responsibilities. Her graduate degree in Ag. Economics gives her a quantitative analysis, a valuable background asset. Her overall experience and knowledge make her a valid candidate at the PPA 3 level.

The candidates ranked 2-4 all have significantly less experience and knowledge with evaluating utility or related construction projects. None has had any experience with the WEPA process. All three, however, gave good responses to the hypothetical question, showing a basic understanding of project evaluation. They would be valid candidates at the PPA 2 level if the top candidate did not accept the position.

2. Julie Worel--Provided an excellent answer to the hypothetical situation. Is articulate and showed excellent reasoning skills. Has had some education in environmental sciences and land use planning.

3. Paul Rahn--Gave a good answer to the hypothetical situation. He has an educational background in planning and some background in general environmental sciences.

4. Ali Wali--Gave a good answer to the hypothetical situation. Has had a limited educational background in basic biological sciences. He has a basic working knowledge of the PSC's activities.

12. Ms. Worel's resume, which was reviewed by the interviewers, indicated that she had a B.S. degree in Geology and Geophysics and had completed undergraduate course work in botany, animal biology, geology, global physical environments, climatic environments, urban planning, geography, mathematics, chemistry, qualitative analysis, physics, and macroeconomics. Ms. Worel's resume also indicated that she was currently employed as a policy analyst for the Department of Transportation, had been employed as an energy advisor for Madison Gas and Electric Company responsible for analyzing the energy efficiency of residential structures, conducting detailed on-site inspections, collecting and computer-analyzing data, interpreting results for homeowners or renters, and serving as a company representative at public presentations; as a student loan administrative assistant for the Higher Educational Aids Board; as a tour guide for a geology museum, preparing tours responsive to the interests of individual groups and interpreting scientific and historical information for groups ranging from the general public to scientific specialists; and as a project specialist for the Wisconsin Geological and Natural History Survey organizing and maintaining well log information, investigating well drilling, analyzing geological samples, and handling inquiries and requests for groundwater and strata information from private geological consultants.

13. Mr. Jaeger's interview notes indicate that he felt that Ms. Worel used "excellent reasoning" in the answer she gave to question 4. Mr. Jaeger observed that Ms. Worel mentioned in her answer several potential avenues of

inquiry that he had not thought of when he had formulated a sample answer to the question. Mr. Jaeger's interview notes indicate that Ms. Worel discussed, in response to question #4, the following barriers: wetlands--creek, agricultural land impacts, state park, forests, and that elevation of the land, scale of the map, and electromagnetic fields may influence; and the following opportunities: highway, railroad, public access, right of way sharing already disturbed, crossing stream--already disturbed, open grazing areas--less disturbance than wetlands, land use boundaries, shielding.

14. Appellant/complainant's resume, which was reviewed by the interviewers, indicated that he had a B.A. degree in Economics, a M.S. degree in Agricultural Economics, and had completed some course work in a Ph. D. program in Agricultural Economics; that he had completed graduate and undergraduate courses in economics, mathematics, quantitative models and application, agricultural markets and public policy, economic analysis of public policy, chemistry, botany, zoology, plant physiology, organic chemistry, linear programming, and finance; and that his Master's thesis was entitled "Estimates of the Potential Market Share of Nuclear-Generated Electricity in the Four Corners States (Arizona, Colorado, New Mexico, and Utah). His resume also indicated that he had been employed as a university research aide responsible for forecasting the number of livestock and major crop production in New York State; as a research specialist for the Afghanistan Ministry of Planning responsible for assisting in the application of a "regional resource allocation" (linear programming) model to the Afghan Agricultural Sector, and for assisting in the formulation of a "regional plan" embracing the institutional aspects of agricultural development including extension services; and as a university research assistant responsible for estimation and forecast of demand for electricity, the potential market share of

nuclear-generated electricity, and of consumers' electricity cost savings resulting from nuclear relative to coal-generated electricity.

15. The interviewers were aware that appellant/complainant was currently employed by respondent in a part-time project position responsible for analyzing the technical feasibility and costs of reducing nitrogen oxides emissions from coal-fired power plants operated by the five largest Wisconsin electric utilities. This position primarily involves complex quantitative analysis and modeling using computers; and no public contact responsibilities.

16. Mr. Jaeger's interview notes relating to appellant/complainant's interview indicate, with regard to the answer to questions #4, that appellant/complainant discussed the following as barriers: farmland impacts, swamp impacts forest impacts, and state park; and the following as opportunities: boundaries between land uses and road-railroad. Mr. Jaeger indicated in his notes that this was a "good" answer.

17. Mr. Schoengold participated in the 1986 decision to hire appellant/complainant for his part-time project position relating to the nitrous oxides project. Appellant/complainant was Mr. Schoengold's second choice and he recommended the hire of his first choice. Respondent did not accept Mr. Schoengold's recommendation in this regard because it was felt that, even though the other candidate had technical qualifications more closely related to the specific needs of the subject project, appellant/complainant had a more varied background which could be applicable to other projects or duties at the PSC after the subject project was completed; and that appellant/complainant was a member of a minority group and hiring him for the position would be consistent with respondent's affirmative action plan and policies. In assessing appellant/complainant's candidacy for this position, Mr. Schoengold had stated that



appellant/complainant "had no special weaknesses." Lynn Murawski, respondent's personnel director, had stated that complainant had "a strong academic background."

18. At the time the subject hiring decision was made, respondent did not have an affirmative action plan in effect as a result of a directive from the Department of Employment Relations. However, respondent continued to have an affirmative action policy in effect which focused, in the absence of a plan, on equal opportunity and absence of discrimination, and which relied upon the previous affirmative action plan to provide a general framework for reviewing hiring recommendations.

19. At the time the subject hiring decision was made, respondent employed 10 individuals in positions classified in the PPA series and, of these 10, 4 are white females, 4 are white males, and 2 are minority males.

20. The recommendation to hire Ms. Worel for the subject position was reviewed by Joyce Narveson, respondent's affirmative action officer, who concluded that hiring a white female for the subject position would not be inconsistent with respondent's affirmative action policy and, in a general sense, that there did not appear to be an underutilization of minorities or an overutilization of females in the PPA series.

21. Respondent had an Upward Mobility Program in effect at the time the subject hiring decision was made. This program focused on making training opportunities available to PSC staff so that they would be able to compete for higher level positions and was primarily limited to clerical employees.

22. The following PSC hiring statistics were made a part of the record:

Year	White Apps*	White Apps Hired	Non-White Apps	Non-White Apps Hired
1983	91	23	12	2
1984	115	19	44	7
1986	153	32	36	4
1987	86	19	22	3

\*("Apps" represents certified applicants for a position)

23. Complainant's expert testified that his analysis of such statistics indicated that 21 % of white applicants were hired and 11% of non-white applicants were hired by the PSC. He performed a Chi Square analysis of these results and found that there was a 5% chance that such results could be due to chance. He considered that this indicated a statistically significant result and concluded that discrimination on the basis of color had been practiced.

24. Appellant/Complainant is a native of Afghanistan. Mr. Jaeger and Mr. Schoengold were aware of appellant/complainant's national origin at the time they interviewed him for the subject position.

25. Prior to the subject hire, appellant/complainant had applied for permanent, full-time positions at the PSC.

26. Respondent offered the subject position to Ms. Berkani who declined it. Respondent then offered the subject position to Ms. Worel who accepted it.

27. Appellant/complainant filed a timely appeal and equal rights complaint relating to the subject hiring decision.

#### Conclusions of Law

1. These matters are properly before the Commission pursuant to §§230.44(1)(d) and 230.45(1)(b), Stats.

2. Appellant has the burden to prove that the decision by respondent not to hire him for the subject position was illegal or an abuse of discretion.

3. Appellant has failed to sustain this burden.

4. The decision by respondent not to hire appellant for the subject position was not illegal or an abuse of discretion.

5. Complainant has the burden to prove that respondent discriminated against him on the basis of national origin in its decision not to hire him for the subject position.

6. Complainant has failed to sustain this burden.

7. Respondent did not discriminate against complainant on the basis of his national origin in its decision not to hire him for the subject position.

#### Decision

In a case of this nature, the Commission generally uses the method of analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 FEP Cases 965 (1973), and its progeny, to determine the merits of the complainant's charge. In this regard, the Commission notes that, under the Wisconsin Fair Employment Act, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination.

A prima facie case is established in a case such as the instant one by a showing that the complainant is a member of a protected class; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that the employer continued to seek applicants, or hired another person not in the same protected category.

There does not appear to be any dispute in the instant case that complainant has established a prima facie case: he is a member of a protected

class on the basis of his national origin since he is a native of Afghanistan; Mr. Jaeger and Mr. Schoengold were aware of complainant's national origin at the time of the interviews for the subject position; respondent acknowledged in Mr. Jaeger's April 23, 1987, memo (See Finding of Fact 11, above) that complainant was qualified for the subject position; complainant was not hired for the subject position; and a candidate in a different protected class was hired for the subject position.

The burden then shifts to respondent to articulate legitimate, non-discriminatory reasons for its actions. Respondent has offered in this regard that, overall, complainant's and Ms. Worel's qualifications were comparable except that Ms. Worel's response to interview question #4 was superior to complainant's. On their face, these reasons are both legitimate and non-discriminatory.

The burden then shifts to complainant to demonstrate that these reasons are a pretext for discrimination.

Complainant argues in this regard that pretext is demonstrated by the fact that the subject position was not announced in the same manner as other similar positions, i.e., it was announced for a range of classifications, not a single classification; and it was announced for service-wide, as opposed to agency-wide, transfer.

In regard to the announcement of the position for a range of classifications, as opposed to a single classification, the record indicates that it is more common for a position to be announced at a single level, but it is not required to be. Complainant offers in this regard the fact that he reviewed transfer opportunities listed in an unofficial PSC publication (See Finding of Fact 3, above) over a period of almost two years and, of 14 such listings for professional positions, none announced a position at more than one

classification level. This fact has limited significance in regard to the issue under consideration here because the record also indicates that many more than 14 professional positions were filled through transfer at the PSC over this period of time; does not indicate how transfer opportunities are selected for inclusion in the publication; and does not describe any of such opportunities, i.e., does not permit a comparison of any of such transfer opportunities to the one under consideration here. In general, the Commission does not find complainant's arguments in regard to this point to be convincing. If respondent had wanted to exclude complainant from consideration for the subject position, it would have announced the subject position at the PPA 4 level, the classification of the former incumbent. Complainant would not have been eligible for transfer into a PPA 4 position since he was classified at the PPA 3 level and had never occupied a position with a higher classification. If respondent had wanted to discourage complainant from applying for the subject position, it would have announced the subject position at the PPA 1 or PPA 2 level only since complainant was then at the PPA 3 level. In addition, in evaluating a complaint filed under Wisconsin's Fair Employment Act, it is difficult to find fault with an effort to enlarge the pool of available candidates. Efforts to limit a pool of applicants have been a tool of those who have "pre-selected" a particular individual for a vacancy and of those who want to avoid hiring individuals within categories protected by the FEA. Finally, despite complainant's representations to the contrary, respondent did offer a reason for its actions in this regard. Mr. Jaeger explained that the scope of the duties of the position would depend on the experience and technical expertise of the successful candidate and, until it was determined what that scope would be, it was not possible to determine what the proper classification of the position

would be. In view of these factors, the Commission concludes that complainant has failed to demonstrate pretext in this regard.

In regard to the announcement of the position for service-wide, as opposed to agency-wide, transfer, such an action by respondent certainly, in the abstract, reduced the probability that complainant would be selected for the subject position since it enlarged the pool of applicants against whom he had to compete. In addition, although respondent was not actually aware that complainant intended to apply for the subject position until after the vacancy was announced and complainant made his intentions known to Mr. Jaeger and Mr. Schoengold (See Finding of Fact 4, above), such a probability should have been apparent to respondent in view of complainant's employment status at the time, i.e., complainant was in a part-time, project position at the PPA 3 level and had been seeking a permanent, full-time position with the PSC prior to the announcement. However, several reasons militate against the conclusion that respondent, in announcing the subject position as a service-wide, as opposed to an agency-wide, transfer, discriminated against the complainant. Complainant seems to imply in his argument that the fact that respondent should have been aware of complainant's intention of applying for the vacancy and proceeded to announce the vacancy for service-wide transfer creates an irrebuttable presumption that respondent discriminated against complainant in this regard. If the Commission were to adopt complainant's logic, each time an agency anticipates that one of its current employees who is a member of a group protected by the Fair Employment Act intends to apply for transfer to a vacant position in the agency, the agency will not be able to announce the vacancy for a service-wide transfer because to do so will be deemed a violation of the FEA. Such an approach to enforcement of the FEA would fly in the face of sound personnel management

policies, the merit recruitment and selection policies of the State of Wisconsin, and the goals of affirmative action. This is particularly true in this case where, if the PSC had announced the subject position for agency-wide transfer only, they would have had only one applicant, complainant. As discussed above, efforts to limit the pool of applicants for a position have been a tool of those who have "pre-selected" a particular individual for a vacancy and of those who want to avoid hiring individuals within categories protected by the FEA. As a result, the Commission declines to adopt complainant's position in this regard, particularly in view of the fact that respondent's manner of announcing and filling the subject position did not prevent complainant from competing and that respondent offered a very convincing and non-discriminatory explanation for its actions in this regard, i.e., that it would permit the vacancy to be filled in less time than if it were filled on an open competition basis; that there were other agencies which had positions performing similar duties and responsibilities to those of the subject position; and that limiting competition to the PSC would result in too limited a pool of candidates since there are a relatively small number of positions at the PSC which perform similar duties and responsibilities to those of the subject position. The Commission concludes that complainant has failed to demonstrate pretext in this regard.

Complainant further argues that pretext is demonstrated by the fact that respondent did not follow the same procedure in effecting the instant hire as it did when complainant was hired by respondent in 1986. In 1986, complainant was hired even though he was not the interviewers' top-ranked candidate in order to meet a goal of respondent's affirmative action plan. However, two important distinctions exist between the 1986 hire and the subject hire. First, in 1986, respondent had an approved affirmative action

plan in place and determined that hiring complainant would satisfy a goal of such plan. At the time of the subject hire, respondent had no approved affirmative action plan in place and could not determine, either on the basis of specific goals or on the basis of more general information that was available regarding the individuals who occupied positions in the PPA series at the PSC, that there was an actual or even a probable underutilization of minorities in the PPA series. In fact, it appeared more probable that there was an underutilization of women in the PPA series. Second, in 1986, the top-ranked candidate was not a member of a group protected by the FEA while, in the case of the instant hire, the top-ranked candidate is a woman and, as discussed above, it was more probable that there was an underutilization of women than minorities in the PPA series at the time the subject hiring decision was made. The Commission concludes that complainant has failed to demonstrate pretext in this regard.

Complainant also argues that pretext is demonstrated by the fact that complainant's academic credentials were actually superior to those of Ms. Worel. Complainant asserts that the assessment of his academic credentials by respondent at the time of the instant hire conflicts with respondent's assessment at the time of his 1986 hire. In 1986, Mr. Schoengold stated that complainant had "no special weaknesses" in his educational background and Lynn Murawski stated that complainant had "a strong academic background." In regard to the instant hire, Mr. Jaeger stated that complainant "had a limited educational background in basic biological sciences" and that complainant "had only minimal relevant educational background." It should be noted that these two hires involved two different positions with two different sets of duties and responsibilities. What would be a "strong academic background" for complainant's position, i.e., a position emphasizing quantitative analysis,



would be only a "minimally relevant educational background" for the subject position, i.e., a position emphasizing analysis of a variety of environmental factors.

Complainant also asserts that he had the same degree as the top-ranked candidate, Nina Berkani, and that Mr. Jaeger stated in his April 23, 1987, memo that Ms. Berkani's "graduate degree in Ag. Economics gives her a quantitative analysis, a valuable background asset." yet respondent ranked complainant below Ms. Worel who had only a B.S. degree. First, it should be noted that Ms. Berkani was ranked as the top candidate on the basis of her extensive "knowledge and experience in evaluating utility projects for land use and other environmental impacts." It is clear from Mr. Jaeger's April 23, 1987, memo that her degree was considered a positive attribute for the position but not the one that determined her ranking. It is also clear from the record that respondent considered complainant's degree as a positive attribute. No inconsistency has been demonstrated here and complainant has failed to demonstrate pretext in this regard.

In comparing complainant's and Ms. Worel's academic credentials, the record indicates that they have taken many of the same courses, including chemistry, botany, zoology, and mathematics, but that Ms. Worel's educational background emphasizes geology and includes courses in global physical environments, climatic environments, and urban planning while complainant's emphasizes economics and quantitative analysis and does not include any courses specifically designated as environmental courses. Complainant does assert in his brief that he had completed courses in environmental sciences, but the record indicates that these courses are not listed in the resume he submitted to the interviewers and are not mentioned in the interview notes, and it is clear from the record that the interviewers did

not review any college transcripts before making their hiring recommendation. In view of the duties and responsibilities of the subject position, respondent was justified, on the basis of the information available to Mr. Jaeger and Mr. Schoengold at the time of the interviews, to conclude that, on balance, Ms. Worel's educational background was comparable to complainant's. Complainant has failed to demonstrate pretext in this regard.

Respondent also based its hiring decision on the interviewers' opinion that Ms. Worel's response to interview question #4 was superior to complainant's. In arguing that this reason for the hiring decision is pretextual, complainant asserts that the weighting of the questions was done *after-the-fact* and should be discounted. Mr. Jaeger and Mr. Schoengold testified that they regarded question #4 as the most important question prior to conducting the interviews. They were both credible on this point particularly when consideration is given to the fact that the primary duties of the subject position involve the analysis of the environmental impacts of utility actions, the performance of such an analysis is what is required of a candidate by question #4, and no other question requires such an analysis. Complainant has failed to demonstrate pretext in this regard.

Complainant further argues in this regard that the language of Mr. Jaeger's April 23, 1987, memo reveals an inconsistency on this point. Complainant asserts that Mr. Jaeger states at one point in the memo that complainant and Ms. Worel "gave good responses to the hypothetical question" but later in the memo characterizes Ms. Worel's response as "excellent." However, reading each of these statements in context reveals that the "good" language appears in a paragraph in which Mr. Jaeger is grouping complainant, Ms. Worel, and Paul Rahn together as the second tier of candidates below Ms. Berkani, who constitutes the first tier, and the remainder

of candidates who constitute the third. It appears that Mr. Jaeger's purpose is to distinguish those in the second tier from those in the third by indicating that their answers to question #4 met certain minimal requirements and indicated "a basic understanding of project evaluation." Mr. Jaeger then went on to draw distinctions among those in the second tier of candidates and this is where the "excellent" language appears. The Commission concludes that no inconsistency has been demonstrated and that complainant has failed to show pretext in this regard.

Complainant also claims that Mr. Jaeger only drew the distinction between complainant's and Ms. Worel's answers to question #4 after-the-fact but the record shows that Mr. Jaeger, in his interview notes, indicated that complainant's answer was "good" and Ms. Worel's was "excellent." Complainant has failed to demonstrate pretext in this regard.

Finally, in this regard, the record indicates that, in her response to question #4, Ms. Worel not only discussed those factors discussed by complainant but several other relevant factors. On the basis of the content alone, therefore, respondent was justified in concluding that Ms. Worel's answer to question #4 was superior to complainant's. Complainant has failed to demonstrate pretext in this regard.

Complainant argues that respondent's assertion that Ms. Worel's relevant work experience was superior to complainant's is pretextual. However, respondent has not asserted that Ms. Worel's relevant work experience was superior to complainant's. Respondent's position in this regard is that, on balance, Ms. Worel's relevant work experience was comparable to complainant's. It is apparent from the content of the interview questions and from a review of the duties and responsibilities of the subject position that the primary selection criteria related to work experience were:

experience in evaluating utility projects for land use and other environmental impacts; personal contacts, i.e., experience dealing with the media, governmental agencies, customers, the public, legislators, etc.; communication skills; and manipulation and analysis of quantitative information. From a review of Ms. Worel's resume, it is clear that she had experience superior to complainant's in the area of personal contacts and oral communication. From a review of complainant's resume, it is clear that he had experience superior to Ms. Worel's in the area of manipulation and analysis of quantitative information. It is equally clear that neither had any significant direct experience in evaluating utility projects for land use and other environmental impacts or in implementing the Wisconsin Environmental Policy Act. On this basis, respondent appears justified in concluding that neither complainant nor Ms. Worel had any experience performing duties and responsibilities equivalent to those of the subject position but that each had some experience in other relevant background areas and, as a result, that their relevant work backgrounds were comparable. Complainant has failed to show pretext in this regard.

Complainant alleges that respondent misapplied certain affirmative action goals and that this is evidence of pretext. Complainant first argues in this regard that respondent did not properly apply its Upward Mobility Plan to the instant hire. However, it is clear from the record that respondent's Upward Mobility Plan at the time of the subject hire related to making training opportunities available to PSC staff, particularly clerical employees, and the Commission concludes that it was not directly applicable to the subject hire. Complainant has failed to show pretext in this regard.

As stated above, respondent did not have an approved affirmative action plan in effect at the time of the subject hire. As a result, there were no

approved affirmative action hiring goals in place at the time. A review of the number of minorities and women in PPA positions at the PSC at the time of the subject hire indicates that, of ten employees, 2 are minority males, 4 are white males, and 4 are white females. Respondent concluded from this that there was no clear underutilization of minorities or clear overutilization of females in this classification at the time and, therefore, that hiring a white female for the subject position would not be in conflict with respondent's affirmative action policy. The Commission agrees with respondent's conclusion. A point that complainant has ignored in presenting his case is that the successful candidate for the subject position was also a member of a group protected by the FEA. Complainant argues that the numbers are misleading because the 2 minority males were in LTE and project positions. However, the Commission disagrees with complainant that these positions should be disregarded for purposes of assessing respondent's affirmative action record. To do so would provide a disincentive for agencies to hire protected individuals for LTE and project positions which have proved to be valuable training opportunities and a way to "get a foot in the door" of state employment for many protected individuals. In addition, an agency's record in hiring protected individuals for LTE and project positions does provide an indication of an agency's commitment to affirmative action. In addition, in the instant case, the record does not indicate which of the other PPA positions may have been project or LTE positions, i.e., it is possible that some of the 4 positions held by women may have also been LTE or project positions. The Commission does not find that respondent misapplied affirmative action goals in the subject hire and concludes that complainant failed to demonstrate pretext in this regard.

Complainant also introduced hiring statistics in an effort to show pretext. However, the analysis of the data by complainant's expert failed to

take several factors into consideration. First of all, the data and analysis fail to indicate how many times minorities were competing against each other for a single position. For example, the statistics for 1983 indicate that respondent had 25 vacant positions to fill and 12 minority candidates were certified for these 25 positions. However, these statistics do not indicate for how many positions these minority candidates were certified. If all 12 were included on the certification list for a single position or a few positions, this would reduce respondent's opportunity to appoint a minority candidate to a single opportunity or a few opportunities. Second, these statistics include those minority candidates who were certified for a particular position, not those who were actually available for appointment to the position. It is not uncommon for candidates who are certified for a position to drop out of consideration because they are not available, not interested in the position, etc. This again does not accurately represent the number of minority candidates respondent had an opportunity to appoint. The Commission declines to consider these statistics as evidence of discrimination in view of these factors. Complainant further argues that respondent cannot rely on the limitations of the data to dispute the expert's conclusion since respondent supplied the data. However, complainant does not assert that respondent improperly responded to complainant's data request. It appears that complainant failed to anticipate the limitations of the data as he had requested it. The Commission concludes that complainant has failed to demonstrate pretext in this regard.

In regard to appellant's appeal under §230.44(1)(d), Stats., the standard to be applied is whether respondent's decision to hire Ms. Worel for the subject position was "illegal or an abuse of discretion." The only illegality alleged was that the hire violated the FEA and the Commission has already concluded above that the complainant has failed to prove such a violation.

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, Case No. 79-208-PC (6/3/81). 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, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." Harbort v. DILHR, Case No. 81-74-PC (1982).

The Commission has already concluded that the criteria used by respondent in reaching the subject hiring decision were reasonably related to the duties and responsibilities of the subject position and complainant does not appear to dispute this. What complainant does dispute is the manner in which respondent applied these criteria to complainant's and Ms. Worel's qualifications and the conclusions drawn by respondent as a result of this application. However, the Commission has already concluded above that respondent applied the selection criteria to the candidates uniformly and that respondent was justified in reaching the conclusion that it did as a result of the application of such criteria.

In this regard, complainant takes issue with respondent's "overzealous reliance on a single piece of subjective evidence", referring to respondent's comparison of complainant's and Ms. Worel's responses to interview question #4. However, what respondent compared was the content of such answers, not the manner of presentation, and the content was well documented in Mr. Jaeger's and Mr. Schoengold's interview notes. The Commission does not agree with complainant that significant subjectivity was involved in respondent's

comparison of complainant's and Ms. Worel's responses to question #4. The Commission has already concluded that the content of Ms. Worel's answer was clearly superior to complainant's. Complainant has failed to show that respondent abused its discretion in this regard.


Complainant also asserts that respondent abused its discretion in deviating from its typical hiring practices in filling the subject position. The Commission has already concluded above that any such deviation was substantially justified and not, therefore, "clearly against reason and evidence," as required for a showing of abuse of discretion.

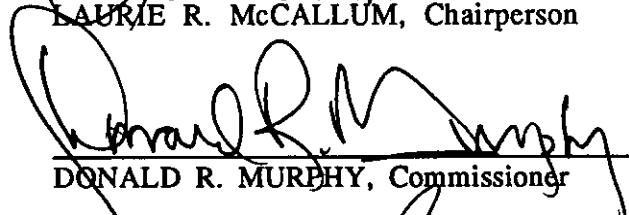
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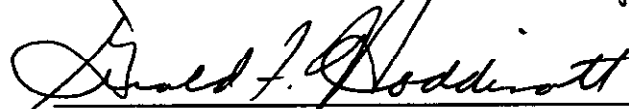
The actions of respondent are affirmed and these cases are dismissed.

Dated: April 7, 1989

STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

LRM/lrm

Parties:

Ali A. Wali  
3013 Jason Place  
Madison, WI 53719

Charles Thompson  
Chairman  
Public Service Commission  
P.O. Box 7854  
Madison, WI 53707