

STATE OF WISCONSIN

PERSONNEL COMMISSION

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NANCY A. MOLITOR,

Appellant/  
Complainant,

v.

Secretary, DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Respondent.

Case Nos. 89-0086-PC  
89-0105-PC-ER

\* \* \* \* \*

DECISION  
AND  
ORDER

NATURE OF THE CASE

This is an appeal of a hiring decision and a charge of discrimination on the basis of marital status in relation to such hiring decision. A hearing was held before Gerald F. Hoddinott, Commissioner.

FINDINGS OF FACT

1. Appellant/complainant began employment with the Southern Wisconsin Center for the Developmentally Disabled (SWC) in 1966. SWC is an institution administered by the Division of Care and Treatment Facilities of the Department of Health and Social Services (DHSS).

2. In 1979, appellant/complainant was appointed to a Teacher-Supervisor position at SWC. In March of 1982, appellant/complainant married her supervisor Graham Molitor, the Education Director at SWC. Immediately after her marriage, appellant/complainant's supervision was transferred to a different SWC employee who served as appellant/complainant's supervisor until he left the position in 1985. Thereafter, Mr. Molitor served as appellant/complainant's supervisor.

3. During the first week of June, 1989, appellant/complainant received notice that she was to be laid off from her Teacher-Supervisor position effective June 16, 1989.

4. Some time between June 14 and June 20, 1989, a contractual transfer opportunity was announced for a Teacher 2-Program Coordinator position at SWC. Appellant/complainant applied for this transfer. This position would be supervised by Mr. Molitor.

5. At all times relevant to this matter, Owen Bradley served as SWC's Personnel Director.

6. Effective March 27, 1989, Marlys Griffiths became the Director of SWC. Ms. Griffiths solicited Mr. Bradley's advice as to the process required to be followed to fill the Teacher 2-Program Coordinator vacancy. Mr. Bradley advised Ms. Griffiths that the applicable collective bargaining agreement had been interpreted to require that seniority play a primary role in such a process but allowed the consideration of other factors such as training and experience. Mr. Bradley further advised that, only if a candidate possessed some relevant training or experience which was clearly and substantially different than that of senior candidates should a selection not be based on seniority. According to Mr. Bradley, an example of a clearly different qualification would be fluency in a foreign language, or special training and years of experience with a particular teaching technique. Mr. Bradley also advised that it was relatively rare for qualifications to supersede seniority for a contractual transfer. Ms. Griffiths decided that each of the candidates should be interviewed for the position. In addition, although Ms. Griffiths felt that the supervisor of the position, i.e., Mr. Molitor, should have input into the decision, she felt that he should not make the decision alone since his wife, i.e., appellant/complainant, was one of the candidates. As a result, Ms. Griffiths decided that she would interview the candidates after Mr. Molitor had conducted his interviews of the candidates. This decision was made prior to Mr. Molitor's interview of the candidates. Other Directors of SWC have become similarly involved in hiring processes for positions they have not directly supervised.

7. On July 6 through 10, 1989, Mr. Molitor interviewed the candidates referred to him by SWC's personnel unit. Mr. Molitor asked each candidate the following questions:

- a. Discuss your knowledge of and experience with E. E. N. rules and regulations.

- b. Discuss your knowledge of and experience with Federal wage and hour rules and regulations, as related to sheltered workshops and Resident Worker Programs.
- c. Discuss your vision for creating (coordinating) a more cohesive integration of unit and Education and Training Services programs.
- d. Discuss your vision for a comprehensive continuum of adult programming.
- e. What role do you see Adult Services playing in the interdisciplinary/active treatment process?
- f. A number of policies and procedures of management are not always popular with staff. Discuss how you might implement and coordinate such policies or procedures.

As a result of these interviews, Mr. Molitor decided that appellant/complainant was the best qualified candidate. Mr. Molitor met with Ms. Griffiths on July 11 or 12, 1989, to discuss the results of these interviews. Mr. Molitor went over the responses of the candidates to the interview questions and advised Ms. Griffiths that, based on these responses, he felt that appellant/complainant was the best qualified candidate. During this meeting, Ms. Griffiths advised Mr. Molitor that, in her get-acquainted meetings with SWC staff, more than one had expressed their feeling that appellant/complainant's relationship with some of her subordinates was marked by hostility or animosity and this concerned Ms. Griffiths.

8. Ms. Griffiths conducted her interviews of the candidates on or around July 14, 1989. Ms. Griffiths asked each of the candidates the following questions:

- a. What do you consider to be the greatest challenges and concerns facing our Adult Education Program and briefly describe some of the specific contributions you, as Program Coordinator, could make to meet them.
- b. Why are you interested in this position?
- c. What ideas do you have for creating opportunities and markets for resident products and services?
- d. What abilities do you have that you feel would help you be effective in this position?
- e. As new programs are implemented, it is inevitable that some disagreements and conflicts will occur. What do you

see as the role of Program Coordinator in resolving differences?

f. Is there anything else that you would like to add?

9. In response to the question presented in Finding of Fact 8.f., above, more than one of the candidates interviewed by Ms. Griffiths mentioned appellant/complainant's supervisory style and Ms. Griffiths noted these comments in her interview notes.

10. After her interviews of the candidates were completed, Ms. Griffiths met with Mr. Bradley and they agreed that none of the candidates had exhibited the clearly and substantially different relevant qualifications which would justify making a selection on a basis other than seniority. As a result, the most senior candidate was offered the position which she ultimately declined. The next most senior candidate was offered the position and he accepted it.

11. After the effective date of her layoff, appellant remained in the Teacher-Supervisor position. This position had remained authorized but was unfunded. Although the SWC personnel unit had created a personnel turnaround document which would have placed appellant/complainant in a Teacher position instead of the Teacher-Supervisor position upon her layoff, this document was either misplaced or not implemented for some reason. Appellant/complainant remained in this Teacher-Supervisor position until a Teacher 2 position in Unit C became vacant and she was placed in this Teacher 2 position some time in August of 1989.

12. Other than appellant/complainant, each of the candidates occupied a Teacher 2 position at the time of their consideration for the Teacher 2-Program Coordinator position. A Teacher 2 position has the following duties and responsibilities:

#### TEACHER 1-2

Summary: Provides a sequential developmental and/or functional training program to prepare residents to return to the community or obtain optimal functional level. Provides prescriptive approaches on individual students to include behavioral and instructional goals and objectives and daily charting. Serves as a member of an interdisciplinary team. Works under the general supervision of the Education Director or Teacher Supervisor. May lead work of Teacher Assistants or Therapy Assistants. Must hold appropriate teaching license in the State of Wisconsin.

- 65% A. Develop and implement an intensive education, adult training or recreation program to meet the needs of mentally retarded residents.
  - A1. Conduct classes or activities designed to facilitate the acquisition of developmental and functional concepts and skills.
  - A2. Select appropriate training materials and equipment.
  - A3. Demonstrate objective program planning.
  - A4. Demonstrate curricular planning by considering persisting life needs, breadth of scope and developmental sequence.
  - A5. Demonstrate positive use of preparation time for curricular offerings.
  - A6. Provide consistency of program for assigned students, assuring regular, timely attendance of students and maintaining positive personal attendance.
  - A7. Self-evaluate teaching procedures and modify techniques (on a regular basis) to meet the needs of assigned students.
  - A8. Demonstrate positive response patterns in class-room and other duties by maintaining objective relationships with students and others.
  - A9. Maintain a positive classroom atmosphere, i.e., comfort, light control, attractiveness, safety of room, and availability of materials.
- 15% B. Develop individual resident instructional objectives.
  - B1. Use available diagnostic or prescriptive information to assess resident characteristics.
  - B2. Identify behaviorally resident needs, method of approach, method of measurement and expectancy of attainment.
  - B3. Document progress toward goal attainment on a regular basis.
- 15% C. Participate in interdisciplinary team approach.
  - C1. Demonstrate positive participation as a member of the various interdisciplinary teams of assigned residents and work toward attainment of team established goals.

- C2. Provide professionally sound educational input upon which team decisions can be made and in proper perspective with all other professional disciplines serving the total needs of residents.
- C3. Act as and conduct the duties of a Qualified Mental Retardation Professional.

5% D. Implementation of general programmatic goals.

- D1. Assure compliance with all applicable Center, State, and Federal laws, codes, regulations, rules and policies.
- D2. Active participation in professional development activities, i.e., in-service activities, staff meetings, etc.

13. The Teacher 2-Program Coordinator position has the following duties and responsibilities:

**TEACHER 2 - PROGRAM COORDINATOR**

Summary: This position is responsible for planning, implementing and coordinating a variety of comprehensive vocational and special education programs to meet a full fange of educational needs of residents. Assume responsibility as assigned by the Education Director; functions under delegation of authority, responsibility and accountability. Is a Qualified Mental Retardation Professional and reports to the Education Director.

- 30% A. Coordinates and administers a variety of comprehensive special education programs for the purpose of meeting the individual needs of residents with a full range of educational services.
  - A1. Coordinates educational programs consistent with all applicable professional standards and policies and procedures of the Department of Health and Social Services and Southern Wiscosnin Center.
  - A2. Participates in the interdisciplinary staff and team process for identifying and assessing individual educational needs of residents.
  - A3. Coordinates staff to meet the individual education needs of residents in proper prospective with all other professional disciplines serving the resident.
  - A4. Coordinates the review of each resident's educational program.
  - A5. Coordinates and facilitates educational related services of the Center.

- 20% B. Implements the delivery of services to meet the needs of developmentally disabled students.
  - B1. Implements policy, decisions and procedures of the Center and Education and Training Services.
  - B2. Conducts and participates in a variety of staff meetings, in-service training, staff development, etc.
  - B3. Coordinates such aspects of special education as are assigned and provides professional consultation within the Center and technical consultation to community agencies and resources.
  - B4. Acts as the Center's liaison with the public school program.
  - B5. Keeps records and makes reports.
  
- 30% C. Develop and coordinate vocational work programs to meet the needs of developmentally disabled adults.
  - C1. Procure sub-contract jobs from business establishments in the surrounding community.
  - C2. Determine commensurate piece rates for residents wages on subcontracts and submit bids for sub-contracts to businesses.
  - C3. Apply for and maintain all records and reports necessary to assure compliance with all applicable Federal Wage and Hour regulations.
  
- 10% D. Coordinate the Resident Worker Program.
  - D1. Determine appropriate wage rates for residents enrolled in the Resident Worker Program in accordance with all Federal Wage and Hour regulations.
  - D2. Work with resident's direct work supervisor to assure active treatment goals are being met.
  - D3. Keep records and make reports on Resident Worker program to assure compliance with Federal Wage and Hour regulations.
  - D4. A3.
  
- 10% E. Provide Education Director with information necessary to:
  - E1. Determine and interpret work procedures.
  - E2. Assign duties to workers.

- E3. Train and orient new employees to the center.
- E4. Evaluate worker performance against standard expectations.

When she became the Director of SWC in March of 1989, Ms. Griffiths had expressed a particular interest in expanding the number of sub-contract jobs available to SWC residents from business establishments in the surrounding community. This would be the responsibility of the Teacher 2-Program Coordinator position as stated in Goal C., Worker Activity C1. of the position description.

14. As a Teacher-Supervisor, appellant/complainant had been responsible for supervising as many as 20 subordinate Teacher 1 or Teacher 2 positions. Some of the non-supervisory duties of this position were similar to the duties of the Teacher 2-Program Coordinator position. As a Teacher-Supervisor, appellant/complainant had been responsible for procuring sub-contract jobs from community businesses but had little time to devote to this responsibility and a sub-contract with only one community business had existed during her tenure as a Teacher-Supervisor.

15. There is no requirement or policy which prohibits or discourages permanent SWC employees from supervising or being supervised by a member of their immediate family.

16. Appellant/complainant filed a timely appeal and a timely charge of discrimination based upon respondent's decision not to select her for the Teacher 2-Program Coordinator position.

#### CONCLUSIONS OF LAW

1. The appeal filed in Case No. 89-0086-PC is appropriately before the Commission pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden to show that respondent's decision not to select her for the subject position was illegal or an abuse of discretion.

3. The appellant has failed to sustain this burden.

4. The charge of discrimination filed in Case No. 89-0105-PC-ER is appropriately before the Commission pursuant to §230.45(1)(b), Stats.

5. The complainant has the burden to show that there is probable cause to believe that respondent discriminated against her on the basis of her marital status when respondent did not select her for the subject position.



6. The complainant has failed to sustain this burden.

#### OPINION

The parties agreed to the following issues:

Whether the decision not to appoint appellant to the position of Teacher 2-Program Coordinator was illegal or an abuse of discretion. (Case No. 89-0086-PC)

Whether there is probable cause to believe that respondent discriminated against complainant on the basis of marital status in violation of the Fair Employment Act with respect to its decision not to appoint her to the Teacher 2-Program Coordinator position. (Case No. 89-0105-PC-ER)

#### Illegal or Abuse of Discretion

Appellant has not alleged any illegality in regard to her non-selection, and none is apparent to the Commission based on the hearing record. As a result, the standard to be applied here is whether respondent abused its discretion in not hiring appellant for the Teacher 2-Program Coordinator position.

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. DIILHR, Case No. 81-74-PC (1982).

It is apparent from the record that seniority has been and continues to be the primary basis utilized by SWC for making hiring decisions pursuant to the contractual transfer process. It is also apparent that the only exception to this has occurred in those situations where a candidate possesses clearly and substantially different relevant qualifications than a more senior candidate. Mr. Bradley testified that this had been the practice consistently followed at SWC and that, in his opinion, this practice resulted from a reasonable, if not required, interpretation of the terms of the applicable collective bargaining

agreement. Appellant failed to rebut this testimony and the Commission concludes that appellant failed to show that this practice was clearly against reason and evidence.

Appellant failed to show that her relevant qualifications were clearly and substantially different than those of the more senior candidates within the context of the contractual transfer provisions of the applicable collective bargaining agreement. Although the record shows that appellant, while employed in the Teacher-Supervisor position, performed certain duties and responsibilities similar to those of the Teacher 2-Program Coordinator position, appellant failed to show the relative emphasis of these duties in the Teacher-Supervisor position; the relative emphasis of these duties in the Teacher 2-Program Coordinator position; or that the knowledge appellant acquired as the result of performing these similar duties and responsibilities could not be acquired by one of the other candidates after a reasonable amount of time on the job, or was akin to the type of knowledge or experience considered to be clearly and substantially different within the context of the contractual transfer provisions of the applicable collective bargaining agreement. As a result, appellant failed to show that respondent's conclusion that she did not possess such clearly and substantially different relevant qualifications was clearly against reason and evidence.

Appellant argues that respondent changed the selection strategy after Mr. Molitor made his hiring recommendation to Ms. Griffiths and that this constituted an abuse of discretion. Appellant argues that respondent had originally intended to use competition, i.e., a comparison of the relative qualifications of the candidates, alone to make the selection decision. However, it appears from the record that Mr. Molitor misinterpreted the information he received from Mr. Bradley in drawing this conclusion. The record shows that Mr. Bradley did explain to Mr. Molitor and to Ms. Griffiths that it was appropriate under the applicable collective bargaining agreement to interview the candidates and to consider certain of their qualifications in making the selection decision. However, the record also shows that Mr. Bradley explained to Mr. Molitor and to Ms. Griffiths that, even if such an interview process was followed, seniority remained the primary selection factor under the applicable collective bargaining agreement and, to overcome seniority, a candidates' relevant qualifications would have to be clearly and substantially different than those of the more senior candidate(s).

Appellant also argues that it was originally understood that Mr. Molitor would be making the selection decision and that it was only after he made his recommendation to Ms. Griffiths that she decided to interview the candidates herself. This is inconsistent with the evidence in the record as elicited through the testimony of both Mr. Bradley and Ms. Griffiths that they had agreed before Mr. Molitor conducted any interviews that Ms. Griffiths would also interview the candidates. In addition, it does not seem reasonable to argue that an experienced personnel manager and an appointing authority would agree to entrust a selection decision to a supervisor whose wife was one of the candidates. The record also shows that the process followed in filling this position (i.e., having the Director of SWC involved in the interview process for a position he/she did not directly supervise) had been followed by previous Directors at SWC in filling similar positions (e.g., Food Services Director), and was consistent with Ms. Griffiths' stated desire early in her tenure to get acquainted with SWC staff and their programs. Appellant has failed to show that the selection process which respondent ultimately followed was different than that originally planned, or was inconsistent with the past practices at SWC.

#### Marital Status Discrimination

The issue under consideration is one of probable cause. Probable cause is defined in §PC 1.02(16), Wis. Adm. Code, as a reasonable ground for belief, supported by facts and circumstances, strong enough in themselves to warrant a prudent person to believe that discrimination has been or is being committed. Although the Commission recognizes that the burden on a complainant to show probable cause is not as rigorous as the burden to prove discrimination, it is useful in the context of a probable cause proceeding such as the instant one to utilize the analytical frameworks and guidance provided by decisions on the merits in discrimination cases to assist the Commission in reaching a decision on probable cause. The Commission will follow this course in reaching a decision here on probable cause.

In analyzing a claim such as the one under consideration here, 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. Under this method, 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.

In the context of a hiring decision, the elements of a prima facie case are that the complainant (1) is a member of a class protected by the Fair Employment Act (FEA), (2) applied for and was qualified for an available position, and (3) was rejected under circumstances which give rise to an inference of unlawful discrimination.

Under the facts of this case, complainant was a member of a class protected by the FEA as the result of her marital status; and she applied for and, as is evident from her eligibility for transfer into the position, she met the minimum qualifications for the position. Based on the facts present in this case, complainant is not claiming discrimination on the basis of her marital status per se, but rather on the basis of the identity of her spouse, and the Commission concludes that the circumstances surrounding the subject hiring decision could raise an inference of discrimination.

The burden then shifts to the respondent to articulate legitimate, non-discriminatory reasons for not selecting complainant for the Teacher 2-Program Coordinator position. Respondent's position in this regard is that Ms Griffiths did not find complainant's relevant qualifications to be clearly and substantially different than those of more senior candidates and that, under the terms of the applicable collective bargaining, such a difference must be found in order to hire a less senior candidate. This reason is both legitimate and non-discriminatory on its face.

It would have been evidence of pretext if complainant had shown that the practice followed by respondent in making the selection decision had not been the practice followed by SWC under the applicable collective bargaining agreement, or that this practice did not result from a reasonable interpretation of the provisions of this agreement. However, as discussed above, complainant failed to show that selection process used was not consistent with the labor contract or past practice.

In addition, it would have been evidence of pretext if complainant had shown that she did actually possess such clearly and substantially different qualifications than the more senior candidates who were offered the position. Complainant, in addition to her supervisory experience, certainly had some experience in the area of procurement of outside employment opportunities

for clients. However, she did not show that this experience was clearly and substantially different than the other candidates to warrant overriding the seniority provisions of the labor contract.

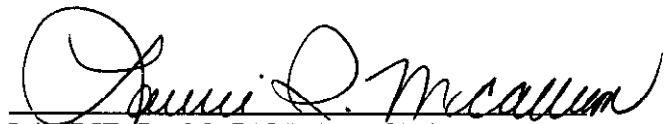
Finally, complainant has alleged that the fact that the selection process was changed during the period of time it was being implemented is evidence of pretext. Complainant has not shown that the process was changed after it began. Complainant may not have been informed of the decision of Mr. Bradley and Ms. Griffiths concerning the selection process that would be followed until after he had conducted his interview. However, the record is clear that this decision was made prior to the interviewing of any candidates. In addition, complainant indicated that it was her impression that a hiring decision could be made without regard to the seniority provisions of the contract. Again, the record shows that seniority had to be used unless a candidate had clearly and substantially different qualifications. These untimely or miscommunications with complainant do not rise to the level of showing the reasons given by respondent for establishing the selection process used to fill the Teacher 2 - Program Coordinator position as a pretext for discrimination.

Complainant has failed to establish probable cause to believe that she was discriminated against on the basis of her marital status.

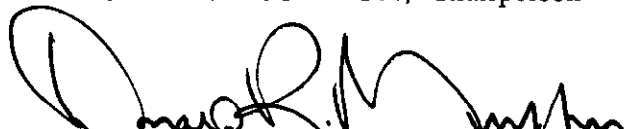
ORDER

The action of respondent is affirmed and these cases are dismissed.

Dated: May 1, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

GFH:rcr

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW  
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

**Petition for Rehearing.** Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the

Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

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