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HOWARD SCHMITT,
 Complainant,

v.

Chancellor, UNIVERSITY OF
 WISCONSIN-MILWAUKEE
 Respondent.

Case No. 90-0047-PC-ER

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FINAL
 DECISION
 AND
 ORDER

A proposed decision and order was issued in this matter on April 5, 1993. The complainant filed objections. A copy of the proposed decision and order is attached hereto. The Commission revises certain portions of the proposed decision and order as noted below. The remaining portions of the proposed decision and order are adopted.

Finding of fact #6 is revised to more accurately reflect the record.

6. Pamela Rehberg, who was completing her MFA in Costume Design at Northern Illinois University (NIU), wrote Mr. Morrison in January 1989 after reading in a Milwaukee newspaper of the revival of the PTTP. Ms. Rehberg enclosed a resume and inquired about an interview.

Finding of fact #11 is revised to more accurately reflect the record:

11. The complainant also filed application materials for the vacant position. The complainant's materials indicated that he had received a MFA from the University of Southern California (USC) in 1982, had been a teaching assistant while in the graduate school program and then had been an adjunct assistant professor and costume shop manager at USC thereafter. His responsibilities there included:

Teach costume design, history and construction, run the daily business of the costume shop, interview prospective graduate students and staff members, handle costume shop accounting and

inventory, supervise student designers and student crews, assist the faculty designer, design or supervise department productions, and coordinate loaning of costumes to cinema students.

The materials reflected that the complainant had been a guest costume designer for 2 productions at the college level in 1989, had worked on costumes for a feature film in 1985, a short film in 1984 and a rock video in 1984, had served as resident costume designer for the TOP Theatre in 1983 and the Festival Theatre USA for its summer season in Edinburgh, Scotland in 1981 and 1982, and served as assistant cutter for a professional regional theater in 1979. Complainant's references consisted of two members of the USC faculty and two lighting designers with the Disney Corporation. Complainant's cover letter also indicated an interest in computer programming and foreign languages.

Finding of fact #19 is revised to more accurately reflect the record:

19. Search and screen committees voted on hiring recommendations for each of the 11 vacancies. For the costume vacancy, the committee consisted of Mr. Morrison, Mr. Lieder and two other male PTPP faculty. A vote was taken by the members of the search and screen committee who were present at the committee meeting on May 4, 1989, to offer the costume position to Ms. Rehberg without a formal interview. After the recommendation was approved at higher levels, the offer was made and accepted.

The following is added to the Opinion section:

The complainant seeks to distinguish the Commission's ruling in Ruff, *supra*, from the facts of this case. The Commission recognizes that there may be jobs which are stereotypically viewed as being filled by members of one sex rather than the other. In those circumstances, the presumption that, for example, a male would not discriminate against a male in filling such a position, would not apply. Here, the record is insufficient to support a conclusion that there is systemic discrimination against men in the filling of faculty level costume technology positions. Complainant testified that he was not familiar with costume positions which had been filled by men "in recent years" and also testified to his observation that the number of males attending costume

symposia was decreasing. However, Mr. Morrison identified several costume shops which are headed by men, although he agreed that none of those particular individuals had been hired after 1989.


The Commission also notes that complainant has relevant experience which was not set forth in his application materials. However, the Commission cannot review respondent's decision in terms of information beyond that reflected in his original submission for the vacancy. The issue before the Commission is whether, based on the information that was made available at the time the decision was made, respondent's articulated rationale for its decision that Ms. Rehberg was best qualified for the position was a pretext for sex discrimination. The record does not support a finding of pretext.

In a letter dated July 29, 1993, respondent objected to "the handling of this complaint and the leniency shown to Mr. Schmitt" in terms of the timing of his objections to the proposed decision and order. The proposed decision was issued on April 5, 1993 and called for the parties to file any objections with written arguments no later than May 5, 1993. Correspondence from the hearing examiner indicates that by letter dated April 27th, the complainant formally requested a copy of the tape recording of the hearing. During a telephone conversation on May 11th, complainant clarified that the reason he wanted the tapes was to prepare his objections to the proposed decision. There was then a substantial delay until the complainant actually received the tapes and, as a consequence, his written objections were not received until July 9th. After the respondent filed a written response to the objections, the complainant contacted the examiner and requested an opportunity to reply. The examiner granted him a period of 2 days to send his reply.


The procedure followed in terms of submitting these materials reflects that 1) there were closing arguments rather than post-hearing briefs, 2) the complainant resides in California, 3) complainant was out of the country during part of this period, 4) complainant did not have a tape recording or transcription of the hearing record which he decided he needed in order to prepare his written argument, 5) there was a significant delay until the complainant actually received a copy of the tape recording, and 6) had complainant requested oral argument before the Commission, he would have been permitted an opportunity to reply to the respondent's argument. Given this

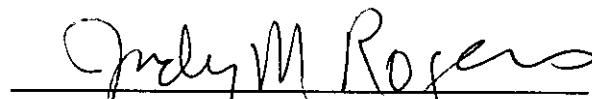
background, the Commission rejects the respondents objections to the procedure followed.

Dated: September 24, 1993 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

KMS:kms
K:D:Cover order (Schmitt)


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Howard Schmitt
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Los Angeles, CA 90028

Chancellor Clifford Smith
UW-M, Chapman Hall
Milwaukee, WI 53201-0413

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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HOWARD SCHMITT,

Complainant,

v.

Chancellor, UNIVERSITY OF
WISCONSIN-MILWAUKEE

Respondent.

Case No. 90-0047-PC-ER

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PROPOSED
DECISION
AND
ORDER

This matter is before the Commission as a complaint of sex discrimination. The parties agreed to the following issue for hearing:

Whether respondent discriminated against complainant on the basis of sex when he was not hired for a faculty position in the Department of Theatre and Dance's Professional Theatre Training Program in May, 1989.

FINDINGS OF FACT

1. In 1978, the Professional Theatre Training Program (PTTP) was created at the University of Wisconsin-Milwaukee (UW-M) within the Department of Theatre and Dance, offering both bachelor and masters degrees with a focus on acting. At that time, students interested in the area of theater production (costume production, stage management, and technical production including lighting and scenery) were limited to a traditional 4 year undergraduate program.

2. In the early 1980's, plans were made to make revisions in the program in the form of adding a Master of Fine Arts degree in the production areas so that the entire theater program could be conducted on the same format.

3. Before the plans were implemented, the majority of the theater faculty gave notice that they would leave the program at the end of the 1988 and 1989 school years, taking positions at another university. After a period in which no classes were offered and the future of the program was in doubt, a

new director, Malcolm Morrison, was hired in the summer of 1988. Mr. Morrison and the four faculty members who were going to continue with the program into the 1989-90 academic year, established a curriculum and prepared to fill 11 other faculty positions as well as to select the class members of the first 3 year program.

4. The PTTP is operated in a conservatory style, so that classroom and production experiences are melded into an integrated learning experience. The goal of the PTTP is to train students in the professional theater, with an emphasis on the American regional theater.

5. One of the four faculty members who remained with the program was Jeff Lieder, Associate Professor in Theater Costume.

6. Pamela Rehberg, who was completing her MFA in Theater Arts with an emphasis in costume design and technology at Northern Illinois University (NIU), wrote Mr. Morrison in January 1989 after reading in a Milwaukee newspaper of the revival of the PTTP. Ms. Rehberg enclosed a resume and inquired about an interview.

7. By letter dated January 31, 1989, Mr. Morrison wrote Ms. Rehberg:

I read your letter and resume with interest since, as you know, we are preparing to fill a number of faculty positions in the Professional Theatre Training Program.

Given your costume production experience, I have included an announcement for a costume construction position that we intend to open soon.

If you are interested in applying, please forward a separate cover letter acknowledging your interest in that position.

8. The vacancy announcement for the position of "teacher of costume construction and history" included the following description of principal duties:

One of two faculty members in costume production, this person will teach costume construction and costume history as well as shop supervision and management to BFA and MFA students and be responsible to supervise their work as cutters, first hands, milliners, tailors, crafts people and wardrobe supervisors. Duties also include management of the associated production spaces, equipment maintenance and, may teach a related course to non-majors. While not a primary duty some design opportunities are possible.

The announcement went on to identify minimum qualifications as follows:

Applicants should have experience in professional theatre in the appropriate areas. Prior teaching experience with continuing contacts in professional theatre desirable.

9. By letter dated February 14, 1989, Ms. Rehberg indicated her interest in the position, enclosed a list of 5 references, enclosed four color slides of her costume work, and indicated she was available to meet with Mr. Morrison.

10. The materials filed by Ms. Rehberg listed skills in "designing, cutting, draping, pattern making, dying, millinery, tailoring, shop supervision and teaching." The materials showed that she had worked 1) as a graduate assistant at NIU for 3 years with responsibility for "costuming instruction, shop supervision, cutting, and garment construction," 2) as a costume designer at a professional theater in Illinois, 3) as a patternmaker/design room supervisor at a Milwaukee women's clothing manufacturer, 4) as a stitcher with the Milwaukee Repertory Theater, 5) as a patternmaker with a New York men's clothing manufacturer and 6) as an assistant in costume design and construction for a New York professional theatre. The materials showed she was receiving a MFA in Theater Arts from NIU, had served as an instructor for the Illinois High School Theater Festival, had won the 1988 National Costumers Association Scholarship and listed numerous theater productions for which Ms. Rehberg had served as costume designer. Ms. Rehberg's references included a faculty member at NIU who had formerly headed costume design at UW-M, the costume shop manager at the Milwaukee Repertory Theatre and a well known director in the Chicago-area professional theatre.

11. The complainant also filed application materials for the vacant position. The complainant's materials indicated that he had received a MFA from the University of Southern California (USC) in 1982, had been a teaching assistant while in the graduate school program and then had been an adjunct assistant professor and costume shop manager at USC thereafter. His responsibilities there included:

Teach costume design, history and construction, run the daily business of the costume shop, interview prospective graduate students and staff members, handle costume shop accounting and

inventory, supervise student designers and student crews, assist the faculty designer, design or supervise department productions, and coordinate loaning of costumes to cinema students.

The materials reflected that the complainant had been a guest costume designer for 2 productions at the college level in 1989, had worked on costumes for a feature film in 1985, a short film in 1984 and a rock video in 1984, had served as costume designer for amateur theater in 1981 through 1983 and served as assistant cutter for a professional regional theater in 1979. Complainant's references consisted of two members of the USC faculty and two lighting designers with the Disney Corporation. Complainant's cover letter also indicated an interest in computer programming and foreign languages.

12. During mid-March, 1989, Ms. Rehberg telephoned Mr. Morrison, stated that she was going to be in the Milwaukee area and asked if she could stop by. Mr. Morrison agreed. Ms. Rehberg brought examples of her costume design and construction work to the meeting, which was held in Mr. Morrison's office and lasted approximately 2 hours. The portfolio included examples of garments produced from Ms. Rehberg's patterns from her employment at the Milwaukee women's clothing manufacturer. During the meeting, they discussed the job criteria and Ms. Rehberg's qualifications.

13. During the course of her graduate studies, Ms. Rehberg taught two courses. One was the costuming segment in an introduction to theatre technology course. The second was a semester long introduction to costume technology class made up of approximately 25 students. Ms. Rehberg's academic record includes four semester long classes in costume history, including two at the undergraduate level and two at the graduate level.

14. In early April, Ms. Rehberg again telephoned Mr. Morrison. Mr. Morrison forwarded the call to Mr. Lieder. Ms. Rehberg discussed her work in the garment industry and people in costuming who she knew in common with Mr. Lieder.

15. At the end of April, Ms. Rehberg again contacted the respondent to check on the status of the decision-making process. Ms. Rehberg had been offered the costume position at Central Missouri State University and she wanted to know the status of the UW-M position before she accepted the Central Missouri offer.

16. The applications which respondent received for the 11 vacancies filled three filing drawers. The procedure was for Mr. Morrison to review all of the applications as they were received. Those continuing faculty members in the same subject area would also review the applications.

17. Twenty-six applications were received for the position in question. Nineteen of the applicants were female. Only Mr. Morrison and Mr. Lieder reviewed all of the applications.

18. Based upon the initial review, 16 applicants were sent rejection letters. The complainant and five of the six other males were in that group. Ms. Rehberg, 8 other females and 1 male comprised the group which reached the second stage.

19. A search and screen committee comprised of Mr. Morrison, Mr. Lieder and two other male PTP faculty voted on hiring recommendations for the 11 vacancies. A vote was taken by the members of the search and screen committee who were present at the committee meeting on May 4, 1989, to offer the costume position to Ms. Rehberg without a formal interview. After the recommendation was approved at higher levels, the offer was made and accepted.

20. The respondent filled two of the other 10 theatre faculty vacancies after interviewing only one candidate.

21. For the period from July 1987 to June 1988, females filled 7 of the 17 faculty positions in the Department of Theatre and Dance and there was no Affirmative Action goal to hire additional females in the department.

22. Based upon the information available at the time of the decision not to consider the complainant's application further, Ms. Rehberg was better qualified than complainant for the costume position.

23. The sex of the candidates for the costume position was not considered in making the hiring decision.

CONCLUSIONS OF LAW

1. This matter is within the Commission's jurisdiction pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden to show that he was discriminated against by respondent on the basis of his sex with respect to the decision

not to hire him for the position of Assistant Professor of Costume Construction and History in the Department of Theatre and Dance.

3. The complainant has not sustained his burden.

4. The respondent did not discriminate against the complainant on the basis of his sex as alleged.

OPINION

In analyzing a claim of disparate treatment as has been alleged 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 (1973) and its progeny. Under McDonnell Douglas, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut the prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were 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, 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.

Here, the complainant, who is male, is a member of a protected class. Complainant possessed at least the minimum qualifications for the vacant position as those qualifications were described in the vacancy announcement. (Finding of Fact 8) The person selected for the vacancy, Pamela Rehberg, is female. Therefore, the complainant has established a prima facie case.

The respondent contends that complainant was not as well qualified for the position, and the ultimate issue of pretext relates to the relevant qualifications of the complainant and Ms. Rehberg. The Commission notes that the burden of proof that is on the complainant in this matter is difficult to meet because the complainant, Mr. Morrison and Mr. Lieder, as well as the other two members of the Search and Screen Committee are all males.

In Ruff v. Office of the Commissioner of Securities, 86-0141-PC-ER & 87-0005-PC-ER, 9/26/88, the Commission wrote:

[C]omplainant has failed to establish a prima facie case of discrimination on the basis of sex. While it is true that he was denied a DPA while the two female examiners in the division were granted DPA's, the Commission cannot ignore that fact that the appointing authority who made this decision was male. In a case such as this where there is no suggestion that the transaction in question (here, a DPA denial) involved an affirmative action component, it is inherently improbable, although not impossible, that a male would discriminate against another male because of the latter's gender.

Here, the record reflects that there was no affirmative action component to the hiring decision and that Ms. Rehberg aggressively pursued the vacant position. She wrote before the vacancy was even announced, submitted an application which included more materials than requested, made several follow-up calls after submitting her materials, asked to meet with Mr. Morrison and did so. Ms. Rehberg's testimony during the hearing showed that she is organized and well-spoken, giving every indication that she would be a good teacher. Both in her written materials, her slides, the visit with Mr. Morrison and her conversation with Mr. Lieder, she convincingly laid out her extensive experience in the garment industry, costume technology and design. Her qualifications were well suited to the principal duties outlined in the vacancy announcement of teaching costume construction and history, serving as shop manager and supervising work in costume construction skill areas. She was well-connected with the professional theatre in the relevant geographic area, had very recently received a significant national award as a graduate student and was keenly interested in the position. In contrast, the complainant had taught costume design, history and construction in a non-tenure track position at USC for a number of years, but his materials did not reflect nearly the same level of experience as Ms. Rehberg in the area of costume technology, recent work in the professional theatre or breadth of contacts in the professional theatre which could work to the benefit of PTP students. Complainant's materials can be fairly read to place a greater emphasis on costume design than costume construction. His materials also identify interest/experience in film work, computers and foreign languages, none of which was of any significant application to the UW-M position.

The focus of the complainant's case appears to be with the fact that Mr. Morrison met with Ms. Rehberg and viewed her portfolio and slides of her work, and that Mr. Lieder spoke with Ms. Rehberg by telephone prior to the

selection decision. Complainant did not have such contacts, and the respondent simply relied on the information found in his written application. There can be no question that the additional contact with Ms. Rehberg provided her a tremendous advantage in the selection process. However, the very clear testimony is that Ms. Rehberg initiated all of that contact and there is no indication that anyone else from the applicant pool who made similar contacts/requests was or would have been treated differently. Mr. Morrison testified that he routinely makes himself available for similar contacts with anyone in the theatre business. While this practice may raise questions about the general fairness of such a policy when it interferes with a formal hiring process, it cannot be said that the conduct here implicates the Fair Employment Act.¹

The Commission notes that respondent's evidence is not, in all respects, internally consistent. Mr. Morrison testified that that while Ms. Rehberg was the top applicant, the second and third-rated applicants were both males. However, none of respondent's witnesses could remember the names of these runners-up. In addition, the list of applicants who did not make it from the long list to the shorter list (Finding of Fact 18) shows that there was only one male candidate in the group of 10. However, this discrepancy is not sufficient to show that the respondent took the sex of the candidate into consideration during the selection process. The evidence shows that Ms. Rehberg had more relevant qualifications and contacts for the position in question than the complainant and that the decision makers and the complainant are all males.

¹Inadequacies in the selection process such as relying on informal interviews with applicants and reviewing applications as they arrived and over an extended period can be attributed to the large number of positions being filled and to the fact that the persons who were primarily responsible for the process were unfamiliar with normal hiring procedures.

ORDER

This complaint is dismissed.

Dated: _____, 1993 STATE PERSONNEL COMMISSION

LAURIE R. MCCALLUM, Chairperson

KMS:kms

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner