

STATE OF WISCONSIN

PERSONNEL COMMISSION

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WALLACE OWENS,  
                   Complainant,

v.

Secretary, DEPARTMENT OF  
 TRANSPORTATION,  
                   Respondent.

Case No.      91-0163-PC-ER

\* \* \* \* \*

DECISION  
AND  
ORDER

Nature of the Case

This case involves a complaint of discrimination under the WFEA (Wisconsin Fair Employment Act) (Subchapter II, Chapter 111, Stats.), on the basis of race and color, with respect to respondent's termination of complainant from the position of Enforcement Cadet, effective October 21, 1991.

Findings of Fact

1. Complainant, who is black, was initially terminated from employment as an Enforcement Cadet at respondent's State Patrol Academy effective April 20, 1990, because of his failure to have maintained a passing score (70%) on his cadet notebooks. His termination letter was signed by Capt. David S. Schumacher, Director of Training, Wisconsin State Patrol Academy.

2. At the time of complainant's termination, Capt. Schumacher encouraged complainant to get training in report writing and to reapply for another recruit class.

3. In March, 1991, after having completed a course in report writing at MATC (Milwaukee Area Technical College), complainant reapplied for employment as an enforcement cadet. He was accepted into the program at the recommendation of Capt. Schumacher.

4. Following his readmission to the academy, complainant started from the beginning of the course of instruction with a new class of recruits, with scheduled dates from July 8-November 2, 1991.

5. Respondent's policy, as set forth in its cadet handbook (Respondent's Exhibit 13), included the following:

Enforcement cadets are required to maintain a minimum academic average of 70 percent on each unit course. Students who fail to achieve a minimum scholastic average of 70 percent on any unit course will be dismissed from the training program.

\* \* \* \*

The scholastic average for each unit course shall be determined by averaging the scores received on the weekly examination, final unit course examination, and assigned project work.

\* \* \* \*

Notebooks will be graded in accordance with Academy guidelines. A minimum grade of 70 percent on each notebook in each of the unit courses of General Law, Traffic Law Enforcement, and Traffic Accident Investigation is considered passing. (The notebook in General Police Subjects course is graded for the student's information, but is not included in these requirements.

Students who receive a grade of less than 70 percent on a notebook will be required to correct any and all noted deficiencies and resubmit the notebook for rescoring. The initial score received, however, will be the score used in computing the final notebook average.

The notebook score used in computing the final scholastic average is an average of the three unit notebook scores. This final notebook average score must be a minimum score of 70 percent. Students who fail to achieve a minimum notebook average of 70 percent will be subject to dismissal.

The student's overall scholastic average shall be determined by averaging the scores obtained from the following:

- |                                   |                            |
|-----------------------------------|----------------------------|
| 1. Weekly examinations            | 5. Project Work            |
| 2. Unit course final examinations | 6. Weekly quizzes          |
| 3. Final spelling examination     | 7. Firearms scores         |
| 4. Notebook score                 | 8. Physical fitness scores |

6. Complainant was the only black of a total of 29 cadets.

7. Complainant's first notebook was graded by Academy Training Officer (ATO) Leslie Savage, who is black. She gave him a failing grade of 60.5.<sup>1</sup>

8. Complainant's second notebook was graded by ATO Chris Neuman, who is white, and awarded a failing score of 20.

9. Respondent's policy was to have failing notebooks graded by the other ATO's in addition to the ATO who scored the notebook first.

10. Pursuant to this policy, complainant's second notebook also was scored by ATO Savage, who gave it a grade of 20, and by ATO Brett Heino, who is white, who gave it a grade of 19.

11. The ATO's had agreed among themselves at the outset of the training program that they would grade notebooks without referring to any grade sheets prepared by other ATO's with respect to that notebook.

12. In scoring complainant's notebooks (including another one referred to below), ATO's Heino and Neuman adhered to this approach. ATO Savage had the other ATO's grade sheets before her when she graded complainant's second and third notebooks. However, she attempted to reach an independent score and not be influenced by the others' scores

13. No one attempted to pressure or influence ATO Savage in her scoring of any of complainant's notebooks.

14. ATO Heino gave complainant's third notebook a grade of 30.5. ATO Savage also graded this notebook and gave it a grade of 38. ATO Neuman graded it and gave it a score of 31.5. At some point after the three ATO's had graded this notebook, it also was graded by Sgt. Lee McMenemy, an academy program director who is white. He gave it a score of 56.

15. ATO Savage was told by ATO Heino that he had been instructed by someone else to grade complainant's third notebook.

16. The procedure followed by the ATO's in scoring notebooks was that, to the extent possible, each cadet's notebooks was scored by a different ATO for every unit of instruction. For example, if an ATO scored a particular cadet's notebook for a certain unit of instruction, a different ATO would score that cadet's notebook for the next unit.

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<sup>1</sup> At a time subsequent to complainant's termination, it was determined that Ms. Savage had incorrectly scored the notebook, and it was stipulated complainant should have received a passing score of 73.5.

17. Following his failing score on the second notebook, which he had handwritten, complainant had someone else type his corrected notebook. It was not completed when it was due (September 16, 1991), and he advised respondent's staff that it was not ready because someone was still working on it. When he submitted it on September 19, 1991, it was refused because it was not complainant's own work product. Complainant then redid the notebook in his own hand and it was accepted.

18. With the exception of one particular notebook unit, which had to be completed by hand, cadets had the option of doing the notebooks by hand or on a typewriter/word processor. About half the cadets turned in typed notebooks. Complainant was the only cadet who had a notebook refused as not his own work. Complainant also was the only cadet with respect to whom the ATO's had been made aware, or were otherwise aware, that he had not done the typing/word processing himself.

19. Complainant's submission of a notebook that he had not typed himself, as aforesaid, was not a factor in his termination.

20. Following the grading of complainant's third notebook, it was determined that it would be impossible for him to achieve a passing grade on his notebooks, regardless of how he did on the remaining notebooks, and he was terminated for this reason, effective October 21, 1991.

21. Of 29 cadets in this cadet class, eight, including complainant, who was the only black cadet, failed to complete the course.

22. All three of the ATO's gave failing grades on notebooks to a number of white cadets in this class.

23. In a November 25, 1991, memo (Complainant's Exhibit 10), ATO Heino remarked at one point that, "During the time that the other cadets were working on their corrections [to their notebooks], Cadet Owens was observed playing basketball," and that.

The G.P.S. notebooks were handed back and all of those with failing scores received counselling. The cadets were encouraged to ask for help anytime it was needed and this included Cadet Owens. During week 4 of the program, several cadets were approaching the point where their grade point average was close to 70% and were told that they were in a risky area. Cadet Owens was instructed by ATO Savage to keep a log of his study times and what material was studied, and to turn the log in to the ATOs or his counsellor, Mr. Fred Wahls if he was experiencing any problems with time management. I instructed Cadet Owens that although the time spent after 4:30 p.m. or 4:45 p.m. was his own time and

that we couldn't structure any work assignments during evening hours, he was still responsible to effectively manage his study time. He was encouraged to seek assistance if he had any problems. Cadet Owens never approached us with any time management problems or asked for any assistance with his after-hours studies. When he was assisted, it was initiated by me or one of the other ATOs. Cadet Owens was observed playing basketball, sometimes for well over an hour, by the ATO's as we went about our activities.

ATO Heino did not mention that complainant also played tennis at the academy during this time frame. The observations of complainant playing basketball were made when the three ATO's were playing tennis.

24. Respondent terminated complainant's employment as an enforcement cadet solely because of his failure to have obtained a passing score on his notebooks, and not because of his race or color.

#### Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent discriminated against him on the basis of race or color in violation of the WFEA with regard to its termination of his employment as an enforcement cadet effective October 21, 1991.

3. Complainant has failed to sustain his burden of proof and it is concluded that respondent did not discriminate against complainant on the basis of race or color with regard to its termination of his employment as an enforcement cadet effective October 21, 1991.

#### Opinion

There probably are a number of ways in which complainant can be considered to have established a prima facie case. In any event, when a case has been fully tried and the employer has put in its entire case, it is unnecessary to linger on this stage of the analysis. See, U.S. Postal Service v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 410, 103 S. Ct. 1478 (1983).

Respondent articulated a legitimate, non-discriminatory reason for its action of terminating complainant's employment, based on the evidence that showed he failed to obtain a passing average on his notebooks, which is a requirement for successful status at the academy. Complainant advances a number of contentions in support of his attempt to show that this purported

reason for termination was actually a pretext for race discrimination. One of the key factors he relies on is that his score on the first notebook, which was graded by ATO Savage, who is black, was passing (73.5)<sup>2</sup>, while two white ATO's (Heino and Neuman) gave his second notebook a much lower failing grade. When looked at in isolation, this constitutes substantial evidence of pretext. However, this evidence is offset by the fact that Ms. Savage, the black ATO, also graded the second and third notebooks<sup>3</sup>, and her grades on those notebooks were consistent with those of the white ATO's. In the face of this fact, complainant is more or less constrained to argue that Ms. Savage violated academy protocol by referring to the other ATO's scores when she graded complainant's second and third notebooks, and that: "A plausible explanation for Ms. Savage's violation of the Academy's protocol is that she was pressured either directly or indirectly to follow the Caucasian assistants' low grading of Mr. Owens." Complainant's brief, p. 13. However, Ms. Savage testified that she saw the other scoresheets because they were maintained in the same book with the notebooks, and that she neither based her scores on the other scores nor felt any pressure to conform to those scores. There is no evidence that ATO Savage scored complainant's notebooks as she did as a result of any attempt to influence or pressure her by respondent's agents<sup>4</sup>

Complainant also contends that the notebooks themselves do not reflect a decline in the quality of his work between the first and the second and third notebooks, but rather that the ATO's were using subjective standards that facilitated discrimination against him. In this regard, while there was some testimony from the ATO's, including Ms. Savage, that the quality of the

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<sup>2</sup> As noted above, the score originally was a failing one but it was determined in the course of litigation to have been erroneously calculated.

<sup>3</sup> Respondent's policy was that if a notebook received a failing grade from one ATO, it then was graded by the others.

<sup>4</sup> It appears likely, based on the notebook excerpts in the record, that ATO Savage took a stricter approach to grading with respect to neatness on complainant's subsequent notebooks than she did on his first notebook. It is possible that she was influenced by the grades given by ATO Heino and ATO Neuman. However, assuming arguendo that this were the case, it does not tend to show that ATO Heino and ATO Neuman acted discriminatorily. There is no evidence in the record that either ATO Heino or ATO Neuman used any different approach to grading complainant than they did to grading the white cadets.

notebooks declined (although ATO Heino testified that there appeared to be an improvement in penmanship and general neatness subsequent to the first notebook), it was difficult to understand on the basis of the notebook excerpts in the record, why many of the entries after the first notebook were marked down in the "general neatness" category. In most cases, while the lettering could be seen to be less than perfect, the scoring seemed to be extremely exacting.<sup>5</sup> While this evidence supports complainant's case, it must be weighed against the fact that there is no evidence in the record that the white ATO's did not use the same approach to their grading of the white cadets. To the contrary, it is undisputed that they failed some of the white cadets' notebooks as well. There was testimony by respondent's agents that although the ATO's were applying the same criteria and grading standards, differences in how the ATO's interpreted and applied these criteria and standards could contribute to differences in results. In the absence of any evidence that ATO Heino and ATO Neuman used a different approach for complainant than they did for white cadets, there is no basis upon which to conclude that the apparent greater strictness in their grading of complainant's second and third notebooks, as compared to ATO Savage's grading of complainant's first notebook, more likely was attributable to complainant's race than it was to differences in how the ATO's interpreted and applied the criteria and standards. Furthermore, the fact that ATO Savage's grades on the second and third notebooks (including neatness) were very close to the grades given by the white ATO's, suggests that while there probably were inconsistencies in the grading process, complainant's scores were not the result of race discrimination.

Complainant also contends that, after his initial experience at the academy and his subsequent report-writing course at MATC, it is unlikely that his notebook performance actually would have deteriorated (as suggested by his notebook grades). While these factors support complainant's case to some extent, the record did not establish the extent (if any) to which the MATC course was coextensive with the academy notebook program. Also, there is no

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<sup>5</sup> There was some testimony to the effect that the quality of the photocopying of these documents may have obscured some of the problems that were more evident in the originals.

way to tell from this record whether the ATOs' concepts of "general neatness" were the same at both academy sessions.

Complainant also contends that ATO Heino (white) intervened to prevent ATO Savage (black) from grading the third notebook herself, presumably as part of a concerted effort to discriminate against complainant. Ms. Savage testified that she believed "Trooper Heino informed me that he was instructed to grade the third notebook," that she didn't "recall which training officer instructed him" to do so, and that she did not know why he had been so instructed. Savage deposition, pp. 28-29.<sup>6</sup> While it arguably could be inferred that there was a racially discriminatory motive underlying this transaction, it also could be inferred that ATO Heino was acting in accordance with the academy practice that "Each cadet's notebook was scored once by a different ATO for every unit of instruction." (Savage deposition Exhibit 11). Furthermore, it was known to ATO Heino at this time that ATO Savage also had given complainant a low grade on the second notebook, and would be grading the third notebook in any event if it were to receive a failing grade, pursuant to academy policy that failing notebooks were graded by all three ATO's. This weighs against the hypothesis that it was likely he had an improper motive to have stopped ATO Savage from grading the third notebook.

In a somewhat related vein, complainant argues respondent should have used a method of scoring notebooks that would have kept the identities of the cadets from the ATO's. However, based on this record, respondent had no real basis to have suspected race discrimination until after complainant had been terminated and filed this complaint. Also, the practice of having all ATO's grade each failing notebook would serve to some extent as a general check against ATO bias.

In addition to the matters regarding the notebooks, complainant has a number of other contentions regarding pretext. He asserts that he was terminated before his final exam and before his final total scholastic grade could be calculated, and that this was in violation of academy rules which he cites as follows:

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<sup>6</sup> Complainant also contends that ATO Heino lied about this transaction. However, his testimony can be reconciled with Ms. Savage's. The question to which he answered in the negative was: "You told Ms. Savage that she would not be allowed to grade Mr. Owens' notebooks after the first one, isn't that right?" This is not what Ms. Savage testified he had said.



"Students who fail to maintain a minimum scholastic average of 70% on any unit course will be terminated.

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The scholastic average for each unit course shall be determined by averaging the scores received on the weekly examination, final unit course examination, notebook grade and assigned project work. (Complainant's Exhibit 8)."

Complainant's brief, p. 14 (emphasis in brief). Complainant's quote from the "Academy Academic Requirements" (Complainant's Exhibit 8) leaves out the provision that: "The acceptable score for unit course notebooks shall be a minimum of 70 percent." The cadet handbook (Respondent's Exhibit 13) also sets forth the requirement that the "final notebook average score must be a minimum score of 70 percent. Students who fail to achieve a minimum notebook average of 70 percent will be subject to dismissal." Therefore, once it was determined that complainant would have been unable to have attained a final passing average notebook score regardless of his grade on the last notebook, he was subject to dismissal, and it was not contrary to respondent's policy to have done this without having waited for the final grade.

Complainant also cites the fact that he was not allowed to submit a typewritten corrected notebook, while no white cadets were denied the right to submit a typed notebook. However, the record clearly establishes that the academy expected the cadets' work to be their own. When complainant submitted this notebook, his comments made it obvious that it had been typed by someone else. Particularly in light of the emphasis on neatness in the completion of notebooks, it was consistent with academy policy to refuse to accept this notebook. There was no evidence that any white cadets who were similarly situated were treated differently. There was no evidence that any white cadet turned in a notebook that had been typed by someone else, or that respondent had reason to suspect this.

Complainant also cites the fact that ATO Heino pointed out in a memo (Complainant's Exhibit 10) that complainant was observed playing basketball when some of the other cadets were working on academics, and didn't mention that he also played tennis, which apparently allegedly reflects a racially-stereotyped attitude, i.e., focusing on a black-oriented rather than a white-oriented sport. Complainant also points out that obviously there were other cadets similarly involved, and that complainant had a legitimate basis (weight

control) to have been working out. In the Commission's opinion, this memo provides little, if any, evidence of pretext. ATO Heino apparently was attempting to point out that after complainant had been counseled regarding his academic problems, he had been observed doing something else when he could have been studying or doing the corrections on his notebook, and the memo refers to observations made by all three ATO's who observed complainant playing basketball while they were playing tennis.

Complainant argues there were a number of inconsistencies in the testimony of respondent's witnesses that undermines their credibility. For example, ATO Heino asserted in his memo that the ATO's did not refer to each others' grading sheets when rescoring complainant's notebooks, while ATO Savage admitted she had seen them. ATO Heino testified that there was no academy policy prohibiting referring to the other ATO's grading sheets, but the ATO's had agreed at the beginning of the program that they would not do this. He also testified that he had no first-hand knowledge of what the other ATO's did. It appears that his assertion in the memo was based on an inference he drew from the ATO's scoring agreement.

Complainant also argues as follows:

Ms. Savage also testified that cadets who did not have their own typewriters would have hired typists. It is not surprising that Messrs. Neuman and Heino deny they permitted Caucasian cadets to hire typists. Their denial does not matter because it is sufficient that a minority member of supervisory personnel has acknowledged the discriminatory practice. See, Howard, supra.

Complainant's brief, p. 17. Ms. Savage actually testified that there were white cadets who did not have typewriters/word processors in their rooms who submitted typed notebooks, and that this was permissible so long as they had done the work themselves. She also testified that she did not know of any cadet who was allowed to submit a notebook that had been typed by someone else. It does not follow that because a white cadet who did not have a typewriter/word processor in his or her dorm room turned in a typed notebook that someone else had done the typing/word processing.

In conclusion, complainant's primary evidence of pretext involves the drastic decline in his grades (particularly on neatness) between his first notebook, which was scored by a black ATO (Savage) and his second and third notebooks, which were scored initially by white ATO's (Heino and Neuman), while the notebook excerpts in the record do not appear to be consistent with a

decline in neatness. Weighing against pretext is the fact the white ATO's had given failing notebook grades to a number of white cadets, and there is no evidence that the white ATO's used any harsher standard with respect to complainant than they did with respect to the white cadets. In addition, ATO Savage also graded the second and third notebooks<sup>7</sup> and scored them about the same as the white ATO's. In the absence of any evidence that the white ATO's treated complainant any differently than any of the white cadets in the class, or that respondent tried to influence or pressure ATO Savage in some way to give complainant a low score on the second and third notebooks, the Commission cannot conclude that respondent's rationale for having dismissed complainant from the academy was a pretext for race discrimination.

While the record in this case does not support a conclusion that complainant was discriminated against, the Commission observes that, at least in its opinion, the notebook grading process used at the academy appears to be susceptible to arbitrary results in at least two respects. First, the evaluation of handwritten entries for the general neatness category appeared to involve subjective and potentially arbitrary determinations as to what constitutes crooked margins, improper letter formation, etc. This kind of system can lend itself to inequitable treatment of cadets and discrimination, although, to reiterate, it was not shown on this record that complainant was treated differently than any white cadets. Second, it appears that the cadets who could type and had access to the necessary equipment had a significant advantage over cadets who, like complainant, did not. The former cadets did not have to worry about such things as uneven margin alignment, improperly formed letters, etc., as their machines eliminated such potential problems. Since it appears that troopers in the field do their reports in handwriting (which is why one of the four notebooks had to be handwritten), it would seem there would be something to be said for requiring all cadets to be scored on the basis of the same requirements for preparing their notebooks. Again, however, there was nothing in this record that would show that this policy was discriminatory, on either a disparate treatment or disparate impact basis.

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<sup>7</sup> As discussed above, this was pursuant to the policy that all three ATO's graded all failing notebooks. This was not done with the first notebook, because the score did not count.

Order

This complaint is dismissed.

Dated: August 23, 1993

STATE PERSONNEL COMMISSION

AJT:lrn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner

Parties:

Wallace Owens  
7219 Milwaukee Ave.  
Milwaukee, WI 53212

Charles H. Thompson  
Secretary, DOT  
P.O. Box 7910  
Madison, WI 53707

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.