

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

DECISION AND ORDER

Case No. 98-0045-PC-ER

A hearing was held in the above-noted case on May 25, 1999. Complainant's request to file post-hearing briefs was granted, as was his request to delay the briefing schedule until he could obtain a copy of the hearing tapes. Both parties filed written arguments. The Commission received the final argument on August 23, 1999.

The issue for hearing is shown below (see conference report dated January 27, 1999, as amended by letter dated February 16, 1999):

Whether respondent discriminated against complainant on the basis of color, national origin or ancestry or WFEA retaliation in connection with its failure to hire him for the positions of Budget and Policy Supervisor 2 and Human Resource Manager.

The complainant, in his final post-hearing brief, withdrew his claim about the Budget and Policy Supervisor 2 position, stating as noted below:

Without wasting (the) Commission's time, Complainant is asking (that) the complaint related to the Budget and Policy Supervisor 2 be dismissed with prejudice. The reason is DHFS has argued convincingly to defeat complainant's arguments as related to the position.

This decision, accordingly, focuses on the remaining position of Human Resource Manager.

FINDINGS OF FACT

1. The State of Wisconsin has employed complainant for 18 years. From May 1981 to August 1985, he worked for the Department of Administration (DOA) as a Marketing Coordinator. From September 1985 to the present, he has worked for DOA as a Contractual Services Management Assistant. He previously worked in Tanzania as a General Manager with the Shirecu Association (June - December 1975), as an Accountant with the Shirecu Association (January 1973-December 1975) and as an Administrative Officer with the Maswa County Council (January 1971-December 1972). He received a Certificate in Public Administration and Finance in December 1970 from the Mzumbe School of Management. He received a bachelor of science degree in Ag-Business Administration from the UW-Platteville in May 1979. In May 1980, he received a Masters degree from the UW-Platteville in Science Agriculture Industries Management. (See Exh. R-14.) Complainant is black. He was born in Tanzania, Africa. Prior to the time period at issue in this case, he had filed a discrimination complaint against the Department of Health and Family Services (DHFS). This case, *Balele v. DOA, DOJ & DHFS*, 96-0156-PC-ER, was dismissed for lack of jurisdiction by order of the Commission dated June 4, 1997.

2. DHFS had a career executive vacancy for a Human Resource Manager (HRM) position located within respondent's Division of Management and Technology. The Division Administrator was Michael Hughes, the appointing authority for the vacant position. He delegated the day-to-day recruitment and hiring activities for the vacancy to his deputy, Ms. Susan Reinardy.

3. Ken DePrey had been in the HRM position for a long time. His retirement resulted in the position becoming vacant. Ms. Reinardy was involved in the recruitment process with Joanne Brockmann, a team leader in respondent's personnel office, and Alan Bell, an Executive Human Resource Specialist at the Department of Employment Relations (DER). All three individuals were involved in writing the job announcement. All three individuals worked on developing the criteria which DER

planned to use to screen applicants. These activities were completed prior to publication of the job vacancy.

4. The Wisconsin Personnel Manual applies to State agencies. Chapter 281 of the manual (Exh. C-8) is dated "February 1978" and deals with staffing career executive positions, including the recruitment options available. Four recruitment options are noted in the manual (Exh. C-8, p. 2), as shown below (using same emphasis as contained in the original document):

- Option I Lateral, downward or upward voluntary movement or reassignment of a Career Executive employe within the employing department.
- Option II Lateral, downward or upward voluntary movement of a Career Executive employe between different departments.
- Option III Certification from the register of Career Executive candidates who are classified civil service employees.
- Option IV Certification from the register of Career Executive candidates who are not classified civil service employees.

All options were utilized to fill the HRM position. No one from within DHFS applied for the position (no option I candidates). Five individuals already in career executive positions in a different agency applied (option II candidates). Eight individuals, including complainant, applied who were in classified service but not in a career executive position (option III candidates). Ten individuals applied who were not in state service (option IV candidates). (See Exh. R-10.)

5. The vacancy was announced in a Current Opportunities Bulletin (COB) on November 17, 1997, as shown below with the same emphasis as contained in the original document (Exh. R-8):

HUMAN RESOURCE MANAGER
MADISON (AREA 8)
JOB ANNOUNCEMENT CODE: 72011

Department of Health and Family Services (DHFS). Starting pay is \$48,024 to \$73,080 per year, depending on experience and qualifications, plus excellent benefits. A two-year Career Executive trial period

will be required. **JOB DUTIES:** Lead, direct and manage the human resource management program for a large state agency; position classification and compensation; occupational and organizational survey/studies; staffing; employment relations; AA/EEO and civil rights compliance; employe development and training; employe assistance; health and safety; payroll and employe benefits administration; and research, development, preparation and dissemination of all HR policies, procedures and strategies. **Well-qualified candidates will have several years of successful executive or managerial HR experience complemented by organizational leadership achievements in a large and complex public sector organization; or equivalent.** **KNOWLEDGE AND SKILLS REQUIRED:** Demonstrated successful executive or managerial HR experience; concepts, principles and methods of contemporary human resource management; organizational development and staff leadership; current management concepts and models; HR technical and legal principles and standards; contemporary personnel classification and compensation models; human behavior assessment methodologies and strategies; merit system principles, practices and standards; represented employe and collective bargaining employment environments; well developed interpersonal, speaking and writing skills; and the capacity to function at a high performance level in a fast-paced, customer service driven environment. **Apply by December 8 with a letter of application limited to two pages accompanied by your current detailed resume of achievements and experiences in the full scope of personnel management activities and functions. In these application materials, be sure to include the length, scope and impact of your roles in the various activities you cite or report. In addition, include two one-page abstracts of significant activities, initiatives or projects which demonstrate your HR executive or managerial achievements. Send completed application materials to DER/DMRS/HRM; (608) 266-1033; 137 East Wilson Street; P.O. Box 7855; Madison, WI 53707-7855; or FAX (608) 267-1000; abell@mail.state.wi.us (e-mail).** Application materials will be reviewed and those who appear best qualified will be invited to participate in the next step of the selection process in mid December.

6. DER received application materials from 23 individuals, including complainant. Mr. Bell determined that all applicants met the minimum job requirements. He recommended to Ms. Reinardy and Ms. Brockmann that, instead of DER screening the applicants that DER simply certify all the applicants to DHFS as eligible for hiring consideration. He made this recommendation, in part, because he felt there would be a delay in the hiring process if DER screened the applications due to the fact that the

Christmas holiday season was near. Ms. Reinardy agreed with Mr. Bell's recommendation.

7. DER certified all 23 applicants to DHFS as eligible for hiring consideration. Complainant's name was on the certification list.

8. There is no requirement that says everyone certified must be interviewed. There is a requirement that each certified person receives fair treatment or equal consideration meaning whatever requirement is applied to one person is applied to all others. Respondent did not wish to interview as many as 23 applicants. Respondent decided to review all candidates' application materials to determine who would be invited to interview. Respondent used the screening criteria that DER had planned to use with a few minor changes. By letters dated December 29, 1997, respondent notified all applicants that the screening process would be used to determine who would be invited for an interview (Exh. C-14).

9. Three individuals participated as screeners; Ray Allen who works for DER, Jeanne Benck who works for DER and Steve Christenson, Personnel Manager for the Department of Workforce Development (DWD). Mr. Allen is black. Ms. Benck and Mr. Christenson are white. Ms. Brockmann sent a letter to each screener on December 19, 1997 (Exh. R-13), which enclosed a copy of the application materials submitted by the 23 candidates (without first removing the names of the candidates), a copy of the HRM job announcement, a copy of the position description and a copy of the screening criteria (commonly referred to as "benchmarks"). Each screener worked alone in rating the candidates. The screening criteria used were related to the job duties of the HRM position.

10. Ms. Brockmann received the scored materials from the screeners. She asked Mr. Bell to analyze the results to ensure they were reliable. He performed the analysis, found the results reliable and reported his findings to Ms. Brockmann.

11. Ms. Brockmann and Ms. Reinardy reviewed the screening results to determine if there was a natural cutoff in the scores. The total scores ranged from 22 (complainant's score) to 138. Thirteen people had scores of 87 or above. The re-

maining 10 candidates had scores of 64 and below. Ms. Brockmann and Ms. Reinardy took the list of candidates and their scores (Exh. R-19) to Mr. Hughes where a brief conversation ensued. Basically, Ms. Reinardy and Ms. Brockmann showed the list to Mr. Hughes and recommended that the top 13 candidates be invited for an interview. He approved their recommendation.

12. The candidates who were not invited for an interview (including complainant) were informed of this decision by letters dated January 20, 1998.

13. The top thirteen candidates were invited to a first interview. The interview panel was comprised of Ms. Reinardy, Larry Tainter and Chuck McDowell. A panel consisting of Mr. Hughes and Richard Lorang, respondent's Deputy Secretary held second interviews. Respondent hired Cheryl Anderson for the position. Ms. Anderson is white. She had applied as an individual already in a career executive position in a state agency other than DHFS (recruitment option II – see ¶4 above).

14. The race is known for 17 of the 23 candidates. Three of the 17 candidates were black, including complainant. One of the black candidates (PT) competed as an Option IV candidate. Complainant and the other black candidate (PJW) competed as Option III candidates. PT and complainant scored the lowest in the screening process and were not invited for an interview. PJW scored 135 and was invited for an interview.¹

15. Complainant knows Mr. Allen and suspects that Mr. Allen is biased against him due to personal and other reasons. Complainant knows Mr. Christensen and suspects Mr. Christensen is biased against him due to litigation complainant filed against DWD. Complainant does not know Ms. Benck.

16. Each screener's scores for complainant's application materials is shown in the chart below. There were three sections to the scoring criteria labeled as "A," "B" and "C" in the chart below.

¹ The information in this paragraph was pieced together from several exhibits. The race of the candidates was derived from Exhs. C-15 and R-4, p. 2 (which indicated that a #1 was a self-identified black person and #5 was a self-identified white person). Exhibit R-19 shows the screening scores. Only the initials of the candidates are noted in this decision.

Section	Mr. Allen (Exh. R-16)	Mr. Christensen (Exh. R-18)	Ms. Benck (Exh. R-17)
A	2	3	1
B	0	5	11
C	2	6 ^A	2
Total	4	14	14

17. Respondent was unaware until the hearing in this case that a potential existed that some of the screeners might be biased against complainant. Even if each screener gave complainant the score given by Ms. Benck (14 total points), complainant's composite score would have been 52 (three times fourteen) which still would not have changed the fact that he did not meet the cutoff of 87 points required to qualify for an interview.

CONCLUSIONS OF LAW

1. This case is properly before the Commission pursuant to 230.45(1)(b), Stats.
2. It is the complainant's burden of proof to establish by a preponderance of the evidence that respondent's decision not to hire him for the HRM position was based on his color, national origin or ancestry. He failed to meet this burden of proof.
3. It is the complainant's burden of proof to establish by a preponderance of the evidence that respondent's decision not to hire him for the HRM position constituted retaliation for having filed a prior discrimination complaint against respondent. He failed to meet this burden of proof.

^A Confusion exists in the record regarding the score Mr. Christensen gave complainant for category C. The summary page of all candidates' scores reflects that Mr. Christensen gave complainant a "6" for category C. Mr. Bell's analysis was conducted with the understanding that complainant had received a "6" from Mr. Christensen for category C. Yet what respondent provided as the actual scoring document shows he gave complainant no points for category C. It is unknown whether respondent provided the wrong scoring page (Exh. R-18, p. 5) or whether the summary was incorrect (Exh. R-18, p. 1)

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

A prima facie case of discrimination in the context of a hiring decision may be demonstrated if the record shows that complainant: 1) is a member of a class protected under the 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. It is presumed for purposes of this decision that complainant established a prima facie case based on his color, national origin/ancestry and his filing of a prior discrimination complaint against respondent.

The burden shifts to respondent to articulate a legitimate reason for not hiring complainant. Respondent met this burden by saying that complainant's qualifications were inadequate to warrant an interview.

The burden returns to complainant to attempt to establish pretext. All arguments of pretext were considered and rejected. The main arguments raised by complainant are discussed in the following paragraphs.

Complainant contends that, as an option III candidate, respondent was required to consider him for appointment prior to considering any candidate who already was in a career executive position (complainant's initial brief, pp. 18-19), such as Cheryl Anderson who was hired for the HRM position. His argument is based on language from Chapter 281 of the Wisconsin Personnel Manual (pp. 6-8, Exh. C-8), relevant portions of which are shown below (with slight reorganization from the original copy). The text relied upon by complainant is shown in bold type.

281.050 Examination and Certification Requirements for Each Career
Executive Selection Option

Options I (A) & (B) – Lateral or downward voluntary movement within the employing department. Appointment consideration is desirable.

Option I(C) – Upward voluntary movement within the employing department. Appointment consideration is mandatory . . .

Option I(D) & (E) – Lateral or downward reassignment within the employing department. Justification of Career Executive reassignments under this option is mandatory . . .

Option II(A) & (B) – Lateral or downward voluntary movement between departments. A systematic appraisal of the qualifications of all Career Executives considered for a specific position under this option is strongly recommended.

Option II(C) – Upward voluntary movement between departments. Objective consideration for appointment is mandatory . . .

Option III – Certification from the register of Career Executive candidates who are classified civil service employes. The State Division of Personnel² will plan, subsequent to job analysis and prior to issuing the announcement, the examination techniques to be used for the establishment of an eligible register for Option III certification . . . The vacancy will then be announced; applications received and reviewed; examinations conducted; and no fewer than the 10 highest ranking candidates certified. If there are fewer than 10 candidates, all candidates found to meet preliminary qualifications established for the position may be referred.

The appointing authority will give appointment consideration³ to the certified candidates and may also consider, in addition, any CE (career executive) incumbents who are interested in the position.

² The reference to the State Division of Personnel is obsolete. The updated reference would be to Division of Merit Recruitment and Selection.

³ The term “appointment consideration” is defined in Ch. 281 of the manual as “Action analogous to making and supporting selection decisions from among persons certified from any other type of civil service eligible list.”

OPTION IV – Certification from the register of Career Executive candidates who are not classified civil service employees. Option IV candidates may be certified only after Option III candidates have been certified and provided appointment consideration⁴ and subsequent to providing Option III candidates appointment consideration the appointing authority has supplied the Administrator of the State Division of Personnel with written supporting information justifying an Option IV certification and written approval to certify Option IV candidates has been provided by the Administrator. (NOTE: All processes up to the point of certification may be conducted concurrently for Options III and IV with the approval of the Administrator . . .)

A brief description of the additional procedural steps required for Option IV follows:

1. The supporting information justifying a request for Option IV certification must be provided to the Administrator in writing . . .
2. After open recruitment is conducted to attract highly qualified applicants . . . a decision may be made at that point to discontinue use of Option IV.
3. Option IV candidates must compete in the same examination process used to establish the Option III register.
4. Certification under Option IV will be done as in Option III. The certification, however, will include only those candidates who have scored at or above the lowest score of a classified civil service employee previously certified for the position, except that when fewer than ten State employees are certified under Option III, up to ten persons who earn a passing score under Option IV may be certified even if some of these scores are lower than the lowest score earned by an Option II eligible . . .

The appointing authority makes a selection from among those certified under Option III or IV or from among interested Career Executive employees, except that if fewer than 10 names have been certified at Options III or IV the Administrator . . . may lower the certification standards, conduct additional open recruitment, or both, so that up to 10 names may be certified at Options III and IV.

⁴ Ibid.

The manual section cited by complainant does not stand for the proposition that Option III candidates must be considered for appointment before employees already in a career executive position. It does stand for the proposition that Option IV candidates may be considered only after candidates from Options I – III are considered for appointment. This conclusion is based on a reading of the document as a whole, rather than complainant’s approach of narrowing in on specific words without consideration of the entire context in which those words are used. Specifically, section 281.040 of the manual (pp. 4-5, Exh. C-8) contains a discussion of what requirements exist to advertise a career executive vacancy. The manual states under Option III that announcement is required and may be announced “simultaneously with Option IV” by publication in the COB. The manual states under Option IV that a separate register will be established for Option IV candidates and such separate register would be used only after appointment consideration has been given to individuals certified under Options I through III.

If complainant’s interpretation had been correct, the alleged harm would be that he should have been considered for the position before respondent considered Cheryl Anderson, the person hired. The real deviation here, though, was that respondent considered Option IV candidates along with all other candidates. The first question is whether this deviation harmed complainant. It would appear from the record that he would have been granted an interview if the Option IV candidates had not been considered for hire at the same time as the other certified candidates. This conclusion is based on the facts that respondent was willing to interview as many as 13 candidates and that the certification list would have contained only 13 names (including complainant’s) if the Option IV candidates had not been considered at the same time as other candidates.

The deviation from the manual (as described above) may be considered probative of pretext but does not automatically establish pretext. The question being litigated is whether discrimination or retaliation occurred. There is no evidence in the record

that the deviation was motivated (either on DER's or on DHFS' part) by reasons related to discrimination or retaliation or by any reason related to complainant.

The complainant's second argument of pretext is his contention that respondent's own policy prohibited use of a screening device to narrow the field of certified applicants. (See complainant's initial brief, p. 21.) As support of this contention, complainant cited respondent's Supervisor's Manual, Chapter 202 (Exh. C-21) and Ms. Brockmann's testimony that respondent's screening of certified applicants was part of the interview process. The referenced manual section is dated "September, 1997" and relates to respondent's hiring process. The manual section does not specifically address the screening of certified applicants to determine who will be interviewed. Complainant points to a section of the manual entitled "Selection Criteria" (Exh. C-21, p. 13). The section is recited below. The bold type was added to highlight the language upon which complainant's argument relies.

Selection Criteria: Selection criteria should be established by the supervisor for each question. **The interview is not an exam per se.** Therefore, scored (sic) should not be used, especially because criteria for scores would require expert validation. Evaluation criteria for responses to each question should be developed for each of these categories:

- 1) For Final Consideration
- 2) No Further Consideration at This Time
- 3) No Further Consideration

A hire is typically made from the "For Final Consideration" group. If a hire is not viable from this group because of references, lack of applicant interest in the job offer, etc., the supervisor may obtain another group of final candidates from the second group.

In convening the interview panel the panel members should be briefed on the selection criteria. Additionally, they should be reminded of our obligations under AA/EEO.

The manual section cited above does not support complainant's argument. The word "interview" in this context has its usual meaning of "a meeting of people face to

face, as for evaluating a job applicant.” *Webster’s New Word Dictionary*, 2d Concise Edition. Ms. Brockman may have testified that the screening was part of the interview process, but this cannot be interpreted to mean that the screening process was the same as the face-to-face interviews later held for the top candidates. In short, the manual section recited above bears no relation to complainant’s contention that respondent’s pre-screening practice was illegal or prohibited in some other way. Mr. Bell testified that such pre-screening practices were not prohibited.

Complainant’s final argument of pretext also is based on Chapter 202 of respondent’s supervisory manual. Specifically, complainant points to §202.3 B4g(1) of the manual (Exh. 21, p. 14), the text of which is shown below:

Appointment Recommendations Reviewed by Secretary’s Office

All division and institution supervisory, managerial and professional positions in pay range 18 and above (or equivalent) require the approval of the Secretary’s Office before an offer of employment can be made. The Department’s Affirmative Action and Equal Opportunity goals will be taken into consideration when reviewing hiring requests.

The Division Administrator forwards hiring information along with a resume and memorandum of explanation for the recommended hiring decision. When women and/or racial/ethnic minorities and/or people with disabilities are available for consideration but are not recommended for hire, their resumes must also be included. In these cases the transaction should be reviewed by the Department AA/CRC Office before it goes to the Secretary’s Office.

Respondent’s witnesses testified that only the *interviewed* candidates are subject to the above-noted provision and complainant’s name and resume were not forwarded to the Secretary’s Office or the Affirmative Action Office because he was not interviewed. Respondent’s interpretation of its own manual was reasonable. Complainant did not establish that in any other hiring process names were forwarded to the Secretary’s Office or the Affirmative Action Office except the names of interviewed candidates. In short, pretext has not been shown.

ORDER

This case is dismissed.

Dated: November 3, 1999.

STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

Commissioner Donald R. Murphy did not participate in the consideration of this matter.

Parties:

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Joe Leann
Secretary, DHFS
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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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) 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.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95