

MICAH A. ORIEDO,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,
Secretary, DEPARTMENT OF
EMPLOYMENT RELATIONS, and
Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,**
Respondents.

**RULING
ON MOTION
TO DISMISS
PARTIES**

Case No. 98-0124-PC-ER

This matter is before the Commission on a motion to dismiss the Department of Employment Relations and the Division of Merit Recruitment and Selection as parties for failure to state a claim against them.

The underlying complaint of discrimination, based on color, national origin or ancestry and race, states, in relevant part:

1. Sometime in February 1998, DOC, DER and DMRS jointly advertised the position of Correctional Services Manager - Regional Chief, a career executive position, which was to serve in DOC. Complainant completed the AHQ exam and submitted it timely to DOC. Because complainant has taken numerous such AHQ career executive exams and been certified, complainant should have been certified as eligible to be selected or appointed into the position. While those certified are usually invited for an interview and, in fact, [are] eligible for appointment, DOC did not invite complainant for an interview as required and therefore denied him the position. Instead, respondents sent complainant a letter telling him that they had used career executive status selection process to appoint an individual. Complainant alleges that the career executive selection policy has [a] disparate impact on blacks and other racial minorities seeking career executive positions or administrative managerial positions.

2. About March 12, 1998, complainant submitted completed AHQ exam to DOC for the position of Correctional Services Manager - Re-

gional Chief, a career executive position, which was to serve in DOC. On March 18, 1998 complainant received a letter from DOC/Alison Scherer informing him that recruitment for the position had been cancelled and that DOC had used career executive status to appoint an individual from within DOC. Complainant wrote to DOC, DER and DMRS complaining that respondents had acted arbitrarily for using the career executive status, with full knowledge that the position group was underutilized for racial minorities and blacks, and because of this respondents had disadvantaged complainant in the selection process, given that he had taken [the] trouble to respond to the Achievement History Questionnaire (AHQ). Complainant alleges that respondents did not act or respond because of [complainant's] black race. . . .

4. In this particular case complainant asked DER, DMRS and DOC, to investigate why DOC used the career executive option to fill the position. DER and DMRS did not respond, obviously because complainant happened to be black. Complainant alleges that respondents DER and DMRS did not respond intentionally and with disregard of complainant's civil rights to deny him the position because of his black race.

The goals of the career executive program are set forth in §230.24(1), Stats:

[T]o provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employes a broad opportunity for career advancement and to provide for the mobility of such employes among the agencies and units of state government for the most advantageous use of their managerial and administrative skills. To accomplish the purpose of this program, the administrator [of DMRS] may provide policies and standard for recruitment, examination . . . [and] transfer.

Subsection (2) goes on to provide substantial discretion to the appointing authority in deciding how to fill a vacancy in a career executive position:

A vacancy in a career executive position may be filled through an open competitive examination, a competitive promotional examination or by restricting competition to employes in career executive positions. . . . The *appointing authority* shall consider the guidelines under s. 230.19 *when deciding how to fill a vacancy* under this paragraph. (Emphasis added.)

The Administrator of DMRS has promulgated rules that offer a more complete understanding of the rights available to career executive employes. According to §ER-

MRS 30.08, Wis. Adm. Code, “Any career executive shall be eligible to voluntarily move to any vacant career executive position.” According to §ER-MRS 30.10(1), “Career executive program employment grants to each employe thereunder rights and privileges of movement between positions within the program without examination and additional competition.”

Complainant’s allegations may be summarized as follows:

Respondents DOC, DER and DMRS discriminated against the complainant on the basis of color, national origin or ancestry and race with respect to the following actions:

1. The decision to fill the vacant career executive position by transfer.
2. The failure to respond to complainant’s letter of complaint about that decision.

The language of §230.24(2) clearly indicates that it is up to the appointing authority, i.e., DOC, and *not* DER or DMRS, to decide how to fill a vacancy in the career executive program. Neither DER nor DMRS acted as the “employer” with respect to that decision. Therefore, neither DER nor DMRS are appropriate respondents in terms of reviewing the decision to fill the vacancy by transfer..

Complainant also contends that all three respondents, including DER and DMRS, discriminated against him when they declined to respond to his letter of complaint about the situation. The parties did not address this contention in their arguments to the Commission regarding the motion to dismiss DER and DMRS as parties.

The Fair Employment Act states, in §111.322(1), that it is an act of employment discrimination to “refuse to hire, employ. . . to bar or terminate from employment. . . or to discriminate against any individual in promotion, compensation or *in terms, conditions or privileges of employment.*” (emphasis added). It is clear that the action in question, as to DER and DMRS, did not result in one of the discrete employment transactions specifically mentioned in the FEA. At this stage of the proceeding, the question is whether the failure, by DER and DMRS, to respond to or act on complainant’s letter of complaint did or could have had any adverse effect on appellant’s conditions of employment.

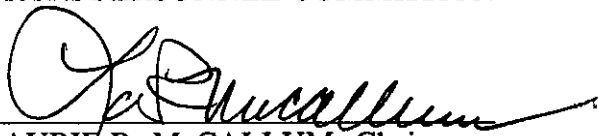
There is no indication that, at the time in question, complainant was employed by either DER or DMRS. His letter to them was a request to investigate a third agency's conduct. In *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, the Commission held that an employing agency's action of investigating the complainant for a possible work rule violation was not an adverse employment action with respect to "terms, conditions or privileges of employment" where the complainant had not established that the pre-disciplinary process followed by respondent created a hostile work environment. In contrast to *Klein*, which involved the employing agency holding a predisciplinary hearing about an employe's conduct, the present case involves an alleged failure to act on a complaint about another agency's personnel practices. The Commission concludes that there is no way that this alleged action by DER and DMRS could have any adverse effect on complainant's employment where complainant was not employed by either DER or DMRS.

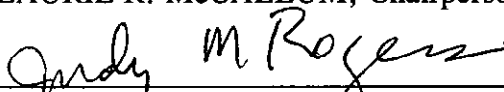
For the above reasons, neither DER nor DMRS are proper respondents in this matter.

ORDER

The motion by respondents DER and DMRS to dismiss them as respondents in this matter is granted. This action will subsequently be referred to as *Oriedo v. DOC*.

Dated: November 4, 1998. STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

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