

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI M. BALELE,
Complainant,

v.

Secretary, DEPARTMENT OF CORREC-
TIONS,
Respondent.

FINAL DECISION AND
ORDER

Case No. 00-0007-PC-ER

NATURE OF THE CASE^A

The following is the issue agreed to at the prehearing conference:

Whether respondent discriminated against complainant based on arrest/conviction record, national origin, or race, or retaliated against complainant for engaging in protected fair employment activities with respect to the failure to hire him for the vacant position of Correctional Service Manager-Assistant Administrator (Complainant will proceed on the theories of disparate treatment and disparate impact).

FINDINGS OF FACT

1. Complainant is black and was born in Tanzania.
2. This case involves a selection process for the position of Correctional Services Manager, Assistant Division Administrator, which is a career executive position. This vacancy was announced in the October 18, 1999, Current Opportunities Bulletin (COB). Respondent's Exhibit R101. This announcement included the following:

JOB DUTIES: This position will be responsible for and accountable to the Administrator of the Division of Management Services for planning, organizing, coordinating, evaluating and administration of selected management programs of the Division. Specifically, this position has department-wide responsibilities for technology management, procurement, contract administration, space planning, finance and risk

^A This decision is being issued following the issuance of a proposed decision and order (PDO) pursuant to §227.46(2), Wis. Adm. Code, and consideration of the parties' arguments and objections with regard to that PDO. Changes to the PDO are indicated by alpha footnotes.

management. KNOWLEDGE AND SKILLS: Public administration and management techniques; project management methods, budgetary processes and fiscal management techniques; information technology systems and standards; state personnel policies and procedures; state procurement policies and procedures; strong oral and written communication skills and strong organizational and planning skills.

3. Complainant submitted a resume and an AHQ (Achievement History Questionnaire). Following evaluation of this material, complainant was certified as eligible and moved to the next step in the selection process.

4. The next step in the selection process involved interviews before a three member panel. The members of this panel were selected by Cindy Archer, the Administrator of the Division of Management Services and the immediate supervisor and effective appointing authority for the position in question.

5. The panel consisted of one black member--Eurial Jordan--and two white members--Helen McCain and Barry Larson.

6. Archer developed interview questions and benchmarks for use by the panel. She was very well qualified to have developed these items on the basis of her training and experience and familiarity with the position, and the items were job related.

7. The panel interviewed all the certified candidates in the same manner, and asked them the questions that Archer had developed. They gave each candidate a numerical score based on how well the applicant compared to the benchmarks. During the interview process the panel had a copy of the position description available.

8. Complainant's background includes employment as an accountant and as a manager of a cooperative in Tanzania approximately 26 years ago. His more recent experience has been in the area of procurement in DOA (Department of Administration) in a relatively low level position which has not included responsibility for budget development and the development of strategic planning. In his interview with the panel, complainant's responses were rambling and unorganized, were not concise, and did not directly address the criteria incorporated in the questions. His significant higher-level experience in information technology (IT) management was very dated. The panel con-

sidered this problematical because IT has been a fast-changing field. Complainant also lacked strategic planning experience comparable to most of the other candidates.

9. The candidates' scores fell into three tiers—6 were 40 or higher, 6 were 20-35, and 8 were below 20. Complainant was in the latter group with a score of 15½. The panelists' scoring reflected a high level of inter-rater reliability, a statistical parameter which is relevant to the validity of an evaluation process.

10. Archer accepted the scoring performed by the panel without review or assessment. She decided to forward for further consideration only the top six applicants. This included one Hispanic minority and five whites. The next step in the selection process involved another panel interview in which Archer participated as a panelist. She then decided to appoint a white person, Susan Kidder.

11. Prior to finalizing Kidder's appointment Archer discussed the hiring decision with the DOC Affirmative Action Officer (AA), Jo Winston. They both agreed that Kidder should be appointed.

12. Archer then discussed this appointment with Jessica O'Donnell, the DOC Executive Assistant, and subsequently they both talked to the DOC Secretary, Jon E. Litscher. Both O'Donnell and Litscher concurred in the decision to hire Kidder. Neither O'Donnell nor Litscher were apprised of any information about any candidate other than Kidder, and were not apprised that there were minorities among the certified candidates.

13. Respondent was under-utilized for racial minorities with regard to the job group in question (Correctional Services Manager), see DOC Affirmative Action/Equal Employment Opportunity (AA/EEO) Plan, Complainant's Exhibit C1, p. 10, and had a short-term affirmative action goal in effect for this job group and for the position in question.

14. Pursuant to the foregoing AA/EEO Plan at pp. 7-8, the existence of a short-term goal required that all staff involved in the hiring process be notified of the goal. This did not occur with regard either to the panel members, the effective appointing authority (Archer), the Executive Assistant (O'Donnell), or the Secretary (Litscher).

15. Pursuant to the Department of Employment Relations, Division of Affirmative Action, AA/EEO Policy and Procedure Standards, Complainant's Exhibit C3, pp. 5-7, there are certain standards with regard to all agencies with positions for which short term goals exist.

16. Pursuant to ¶ III. D. 1) of the foregoing standards: "All agency staff involved in the hiring process must be informed in writing when there is a short-term goal" (Complainant's Exhibit C 3, p.6). This did not occur with regard to the panel members, the effective appointing authority (Archer), and the secretary's office.

17 Pursuant to ¶III. D. 3) of the foregoing standards: "Prior to the start of the selection interviews, the EEO/AA Officer or designee will discuss the EEO/AA objective in the hiring decision with the selection interview panel." Complainant's Exhibit C3, p. 5. This did not occur.

18. Pursuant to the DOC AA/EEO plan, Complainant's Exhibit C1, ¶A. C., the existence of a short-term goal requires that the agency "follow the required policies and procedures as outlined in [DOC] Executive Directives #1, #4, and #6."

19. Executive Directive #4, Complainant's Exhibit C4a, provides as follows:

II. Policy

Hiring justifications are required for all competitive hiring actions in the Department of Corrections for positions with affirmative action goals, which are supervisory in nature, or at pay range 15 or above. Completion of the form DERDAA 11 is completed [sic] for all permanent and project positions.

III. Procedure for Under-Utilized Positions and Supervisory/Management Positions

For positions which are underutilized for women and/or racial and ethnic minorities, AND for supervisory and management positions a hiring justification must be submitted to the Department Affirmative Action Officer before offering the job to any candidate. Justifications may ordinarily be handled by telephone. The AA Officer will maintain a record of verbal justifications, and will complete the form DERDAA 11 for justifications handled verbally. The AA Officer may require a written justification from the employing unit, if s/he feels it is necessary. A written or verbal justification should include the position title, position number(s), the current workforce composition for the employing unit in

question, the performance of the candidates on the interview or other screening tools, their references, and relative qualifications.

20. Respondent partially completed a form DERDAA 11 (Complainant's Exhibit C 18, p. 4) with respect to this position. The information on the form identified the position in question, but was not completed with respect to §§I. "Hiring Decision," II. "Written Hiring Reason," III. "Statistical Summary," IV. "Additional Information."¹ The form was neither signed nor dated. Attached to this form was another form entitled DIVISION OF MANAGEMENT SERVICES JUSTIFICATION TO HIRE. Complainant's Exhibit C 18, pp. 5-6. Included on the latter form, among other things, are the names, interview scores, and ethnic codes of the candidates. There were two Hispanic, one Asian, one black (complainant), and 16 white candidates. The form reflects that the information on the form was provided by Cindy Archer. On the second page of this form the following information was provided:

Reason for selection: Best skills in the area of facilitation, consensus building, IT planning & project management. Excellent References!

Target group candidate #1

Reason for non-selection (interview, references, education, experience, etc.): Weak in area of facilitation & IT planning.

The space on the form for "Target group candidate #2" was not filled in.

21. DOC Executive Directive 4, Complainant's Exhibit C4a, also provides at ¶III as follows:

If the Affirmative Action Officer disagrees with the proposed hiring decision, he/she will discuss the issue with the Appointing Authority.

If the Division Administrator and the Affirmative Action Officer cannot reach an agreement at this level, the AA Officer will so advise the secretary, who will make the final decision.

22. The AAO and Archer discussed the decision to hire Kidder and agreed with it. Therefore, the secretary was not advised of such a disagreement.

¹ It is possible with regard to §IV that none of the five check-off categories were applicable.

23. Kidder's qualifications included extensive experience in leading and developing strategic plans, she was well-versed in the field of IT, including the standards that the Division of Technology Management had developed for the state. At the time, she was working in that division, which has the role of establishing statewide IT policy and direction, and participated in the review of those strategic plans. She thus was very well-versed both on the direction the state was going and how that all fed in to agencies' plans both in terms of the areas of IT and strategic planning. Her experience was current, which was very important for this position due, at least in part, to the fact that IT is such a fast-changing field.

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 show by a preponderance of the evidence the facts necessary to establish his claims.
3. Complainant has not satisfied his burden of proof.
4. Respondent did not discriminate against complainant on the basis of color, national origin or ancestry, race, or arrest/conviction record² with respect to the decision not to hire him for the position of Correctional Service Manager-Assistant Administrator
5. The selection process for this position did not have a disparate impact on the complainant based on his race, color, ancestry or national origin.

OPINION

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for dis-

² Neither party addressed the arrest/conviction record issue. It apparently either was mentioned in the issue by inadvertence, or complainant decided not to pursue such a claim.

crimination. The complainant has the ultimate burden of proof. See *Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) he is a member of a group protected by the WFEA, (2) he applied and was qualified for a job which the employer was seeking to fill, (3) despite his qualifications he was rejected, and (4) the employer continued with its attempt to fill the position. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). Here, complainant is a black person whose country of origin is Tanzania³. He applied for the position in question, and was certified for consideration which shows that on this record he was at least minimally qualified. See §230.25(1), Stats. The respondent filled the position with a white candidate. Therefore, he has established a prima facie case. Respondent articulated a legitimate, non-discriminatory reason for its decision based on its determination that the candidates who were scored higher by the initial panel were better qualified than complainant, and the person who was hired (Kidder) was substantially better qualified than complainant. At this point, complainant has the burden to show that respondent's articulated reasons were pretextual, and the real reason for the decision was because of his race or national origin.

The complainant's main evidence of pretext involves respondent's failure to have complied with all the affirmative action (AA) policies and procedures applicable to this selection process, which involved a job group which was underutilized for racial minorities. These included failing to notify, either verbally or in writing,⁴ all staff involved in the hiring process of the existence of an affirmative action goal. The AA/EEO office failed to discuss the short term goal with the panel. Also, respondent failed to fill out completely a form DERDAA 11 with respect to this position, albeit the internal DOC form which was completed provided some of the information required for

³ The panel could have inferred this from complainant's application materials. Also, one of the members of the panel knew complainant.

⁴ There were separate requirements imposed by different policies for both notification in general and written notification.

the DERDAA 11. An employer's failure to follow its internal affirmative action policy can be probative of pretext. *See, e. g., Antol v. Perry*, 82 F. 3d 1291, 1301, 70 FEP Cases 993, 999 (3d Cir. 1996) (employer's failure to follow its own affirmative action rules is evidence of discriminatory intent); *Yatvin v. Madison Metropolitan School Dist.*, 840 F. 2d 412, 415-16, 45 FEP Cases 1862, 1864-65 (7th Cir. 1988) (where there is substantial compliance with affirmative action plan, occasional departures do not have evidentiary significance). While the evidence in this case provides some evidence of pretext, it is insufficient to enable complainant to satisfy his burden of proof on this issue. The evidence establishes that the panel was working with questions and benchmarks which Archer had developed. She was well qualified to have established these criteria, and the panel was well qualified to have applied them in its evaluation of the candidates. Complainant did not provide any evidence that would tend to show that the panel erred in its scoring,⁵ or that its criticism of his performance in the interview process was unfounded. Furthermore, the panel was racially balanced, consisting of two whites and one black.

Complainant argues that the panel should not have relied on the fact that much of his experience was not recent. The only basis for this argument was that complainant asked some of respondent's witnesses if they were familiar with any research that would tend to support that proposition, and they responded that they had not. This argument is inconsistent with the point that it is complainant who has the burden of proof on this issue. Also, it ignores convincing testimony from respondent's witnesses that IT is a rapidly changing field.

The fact that the panel was neither notified nor briefed on the department's affirmative action goal for this position supports complainant's case. However, this panel was only acting as a screen to determine the best qualified candidates for further consideration by the appointing authority. There is nothing which would provide an inference that the panel evaluation of the candidates would have been any different had they known of the department's affirmative action goal with regard to this position.

Respondent's failure to have completed the Department of Employment Relations, Division of Affirmative Action form DERDAA 11 also is probative of pretext. However, some of the information which that form seeks to elicit could be abstracted from the internal form (DIVISION OF MANAGEMENT SERVICES JUSTIFICATION TO HIRE) which respondent did complete and which was attached to a form DERDAA 11.

In conclusion on the issue of pretext, the record strongly supports the accuracy of the panel's evaluation of complainant, and while respondent's failure to have followed all applicable affirmative action policies and procedures is probative of pretext, it is insufficient to establish pretext in light of the clearly reasonable assessment of the candidates' (including complainant's) qualifications. Also, the selected candidate (Kidder) was far better qualified than complainant. If complainant had been more qualified for this position (i. e., more qualified than he actually was)[^], the result might be different, but this is not the case.

Moving on to the retaliation issue, if we assume a prima facie case (one of the members of the panel was aware that complainant had filed a case against DOC), the rest of the analysis parallels the discussion of the race and national origin claims, and the result is the same.

The Commission will next address complainant's disparate impact claim. Complainant proceeds on a mistaken view of the concept of disparate impact, and he does not have anything resembling an adverse impact claim.

Under a disparate (or "adverse") impact theory, an employer's facially neutral policy or practice may be unlawful—even without a showing of discriminatory intent—because it has a significantly adverse impact on a protected group. Federal case law discussing the disparate impact theory is "relevant and persuasive" in analyzing a claim under Wisconsin's Fair Employment Act. *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 595 n. 14, 476 N.W.2d 707 (Ct. of App., 1991). The allocation of the burden of proof in a disparate impact case is as follows:

⁵ The panel scores exhibited high inter-rater reliability.

[^] The parenthetical comment is added to the PDO for purposes of clarification.

(1) *The prima facie case*: A court will consider statistical evidence offered by both the plaintiff and the defendant to determine whether, on the basis of those statistics that are most probative, the challenged practice or selection device has a substantial adverse impact on a protected group. The burdens of production and persuasion at this stage are on the plaintiff.

(2) *Business necessity*: If impact is established, the inquiry becomes whether the practice or selection device is "job-related for the position in question and consistent with business necessity." The burdens of production and persuasion at this stage are on the defendant.

(3) *Alternatives with a lesser impact*: To rebut the employer's proof of business necessity, a plaintiff can show that the employer refused to implement an effective alternative practice or selection device that would have a lesser adverse impact. (Footnotes omitted) Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 87 (3^d ed. 1996).

In the instant case, complainant presents neither any statistics⁶ nor other evidence of disparate impact as defined above. Complainant does not really have a case for disparate impact other than to the extent he is arguing that since he did not get selected for the position in question as a result of having been screened out in the first cut made by the panel, respondent's decision had an adverse *effect* on *him* which he mistakenly equates to an adverse impact. *See, e. g.*, Complainant's post-hearing brief, pp. 9-10, 12-13:

In a disparate impact case, the plaintiff must prove that the challenged practice is discriminatory because it had **direct** disparate impact on him and is unjustified by the defendant's legitimate business needs. *Allen v. Seidman*, 881 F. 2d 375, 379 [50 FEP Cases 607] (7th Cir 1989)

Balele's name was not forwarded for appointment consideration because he did not do well at interview. Therefore, Balele was correct in his complaint that interview results which were post certification decision had a **direct** adverse impact on him as an individual applicant and for his protected status.

⁶ The only statistics complainant cites in this case concern Complainant's Exhibit C15, which reflects certain data with regard to statewide career executive transactions during fiscal years 1994, 1995, and 1996. This data is not broken out for either DOC or the job group in question, it is for a period which predates the appointment in question, and the data does not show a significant difference between the percentage of minority applicants and the number of minorities on registers.

Allen v. Seidman involved a disparate impact claim with regard to a promotion-related exam that was passed by 39% of black examinees and 84% of the white candidates. It provides no support for complainant's apparent theory that a claimant only needs to show that a selection vehicle adversely affected the claimant to establish a prima facie case of disparate impact. *See also Balele v. DOT*, 99-0103-PC-ER, 11/15/00; *Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/01, *Balele v. DOC*, 00-0034-PC-ER, 6/3/01^B

In conclusion, the Commission notes that while it has considered all the arguments complainant raised in his post-hearing briefs, it has only tried to address those it considers the most pertinent.

ORDER


This complaint is dismissed.

Dated: July 13, 2001.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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

Petition for Rehearing. Any person aggrieved by a final order (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 oc-

^B These citations are added to further explain the Commission's decision.

curred 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.)