

**PASTORI BALELE,**  
*Complainant,*

v.

**Secretary, DEPARTMENT OF  
CORRECTIONS,**  
*Respondent.*

**FINAL  
DECISION  
AND  
ORDER**

Case No. 00-0034-PC-ER

This matter is before the Commission on the following statement of issues for hearing:

Whether the respondent discriminated against complainant on the basis of color, national origin or ancestry, race, sex or WFEA retaliation in violation of the WFEA when it failed or refused to hire him for the Purchasing Director position in question.

Whether respondent discriminated against complainant on the basis of color, national origin or ancestry, race or sex in violation of the WFEA on a disparate impact theory in connection with the foregoing transaction, as alleged in the charge of discrimination filed March 15, 2000.

The designated hearing examiner issued a proposed decision and order on May 1, 2001. The parties were provided until May 31, 2001, to request oral argument or file written arguments objecting to the proposed decision. Complainant hand-delivered a request for oral argument to the Commission on June 11, 2001. The request was clearly late and, as a consequence, is denied.

#### FINDINGS OF FACT

1. Complainant is a black male. He was born in Tanzania and speaks with an accent. He has worked for approximately 15 years as an administrative assistant in the area of contractual services, a segment of the Procurement Section, in the Bureau of Procurement, Division of State Agency Services, Department of Administration, without supervisory responsibilities.

2. Prior to the decision in question, complainant had filed one or more discrimination complaints against respondent.

3. The vacant position in question was described in a job announcement (Comp. Exh. 1) dated December 6, 1999, as follows:

This position is responsible for the development and management of all departmental purchasing activities. Duties include development and management of purchasing policies and procedures; purchasing and printing activities; procurement of commodities and services required by the department and the supervision of staff.

The position is classified as a Purchasing Agent Supervisor 6 and is part of the career executive program. It has a working title of DOC Purchasing Section Supervisor.

4. At the time the job announcement was issued, the position was to be supervised by Bev Balakhovsky, who served as respondent's comptroller and had responsibilities for the areas of fiscal management, risk management, purchasing and food service. Ms. Balakhovsky's position title was Director of respondent's Division of Finance.

5. The classification of Purchasing Agent Supervisor 6 was not underutilized on the bases of either race or sex in the Department of Corrections. Therefore, no special affirmative action considerations were applicable to the hiring process.

6. Complainant applied for the position in question and was certified as eligible for further consideration.

7. It is respondent's standard procedure to interview those persons on the certification list who wish to be considered further for the vacancy.

8. Respondent developed a series of questions for the interviews as well as benchmarks as a basis for analyzing the responses of the candidates. Ms. Balakhovsky helped to develop the interview questions, wrote the position description and participated in selecting the interview panel.

9. The interview panel consisted of Bev Balakhovsky, Eurial Jordan and Susan Kidder. Ms. Balakhovsky is a white female, Mr. Jordan a black male and Ms.

Kidder a white female. Ms. Kidder is Assistant Administrator, Division of Management Services, in the Department of Corrections.

10. The questions gave the applicants an opportunity to explain why they were qualified for the position, to identify relevant training and experience and to show how they communicated in an interview setting,

11. The applicants' resumes were made available to the panelists, but the resumes were not considered as a basis for scoring the interviews. Grading of the interviews was based solely on the responses to the interview questions.

12. Each candidate was graded independently of all of the others.

13. Complainant was one of nine individuals who were interviewed.

14. Helen McCain was ultimately selected to fill the vacancy. Ms. McCain was employed as deputy director for procurement for the Department of Administration, where the purchasing program spent \$800 million annually. Ms. McCain supervised 6 professional staff, had worked 12 years in procurement and had served as a trainer in all relevant purchasing courses. Ms. McCain's position at the Department of Administration was already part of the career executive program. During her interview, Ms. McCain related her extensive training and experience directly to the benchmarks for the position.

15. At the beginning of his interview, complainant stated that he was the most qualified candidate for the position.

16. Complainant's comments during the course of the interview were not very responsive to the particular questions that were posed, and he did not tie his experience and training to the established benchmarks.

17. Several years before the interview, when both she and complainant were employed at the Department of Administration, Ms. Belakhovsky had heard rumors that complainant had filed discrimination complaints. Ms. Kidder was not aware of any previous fair employment protected activities by complainant. At all relevant times, Mr Jordan was not aware that complainant had engaged in any fair employment protected activities.

18. Ms. Kidder began working for the Department of Corrections on January 2, 2000, after the selection process for the position in question had already begun.

19. Ms. McCain and Mr Jordan had served on the panel that had interviewed Ms. Kidder in November of 1999 for the position of Assistant Administrator of the Division of Management Services.

20. The panelists scored complainant and the two highest-scoring candidates as follows:

Candidate	Score by Ms. Kidder	Score by Ms. Balakhovsky	Score by Mr Jordan	Total Score	Rank
Helen McCain	27	29	27	83	1
Robert Canfield	27	26	25	78	2
Complainant	8	8	9	25	9

21. The interview scores were later analyzed by the Division of Merit Recruitment and Selection, Department of Employment Relations, in terms of consistency and resulting reliability. The panelists' scores were found to be highly reliable, i.e. there was strong agreement between the interviewers without showing collusion.

22. Ms. McCain was significantly more qualified than complainant for the position.

23. After the interviews were conducted, but before the selection decision was made, respondent reorganized. As a consequence, Ms. Balakhovsky no longer served as the immediate supervisor for the vacant position. Respondent assigned Ms. Kidder that responsibility.

24. On February 3, 2000, complainant sent an e-mail message (Comp. Exh. 22) to respondent's secretary, Jon Litscher. Complainant sent copies to Ms. Balakhovsky and Mr. Jordan. The e-mail stated:

I would like to thank your staff for interviewing me for the Purchasing Director position at DOC. I believe I am the best qualified for the position. Please hire me for this position. Thanks.

25. Ms. Kidder checked references for both Ms. McCain and for the second-ranked candidate, Mr. Canfield, but not for any of the other candidates. The references for Ms. McCain and Mr. Canfield were positive.

26. Ms. Kidder made the final hiring recommendation to Cindy Archer, Administrator, Division of Management Services, who was the appointing authority. Ms. Kidder recommended that respondent hire Ms. McCain for the vacancy.

27. Respondent prepared a form (Resp. Exh. 111) entitled "Written Hiring Reason for Classified and Project Appointments." Preparation of this form is standard procedure for filling a supervisory position. Sanger Powers, the acting affirmative action officer for DOC at the time, signed the form on February 23, 2000. The form indicated that the position was not under-utilized for women or minorities. It indicated that Helen McCain was selected by the employing unit because of a "combination of experience both supervisory & purchasing" and because of "excellent references." It further indicated that the "target group candidates," including complainant, were not selected because of "poor interview score." It showed that complainant had received an interview score of 25, while Ms. McCain had a score of 83.

28. By letter (Comp. Exh. 18) dated March 17, 2000, respondent confirmed movement of Ms. McCain into the Purchasing Agent Supervisor 6 position, pursuant to §ER-MRS 30.08, Wis. Adm. Code,<sup>1</sup> effective April 9, 2000.

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<sup>1</sup> This rule provides:

Any career executive shall be eligible to voluntarily move to any vacant career executive position. If the appointing authority is considering the voluntary movement of a career executive employee to a position allocated to a higher class, all career executive employees shall be so notified and provided an opportunity for appointment consideration, as follows:

- (1) Intra-agency movement: all career executive employees in the agency.
- (2) Inter-agency movement: all career executive employees in state service.

### CONCLUSIONS OF LAW

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

2. Complainant has the burden to establish that he was discriminated against based on his color, national origin or ancestry, race or sex or retaliated against for having engaged in fair employment activities when he was not selected for the Purchasing Director position.

3. Complainant has failed to sustain his burden.

4. Respondent did not discriminate against complainant or retaliate against him with respect to the Purchasing Director selection decision.

5. The procedures followed by respondent with respect to this selection decision did not have a disparate impact on the complainant.

### OPINION

#### I. Fair employment discrimination claim

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 discrimination. 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 Wisconsin Fair Employment Act, (2) he applied for 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. 1917, 5 FEP Cases 965 (1973). Here, complainant is a black person whose country of origin is Tanzania. He applied and was interviewed by a screening panel for the position in question. He was rejected

because he had the lowest score among the 9 interviewees. Respondent continued with the selection process and appointed a white female, Helen McCain, to fill the position. The record supports a finding that complainant was at least minimally qualified for the position as evidenced by his certification for further consideration following the examination process. In any event, since complainant clearly has established the other elements of a prima facie case of race discrimination, and this case was heard fully on the merits, the Commission can proceed directly to the issue of pretext, *see, e.g., United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d. 403, 103 S. Ct. 1478 (1983).

Respondent's rationale for its decision to hire Ms. McCain rather than complainant is that complainant's qualifications were evaluated as significantly below the group of the top two applicants, including Ms. McCain, whose names were forwarded for further consideration.

Respondent followed its standard procedures when it filled the position, both during the interviews and throughout the selection process. The position in question is a highly responsible one with important and extensive supervisory responsibilities. All candidates were asked the same questions, their responses were rated separately by the three panel members and the resulting scores were combined. Complainant had the lowest score of the 9 candidates. Respondent then contacted references for the two candidates with the highest cumulative scores.<sup>2</sup> Ms. McCain's reference was positive. The supervisor recommended to the appointing authority that Ms. McCain be hired and she was.

Ms. McCain had extremely relevant experience. She had served as the deputy director for procurement in the Department of Administration and had very significant supervisory experience in the relevant subject area. In contrast, complainant had worked at the administrative assistant level, without supervisory responsibilities, for the

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<sup>2</sup> Respondent's practice of only checking the references for the candidates that scored best in the interviews, is logical in that it means not spending more time than necessary on the selection process if the references for the highest ranked candidate(s) are positive. *Carratt v. DOC*, Case Nos. 98-0063-PC, 98-0143-PC-ER, 1/17/2001.

previous 15 years. Complainant did not have the same depth or breadth of relevant experience as Ms. McCain. The three panelists were quite consistent in their scoring of the three candidates. The interview panel awarded Ms. McCain 83 points out of a possible 90. In contrast, the petitioner received only 25 points.

We do not have a tape recording of what was said during the interviews, but we do know that all three panelists had benchmarks to follow, they took notes about each candidate's responses for each of the three questions, the written notes were reasonably consistent in terms of what was said, they all assigned scores to the various candidates, the scores were very similar with respect to complainant, the scores were very similar with respect to Ms. McCain, and when totaled, the scores placed complainant last among the nine candidates.

Complainant contends that respondent's "agents had ministerial duty to forward all names, including Balele's to the DOC Secretary for appointment consideration as a matter of DOC and state policies." (Reply brief, p. 8) Complainant's contention is unsupported. Jean Nichols, respondent's Human Resources Program Officer testified that respondent cannot just hire anyone off of the certification list. Cindy Archer, the appointing authority for the position, testified that the interview panel would not have been doing its job if it had transmitted all 9 names to the appointing authority.

Complainant testified that another unsuccessful candidate for the position told complainant that complainant had been recommended for appointment. The other unsuccessful candidate did not testify and the record does not support the conclusion that another candidate made this statement to complainant. The record clearly shows that complainant was not recommended for appointment at any point in during or after the interview. To the contrary, the interview panel ranked him weakest of the 9 candidates.

While complainant is of the opinion that he was the most qualified, his view is unsupported. There is no justification for complainant's contention (which he first expressed during his own interview and without any knowledge of the other candidates) that he was the best-qualified candidate.



## II. Fair employment retaliation claim

Complainant has created at least a minimal prima facie case of fair employment retaliation by establishing that he had previously filed fair employment claims against respondent, that Ms. Balakhovsky was aware of this, and that he was certified as eligible for appointment but not hired. *See, e. g., Chandler v. UW-LaCrosse*, 87-0124-PC-ER, 8/24/89. Evidence that there was a causal link between the protected activities and the failure to hire can be supplied by the evidence probative of pretext. The rest of the *McDonnell Douglas* analysis tracks the discussion of the race, color, national origin/ancestry and sex claims discussed above and leads to the same result. One additional consideration under this heading is that Ms. Balakhovsky was the only one of the three panelists who was aware of complainant's protected activities, and her assessment of the applicant's qualifications was very similar to scores by the other two panelists.

Complainant has failed to establish *any* circumstances giving rise to an inference of retaliation with respect to the decision to reject him as a candidate for the position in question. Complainant failed to establish pretext with regard to respondent's evidence that Ms. McCain was better qualified and did a better job during the interview than complainant.

## III. Disparate impact

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:

- (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<sup>d</sup> ed. 1996)

In the instant case, complainant has no statistics or other evidence of disparate impact as defined above. The Commission has previously rejected complainant's assertion that a disparate impact claim can be established without any statistical proof. *Balele v. DOT*, 99-0103-PC-ER, 11/15/2000. In the same ruling, the Commission also rejected complainant's argument that disparate impact could be established by citing to him as the sole adversely-affected individual.<sup>3</sup> Complainant quotes at length from the decision in *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661, 70 FEP Cases 589

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<sup>3</sup> The Commission reached similar conclusions in *Balele v. UW-Madison*, 99-0169-PC-ER, 2/26/2001.

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 BASS Director position, respondent's decision had an adverse effect on him. *See, e. g.*, Complainant's post-hearing brief, pp. 9-10:

At the hearing Balele identified that post certification practices which include interviews and decisions after interviews had disparate impact on him as in individual applicant and for his race and national origin. Indeed, during the hearing Respondent's agents, Ms. Harder, Harrod and Drummond testified that Balele's name was not forwarded for equal appointment consideration because he did not do well at the interview. Therefore Balele was correct in his complaint that interview and decision to forward only five names for equal appointment consideration had disparate impact on Balele as an individual and for his protected status.

This line of thinking simply does not amount to an adverse impact.

(7<sup>th</sup> Cir., 1996). However, that case deals with a question of whether an individual plaintiff has established whether s/he is entitled to relief once disparate impact has been established. In *Melendez*, the parties had stipulated that a standardized test had a disparate impact on Hispanics. There was some evidence, however, that Illinois Bell would not have hired Mr. Melendez even if he had passed the test in question. The language that complainant quotes in his brief all relates to the question of whether Mr. Melendez was entitled to relief, rather than to whether there was a disparate impact.

In the present case, there not only is no stipulation that a practice of respondent caused a disparate impact, there is no evidence whatsoever to that effect. The decision in *Melendez* is simply inapplicable to the present facts.

ORDER

This matter is dismissed.

Dated: June 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 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