

STATE OF WISCONSIN

PERSONNEL COMMISSION

**PASTORI M. BALELE**

*Complainant,*

v.

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

RULING

Case No. 00-0077-PC-ER

This is a complaint of discrimination on the bases of color, national origin or ancestry, and race, and of retaliation for engaging in protected fair employment activities relating to the filling of a vacancy in the position of Director, State Bureau of Procurement, Department of Administration. On December 7, 2000, respondents filed an objection to the proposed statement of issue for hearing. The parties were permitted to brief this motion and the schedule established for doing so was completed on January 12, 2001. The following findings of fact appear to be undisputed, and are derived from information provided by the parties, or from findings made by the Commission after an evidentiary hearing conducted on July 31, 2000, on an issue related to a request for a temporary injunction in this matter.

#### FINDINGS OF FACT

1. In a prehearing conference conducted on November 28, 2000, the following statement of issue for hearing was drafted by the hearing examiner based upon a proposal offered by complainant:

Whether respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities when complainant was not certified for nor appointed to the position of Director, State Bureau of Procurement, in May of 2000.

2. In the objection under consideration here, respondents challenge the inclusion of the language “nor appointed to” in the proposed statement of the issue for hearing.

3. At all times relevant to this matter, complainant has been employed in a line staff position as a Contract Specialist in the State Bureau of Procurement, Department of Administration (DOA). In this position, complainant has not supervised other staff.

4. In March of 2000, Jan Hamik, Director, State Bureau of Procurement, was promoted to the position of Policy Initiatives Advisor, Department of Administration. The vacancy in her former position as the Director of the State Bureau of Procurement was advertised on or around May 1, 2000. In this advertisement, applicants were advised how to obtain the special application materials and that completed application materials were due before 4:30 p.m. on May 12, 2000.

5. The application materials consisted primarily of a cover sheet requesting personal information about the applicant and an Objective Inventory Questionnaire (OIQ) which obtained information from the applicant about his or her work background.

6. The cover sheet of the application materials included a quote from §ER-PERS 6.10, Wis. Adm. Code, to the effect that the Administrator of the Division of Merit Recruitment and Selection (DMRS) may refuse to certify an applicant for a position who has made a false statement of any material fact in any part of the selection process or who practices, or attempts to practice, any deception or fraud in application, certification, examination, or in securing eligibility or appointment.

7. The cover sheet also included a section in which the applicant was to certify, through his or her signature, that he or she had read and acknowledged, among other things, the quoted provisions of §ER-PERS 6.10, Wis. Adm. Code; and that “my

responses about my experience in the questionnaire are true to the best of my recollection; that I can document or demonstrate these experiences and performance levels if required to do so at some future date.” Complainant signed this section of the cover sheet on April 26, 2000.

8. In the OIQ which he submitted with his other application materials on or around April 26, 2000, complainant modified the language of certain questions and apparently answered these questions based on the content of the modified question. Patricia Thyse, the DOA Human Resource Program Officer who was responsible for reviewing the OIQ’s, brought this to the attention of Peter Olson, DOA Human Resources Director, and Mark Saunders, DOA Deputy Legal Counsel. These three decided that, consistent with the practice followed when applicants submitted incomplete applications, complainant should be contacted and afforded an opportunity to submit an OIQ in which he responded to the unmodified questions. Ms. Thyse notified complainant of this opportunity by email.

9. Complainant submitted a second OIQ before the application deadline which contained the same answers to the questions as his first OIQ but which did not modify the language of any of the questions.

10. Ms. Thyse, Mr. Olson, and Mr. Saunders were familiar with the duties and responsibilities of complainant’s position not only due to their personnel-related responsibilities for DOA but also due to their roles in previous litigation of cases filed by complainant against DOA.

11. Section 2. of the OIQ included the following questions, among others (the instructions for the candidate, including the criteria to be used in answering each questions, are reproduced in part below in bold type, and the questions are in regular type):

***For each question in this section, circle the Response Criteria that best describes your highest level of experience. ...***

***D I have extensive working experience and a thorough knowledge. It is the principal focus of my current job. ...***

Managed at least 15 professional, administrative, and technical staff through subordinate levels of supervision.

Experience managing a diverse work group with various backgrounds (cultural, technical, non-technical).

Managed staff using general management concepts such as delegation, motivation, and team building.

Experience developing performance standards and conducting evaluations for subordinate staff.

Experience establishing work plans and priorities for subordinate staff.

12. Complainant recorded his answer as "D" to each of the five questions quoted in Finding of Fact 11, above.

13. Ms. Thyse concluded, after reviewing complainant's second OIQ, that he had misrepresented his level of experience in his current job as exemplified by the responses complainant gave to the questions quoted in Finding of Fact 11, above, despite the fact that, in his current job, complainant had no supervisory responsibilities. Ms. Thyse discussed her conclusion with Mr. Olson and Mr. Saunders on May 10, 2000. The three of them decided that, in view of the language of §ER-PERS 6.10, Wis. Adm. Code, quoted on the cover sheet of the application, and complainant's certification that his responses to the OIQ were accurate, a letter should be sent to DMRS requesting that complainant be refused certification for the subject position.

14. Mr. Saunders did a draft of the request to DMRS during the week of May 15, 2000. Due to the press of business, this request was not finalized and sent until May 22, 2000. This request was directed to Robert Lavigna, Administrator of DMRS and explained the basis for DOA's conclusion that complainant had misrepresented his level of work experience on the OIQ in contravention of §ER-PERS 6.10, Wis. Adm. Code.

15. DOA's request was granted by Alan Bell, Staffing Analyst, DMRS, in a letter to complainant dated May 25, 2000. As a result, complainant was not certified nor considered further for the subject position.

#### CONCLUSIONS OF LAW

Complainant lacks standing to challenge any post-certification actions relating to the subject hire.

#### OPINION

In order to have standing to challenge an action, a complainant must show that he or she has sustained or is immediately in danger of sustaining some direct injury as a result of the action, and this injury or threat of injury must be real and immediate, not conjectural or hypothetical. *Wood v. DER & DNR*, 85-0008-PC-ER, 7/11/86, citing *Fox v. DHSS*, 112 Wis. 2d 514, 334 N.W. 2d 532 (1983). Applying this standard, the Commission has held that a complainant lacks standing to challenge a post-certification selection process or decision if his exam score was too low for him to be placed on the certification list. *Wood, supra*.

In his argument, complainant focuses on the injury which would have occurred to the candidates who were ultimately certified for the subject position if complainant had been certified, and on respondents' "ministerial duty to certify, interview and consider all qualified applicants for appointment." However, the appropriate focus here is on the injury to the complainant, not to the other candidates; and the scope of respondents' administrative responsibilities is irrelevant to the issue of complainant's standing to challenge post-certification actions of the appointing authority.

ORDER

The Commission sustains respondents' objection under consideration here. The statement of issue for hearing is as follows:

Whether respondents discriminated against complainant on the basis of color, national origin or ancestry, or race, or retaliated against him for engaging in protected fair employment activities when complainant was not certified for the position of Director, State Bureau of Procurement, in May of 2000.

Dated: January 25, 2001

STATE PERSONNEL COMMISSION

Laurie R. McCallum, Jr.  
LAURIE R. McCALLUM, Chairperson

LRM:000077Cru14

Judy M. Rogers  
JUDY M. ROGERS, Commissioner