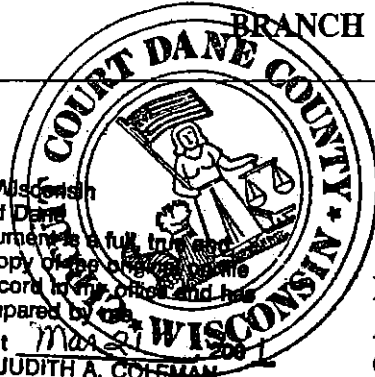


PASTORI M. BALELE,

State of Wisconsin
County of Dane
Petitioner
This document is a full, true and
correct copy of the original and
and of record in my office and has
been compared by me.



Attest *M.A.C.*
JUDITH A. COLEMAN
Clerk of Courts
By *Joy Houghton*
Deputy Clerk

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PERSONNEL COMMISSION

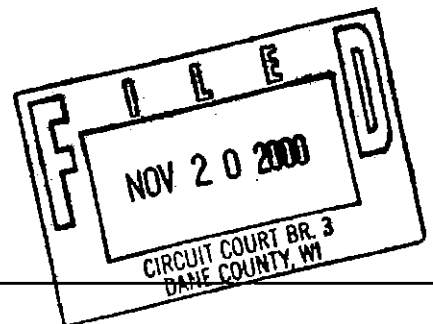
MEMORANDUM DECISION
AND ORDER

Case No.: 00-CV-1108

Case Code: 30607

PERSONNEL COMMISSION, DEPT. OF
AGRICULTURE, TRADE AND CONSUMER
PROTECTION, DEPARTMENT OF EMPLOYEE
RELATIONS, and DIVISION OF MERIT
RECRUITMENT AND SELECTION,

Respondents.



BACKGROUND

This is a chapter 227 Wis. Stats. review brought by Pastori M. Balele (hereinafter "Balele") challenging the Wisconsin Personnel Commission's (hereinafter "the Commission") April 19, 2000 decision under the Wisconsin Fair Employment Act (WFEA), §§111.31-111.395 Wis. Stats. The Commission's decision granted summary judgment to the Wisconsin Department of Agriculture, Trade and Consumer Protection (hereinafter "DATCP"), the Wisconsin Department of Employee Relations (hereinafter "DER") and the Wisconsin Division of Merit Recruitment and Selection (hereinafter "DMRS"), denying Balele's motion for summary judgment and dismissing Balele's complaint. After consideration of the record and the applicable law, I conclude that the Commission's decision must be affirmed.

FACTS¹

On August 17, 1998 and September 14, 1998, DATCP advertised that a career executive vacancy existed in the position of Administrative Manager, Assistant Administrator-Division of Animal Health, and invited candidates to apply with a resume and a completed Achievement History Questionnaire (AHQ). The AHQ's were scored by a three-member panel based on benchmarks developed by DATCP. Two of the three panel members were white and the third was of Egyptian national origin who identified his race as black. Fifty-one white and six non-white candidates, including Balele, completed an AHQ for this position. Twenty-three white candidates and three non-white candidates were certified for an interview. Balele was one of the candidates not certified for an interview. The successful candidate was selected through a career executive option 1.

Balele filed a WFEA discrimination complaint with the Commission on November 2, 1998 against the DATCP, DER, and DMRS. In the complaint, under the heading "Causes of the discrimination/retaliation," Balele checked boxes which indicating discrimination was based on "color", "national origin or ancestry," and "race." Additionally, under the heading "The acts of discrimination/retaliation were related to," Balele checked the box "failure to hire or promote" Balele also alleged the following in his complaint:

- (1) the use of the AHQ had a disparate impact on racial minorities seeking administrative-senior executive positions;
- (2) the use of the career executive status as a qualifying criterion had a disparate impact on racial minorities seeking career executive positions;

¹ The principal source of these facts is the Commission's Decision and Order, dated April 19, 2000.

- (3) the use of an all white screening panel² had a disparate impact on racial minorities seeking career executive positions;
- (4) permitting individuals in career executive positions to compete for the position had a disparate impact on racial minorities seeking career executive positions³;
- (5) the use of appointing individuals of career executive status had a disparate impact on racial minorities; and
- (6) the pre-certification and pre-selection of the appointed individual was injurious to Balele's candidacy and was in violation of Wisconsin law.

On April 21, 2000, the Commission issued a decision granting respondents summary judgment and ordering dismissal of the complaint. Balele filed a petition for judicial review of the Commission's decision and order with the court on April 25, 2000.

STANDARD OF REVIEW

Depending on the nature of the issues and facts, the reviewing court must accord an agency's determinations great weight, due weight, or no weight at all. See Sauk County v. WERC, 165 Wis.2d 406, 413-14, 477 N.W.2d 267 (1991). A court will give great weight deference to an agency's interpretation when:

- (1) the agency was charged by the legislature with the duty of administering the statute;
- (2) that the interpretation of the agency is one of long standing;
- (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and
- (4) that the agency's interpretation will provide uniformity and consistency in the application of the statute. See Harnischfeger Corp. v. LIRC, 196 Wis.2d 650, 659-60, 539 N.W.2d 98 (1995) (citing Linsey v. LIRC, 171 Wis.2d 499, 505, 493 N.W.2d 14 (1992)).

When all these circumstances are present, the agency's decision should be given great weight

² The Commission concluded that there is no longer a factual issue as to one of the panel member's race since Balele stopped asserting that the AHQ's were reviewed by an all-white panel (See Commission's April 19, 2000 decision and order, p.8, fn. 1).

³ Although Balele did not use the term "career executive position," in this allegation, it is reasonable to interpret this allegation using this term based upon the pleadings.

and it should only be reversed where it directly contravenes the statute or is otherwise unreasonable or lacks rational basis. See Linsey, 171 Wis.2d at 506.

A due weight standard differs from great deference only in a slight degree and is appropriate "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." See Barron Electric Cooperative v. Public Service Commission of Wisconsin, 212 Wis.2d 752, 762, 569 N.W.2d 726 (Ct. App. 1997) (citing UFE, Inc. v. LIRC, 201 Wis.2d 274, 286, 548 N.W.2d 57, 62 (1996)). Giving an agency's interpretation due weight will also sustain the agency's interpretation if it is reasonable, however, not if another interpretation is more reasonable than the one used by the agency. See Barron, 212 Wis.2d 752 at 763 (citing UFE, 201 Wis.2d at 287).

Finally, a no weight or *de novo* standard is employed if any of the following are true:

(1) the issue before the agency is clearly one of first impression; (2) a legal question is presented and there is no evidence of any special agency expertise or experience; or (3) the agency's position on issue has been so inconsistent that it provides no real guidance. See Couts v. Wisconsin Retirement Bd., 209 Wis.2d 655, 664, 562 N.W.2d 917 (1997).

It is clear that the Commission is legislatively charged with the administration of WFEA regarding complaints of discrimination against an agency as an employer pursuant to §111.375(2) Wis. Stats. Additionally, the Commission has a history of interpreting WFEA and has developed an expertise applying WFEA. Finally, the Commission's interpretation of WFEA provides uniformity and consistency regarding its application. As a result, the court will apply "great weight" standard in this review.

DECISION

Balele first asserts that the Commission erred when it found that the AHQ did not have a disparate impact on black candidates. Wisconsin recognizes two theories of employment discrimination: that of disparate impact and disparate treatment. See Racine Unified Sch. Dist. v. LIRC, 164 Wis.2d 567, 594, 476 N.W.2d 707 (Ct. App. 1991). The disparate impact theory is used "to attack facially neutral policies that, although evenly applied, impact more heavily on a protected group." See Id. at 595. The disparate treatment theory is invoked when a complainant establishes that the employer treats some people less favorably than others because of their membership in a protected class. See Id. An important distinction between the two theories is that the disparate treatment theory requires that the complainant prove that the employer intentionally discriminated against him or her whereas disparate impact theory does not require intent. See Id.

The Commission held that the AHQ did not have a disparate impact on black candidates. It reasoned that in Balele's experience with the AHQ process, he specifically has been certified for an interview 87% of the time. In addition, the Commission reasoned that since a higher percentage of non-white candidates (50% non-white v. 45% white) were certified for an interview, there was no evidence of a disparate impact of the AHQ on Balele. Any disparate impact analysis must include a conclusion as to whether the degree of disparity between the protected class and the non-protected class is of sufficient magnitude to establish a *prima facie* claim for disparate impact. See Id. at 596. In consideration of the statistical evidence, the Commission's finding that Balele failed to demonstrate a disproportionate impact on a protected group is reasonable.

Furthermore, the Commission held that there was no evidence of a disparate treatment in the DATCP's use of the AHQ since both white and non-white candidates alike were required to complete the AHQ in order to be certified. Since Balele failed to show racial differences in the way that candidates were treated in using the AHQ, the Commission's finding of no disparate treatment is reasonable. A court will not overturn a reasonable agency decision unless the court determines that there is a more reasonable interpretation available. See UFE, Inc. v. LIRC, 201 Wis.2d 274, 286-87. Accordingly, the Commission's conclusions with respect to this issue are upheld.

Balele additionally asserts that the Commission erred in determining that employees with "career executive status," who are exempt from completing an AHQ, is not a discriminatory practice. The Commission recognized that it is established practice by DER and DMRS that a current career executive employee qualifies for an interview for another vacant career executive position without completion of an AHQ examination or other competition. In its finding, the Commission relied upon the relevant statistics which demonstrated that availability of racial/ethnic minorities in the relevant labor pool was 7.5%. Additionally, as of January 1, 1997, it is undisputed that 8.3% of DATCP's administrators/senior executives were members of a racial/ethnic minority group. The Commission concluded that since 8.3% is greater than 7.5%, the pool of available minorities within DATCP was larger than the pool in the labor market. The fact that this data supports the conclusion that there was no disparate impact on racial/ethnic minorities is a reasonable one. Furthermore, the Commission properly recognized that career executive reassignment within an agency does not have a different impact on minority career executives that it does on white career executives since both are eligible for reassignment.

Next, Balele claims that the Commission erred in not allowing him to demonstrate that respondents' intention to discriminate against him as well as retaliation in the scoring of his AHQ. The Commission concluded that Balele was precluded from advancing assertions that the scoring of his AHQ response was inconsistent with the scoring of other candidates' AHQ responses and was contrary to the established benchmarks since these specific assertions were raised for the first time in his brief responding to respondents' motions for summary judgment.

The Commission is unable to decide issues that are not contained in a complaint and have failed to be noticed for hearing. See Wisconsin Telephone Co. v. ILHR Dept., 68 Wis.2d 345, 358-60, 228 N.W.2d 649 (1975). While Balele did allege discrimination in his complaint and was noticed for hearing (see sub-issue 1.c.), the Commission refused in allowing him to advance a factual basis of the AHQ scoring discrimination claim beyond what had been demonstrated in his responses to DATCP's interrogatories 5 and 6. In support of this conclusion, the Commission the following reasoning:

The Commission, by administrative rule, has adopted the discovery provisions of ch. 804, Stats. §PC 4.03, Wis. Adm. Code. Section 804.12(4) Stats., permits the Commission to make such orders as it deems just when a party fails to fully answer an interrogatory. It would be consistent with this authority and the Commission's practice to bar complainant from now offering the assertion that the scoring of his AHQ was inconsistent with the scoring of other candidates' AHQ's and contrary to the established benchmarks. This result is even more compelling here given the fact that respondents' interrogatories 5 and 6 specifically ask complainant for any assertions he had to offer relating to the scoring of his AHQ, and that complainant, even though ordered by the Commission on November 2, 1999, to supplement his answers to respondents' interrogatories 5 and 6, failed to advance, in his initial or supplemental responses, the assertion he is now attempting to advance. Even though complainant may not have received until March 9, 2000, certain information relevant to this point, in particular copies of the AHQ panel members' scoring sheets (see Finding 10 above), complainant had not represented here that he modified his responses to DATCP interrogatories 5 and 6, despite a continuing obligation to do so if he felt his earlier responses were incorrect. §804.01(5)(b), Stats.

In consideration of the discovery provisions cited and adopted by the Commission, its decision to limit what Balele could advance as a factual basis regarding the claims of discrimination in scoring his AHQ is reasonable. Additionally, since Balele did not plead a retaliation claim in his complaint and since it was not noticed for hearing, the Commission properly did not consider this claim. Under the great weight deference standard, an agency's interpretation need only be reasonable in order for it to be sustained *See Harnischfeger*, 196 Wis.2d at 661.

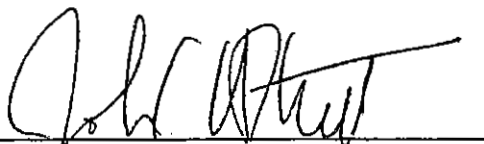
Finally, Balele asserts that Commission was incorrect in finding that the scoring and use of the AHQ did not result in actual injury to Balele. The reasoning supporting this finding was that since the selection of the successful candidate was through a career executive option, the AHQ results did not impact his selection. Once again, this is a reasonable conclusion by the Commission which, under the great weight standard, compels a reviewing court to uphold any reasonable agency decision.

CONCLUSION

Under the "great weight" standard of review, the Commission's interpretation and application of the WFEA articulated in its conclusions of its April 21, 2000 Decision is affirmed.

BY THE COURT:

Dated this 20th day of November, 2000.



John C. Albert, Judge
Circuit Court, Branch 3