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STATE OF WISCONSIN

CIRCUIT COURT PERSONNEL COMMISSION DANE COUNTY
BRANCH 12

MICAH ORIEDO,

Petitioner,

v.

Case No. 00-CV-1116

WISCONSIN PERSONNEL
COMMISSION, WISCONSIN
DEPARTMENT OF
CORRECTIONS,

Respondents.

**DECISION AND ORDER AFFIRMING THE DECISION
OF THE STATE PERSONNEL COMMISSION**

I. INTRODUCTION

On July 2, 1998, Micah Oriedo ("Oriedo") filed a complaint of discrimination on the basis of color, race, and national origin against the Wisconsin Department of Corrections ("DOC"). The complaint alleged that the DOC engaged in a discriminatory selection process for the career executive position of Correctional Services Manager, Regional Chief. Specifically, Oriedo alleged that the DOC violated the Wisconsin Fair Employment Act ("WFEA") under both "differential treatment" and "disparate impact" theories of discrimination when the agency failed to select him for the Correctional Services Manager position.

On July 22 and 30, 1999, the State Personnel Commission ("Commission") held hearings, at which both parties addressed the allegations contained in Oriedo's

complaint. On February 11, 2000, the Commission issued a Decision and Order dismissing the complaint on the ground that Oriedo failed "to show that he was discriminated against as alleged." On March 29, 2000, the Commission denied Oriedo's petition for rehearing. Oriedo now seeks judicial review of the Commission's decision pursuant to Wis. Stat. § 227.52.

II. FACTS

The February 23, 1998, edition of the DOC's *Current Employment Opportunities Bulletin* announced the recruitment for the career executive position of Correctional Services Manager, Regional Chief.¹ (Findings of Fact ("FOF") ¶ 2.) The announcement

¹ The Wisconsin legislature created the Career Executive Program in 1972 to promote excellence in the state's administration. Positions included in the program are administrative in nature and are assigned to pay range 18 or above. ER § 30.02, Wis. Adm. Code. Non-career executives who apply for a career executive position must be certified as being qualified for the position. *Balele v. Wisconsin Personnel Comm'n*, 223 Wis. 2d 739, 589 N.W.2d 418 (1998).

Wisconsin Stat. § 230.24(1)(1999-2000) provides authority for the Career Executive Program. The provision states:

The secretary may by rule develop a career executive program that emphasizes excellence in administrative skills in order to provide agencies with a pool of highly qualified executive candidates, to provide outstanding administrative employees a broad opportunity for career advancement and to provide for the mobility of such employees 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 may provide policies and standards for recruitment, examination, probation, employment register control, certification, transfer, promotion and reemployment, and the secretary may provide policies and standards for classification and salary administration, separate from procedures established for other employment. The secretary shall determine the positions which may be filled from career executive employment registers.

indicated that candidates who did not have career executive status should request application and examination materials from the DOC and those who did have career executive status should submit an "Application for State Employment" form and a current resume to the DOC. (Complainant's Ex. 10.) The announcement stated that "[a]pplication materials of non-Career Executive candidates will be reviewed and those applicants who appear to be best qualified will be invited to participate in the next step of the selection process along with the Career Executive applicants." Id. The deadline for submitting the application materials was March 13, 1998. Id.

In early March 1998, Oriedo, a black male of African national origin who did not have career executive status, requested the application and examination materials for the position of Correctional Services Manager, Regional Chief.² (FOF ¶ 3.) The materials included an Achievement History Questionnaire ("AHQ"). Id. Oriedo completed the AHQ and filed his application with the DOC by the March 13th deadline. (Complainant's Ex. 3.)

Sometime prior to March 13, 1998, Thomas Van den Boom ("Van den Boom"), a white male then holding a career executive position with the DOC, contacted Eural Jordan ("Jordan"), the supervisor of the Correctional Services Manager position, to express his interest in being reassigned to the position. (FOF ¶ 6.) Van den Boom then filed an application for the subject position. Id. He was the only DOC career executive employee to do so. Id.

² Prior to February 1998, Oriedo had been certified for other career executive positions in state service. (FOF ¶ 4.)

Jordan, who had known Van den Boom for over twenty years and was well acquainted with his work history and abilities, believed Van den Boom to be highly qualified for the Correctional Services Manager position and supported his request for reassignment to the position. (FOF ¶ 7.) Under the career executive program, a lateral reassignment is permitted within the DOC without notifying or considering similarly situated persons for the position. Jordan, who was authorized to make the final hiring decision for the position, contacted Alison Scherer ("Scherer"), a Human Resources Specialist in DOC's personnel unit, to confirm that Van den Boom's lateral reassignment "would satisfy all necessary requirements." (FOF ¶ 10.) Scherer indicated that all requirements would be met if such a reassignment occurred. Id. Jordan also discussed the reassignment with Michael Sullivan, DOC Secretary at the time, who had "no problems" with the transfer (Transcript of hearing held July 30, 1999, at 26, lines 19-21.) Jordan then approved the career executive reassignment of Van den Boom to fill the Correctional Services Manager position. (FOF ¶ 10.) Jordan knew that there were other applicants for the position when he approved the reassignment, but was unaware of the race or identity of those other applicants. (FOF ¶ 9.)

The career executive reassignment of Van den Boom did not require approval by the DOC's Affirmative Action unit, as it did not involve a competitive process. (FOF ¶ 11.) The subject position is included in the Administrator/Senior Executive job group for affirmative action reporting purposes. Id. This job group is underutilized for racial minorities in state service. Id. The availability factor for racial minorities for this job group was 7.5%. Id. During the relevant time period, the DOC employed 70 individuals

in career executive positions, five of whom (7.1%) were classified as racial minorities.³ (FOF ¶ 13.) Between July 1, 1997, and June 30, 1998, DOC filled 11 career executive positions, two of which were filled by racial minorities. (FOF ¶ 14.)

After Jordan decided to reassign Van den Boom, the DOC canceled the recruitment for the position without assessing the examination and application materials submitted by the other candidates or generating an employment register or certification list. (FOF ¶ 16.) The other candidates,⁴ including Oriedo, were notified of the cancellation by letter from the DOC dated March 18, 1998. (Respondent's Ex. R103.)

Upon receipt of the letter, Oriedo's "representative," Pastori Balele, sent e-mails to several DOC employees inquiring as to the basis of the cancellation. (Respondent's Ex. R105.) Scherer, who worked in the DOC's personnel unit, responded by sending a second letter to Oriedo on April 8, 1998, which set out the basis of and legal authority for the cancellation. Id.

III. ISSUES FOR REVIEW

Oriedo presents five issues on appeal. Only two of those issues, however, are properly before the court. First, Oriedo seeks review of a moot issue. Specifically, he requests that the court review "whether the Commission erred when it failed to find that

³ Oriedo disputes that one of the five individuals holding career executive status is correctly classified as a racial minority. (FOF ¶ 13.)

⁴ Of the ten candidates other than Van den Boom, two identified themselves as African-American, seven identified themselves as white, and one failed to identify his or her race. (FOF ¶ 18.)

Oriedo as an aggrieved individual had the right to file a complaint." (Petitioner's Mem. at 1.) As the Commission heard Oriedo's complaint and concluded as a matter of law that the complaint was properly before it, resolution of the above issue by the court will have no practical effect on the controversy. See Warren v. Link Farms, Inc., 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). Consideration of this issue is unnecessary.

Next, Oriedo seeks review of two issues that were not raised before the Commission: (1) whether the Commission erred when it failed to find that respondents denied Oriedo [sic] due process property interest for equal consideration for the position in question; and (2) whether the Commission erred when it failed to find that Respondents abused their discretion when they used Option 1 of the Career executive selection as used which had a chilling effect on Oriedo and other minorities. (Petitioner's Mem. at 1-2.) Generally, the court will not address issues raised for the first time on review. Goranson v. ILHR Dep't, 94 Wis. 2d 537, 545, 289 N.W.2d 270, 274 (1980); Gallagher v. Indus. Comm'n, 9 Wis. 2d 361, 368, 101 N.W.2d 72, 77 (1960). Here, the issues were neither before the Commission nor briefed by the Commission or the DOC for purposes of this review. (Decision and Order at 5.) As such, the court will not now consider them.

Finally, the issues reviewable by the court are the two issues that were put before the Commission. Those issues are,

- 1 Whether the Personnel Commission erred when it failed to find that DOC discriminated against Oriedo based on color, national origin or ancestry and/or race with respect to the failure to appoint Oriedo to the career executive position of Correctional Services Manager-

Regional Chief (differential treatment theory).

2. Whether the Personnel Commission erred when it failed to find that the practice of reassigning executives from one career executive position to another vacant career executive position violates the Fair Employment Act based on race and/or color (disparate impact theory).

IV. STANDARD OF REVIEW

Judicial review of an administrative agency decision is not a trial *de novo* and the reviewing court must affirm an agency's decision unless it finds grounds to do otherwise under § 227.57, Stats. Barnes v. DNR, 178 Wis. 2d 290, 302 (1993). The court must consider and treat separately findings of fact, interpretations of law, and issues of agency procedure. Wis. Stat. § 227.57(3).

An agency's findings of fact will be upheld if supported by substantial evidence. Wis. Stat. § 227.57(6). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gateway City Transfer Co. v. Public Service Comm., 253 Wi. 397, 405-06, 34 N.W.2d 238 (1948). It is not required that the evidence be subject to no other reasonable, equally plausible interpretation. Hamilton v. IHLR Dep't, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. Robertson Transport Co. v. Public Service Comm., 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). Furthermore, no court may substitute its judgment for that of the agency as to the weight of the evidence on any finding of fact. Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 250 (Ct. App. 1989).

A court will review agency interpretations of law independently. Wis. Stat. §

227.57(5). A court may defer to an agency interpretation of law, however, if the agency's interpretation is aided by experience, technical knowledge, or special knowledge of the legal question is intertwined with a question of fact. Sauk Co. v. WERC, 165 Wis. 2d 406, 413 (1991). The construction and interpretation of a statute by an administrative agency charged with the responsibility of applying the law is entitled to great weight. NCR Corp. v. DOR, 128 Wis. 2d 442, 447-48 (Ct. App. 1986). Therefore, a reviewing court ought not to reverse an agency's interpretation of a statute if there exists a rational basis for the agency's conclusion even if the court does not entirely agree with the rationale. Id. at 448. See also Luetzow Indus. v. DOR, 197 Wis. 2d 917, 923 (Ct. App. 1995).

The Commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying provisions of the act to particular cases. Philips v. Wisconsin Personnel Comm'n, 167 Wis. 2d 205, 216, 482 N.W.2d 121, 125 (1992); Wis. Stat. § 111.375(2). The Commission has long dealt with these sorts of claims. Accordingly, the Commission's conclusions of law are entitled to great weight in the case at bar

V. ANALYSIS

- A. The Commission Did Not Err When it Failed to Find that the DOC Discriminated Against Oriedo on the Basis of Color, Race, or National Origin in Violation of the Wisconsin Fair Employment Act.

In determining the procedure for establishing a claim of discrimination under the WFEA, courts look to federal employment discrimination decisions for guidance in interpreting state fair employment law. Anderson v. LIRC, 111 Wis. 2d 245, 254, 330

N.W.2d 594, 598 (1983). In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set forth a three-step burden-shifting test to be applied by courts when considering employment discrimination claims. Under the test, Oriedo bears the initial burden of establishing a prima facie case of discrimination. Id. at 802. If Oriedo meets this burden, the DOC must then articulate a legitimate, non-discriminatory reason for the action taken. Id., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). If the DOC articulates such a reason, the burden shifts back to Oriedo to show that the reason proffered by the DOC is only a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; See also Hamilton v. DILHR, 94 Wis. 2d 611, 619, 288 N.W.2d 857, 861 (1980).

- i. The Commission Incorrectly Concluded that Oriedo Failed to Establish a Prima Facie Case of Employment Discrimination Based on Race.

In order to establish a prima facie case of employment discrimination based on race, Oriedo must show that: (1) he was a member of a protected class; (2) he applied for and was qualified for the position offered; (3) he was rejected despite his qualifications; and (4) the position was given to a person of a different race who had similar or lesser qualifications. Malacara v. City of Madison, 224 F.3d 727 (7th Cir 2000).

In the present case, the Commission set out a similar, but slightly different test for establishing a prima facie case. Specifically, the Commission stated that "the elements of a prima facie case are that the complainant 1) is a member of a class protected by the Fair Employment Act (FEA), 2) applied for and was qualified for an

available position, and 3) was rejected under circumstances which give rise to an inference of unlawful discrimination." (Decision and Order at 6.) The Commission did not cite legal authority for this test.

The Commission, applying the above test to the facts of the present case, acknowledged that Oriedo, a black male of African origin, was a member of a "class of persons protected by the FEA." Id. The Commission then stated that it was undisputed that Oriedo applied for the career executive position and that, for the purposes of argument, it assumed Oriedo to be qualified for the position. Id. The Commission, however, held that the record did not present a fact situation which gave rise to an inference of unlawful discrimination and, as such, Oriedo failed to establish a prima facie case of employment discrimination based on race. Id. The Commission's decision fails to cite authority that sets out the specific factual circumstances which give rise to an "inference of discrimination." Rather, the Commission's holding is based on two bare facts: (1) Jordan, the supervisor who decided to cancel the recruitment, was unaware of the race, color, or national origin of the candidates when his decision to cancel was made; and (2) all candidates, black and white, were impacted equally by the cancellation. Id. This conclusion could be found to be reasonable under the test as it is set out by the Commission. However, as noted above, the Commission set out the wrong test. Under Malacara, a party alleging employment discrimination is required to show that the position for which he was rejected was given to a person of a different race who had similar qualifications. Malacara, 224 F.3d at 729. It is this specific circumstance, which the Commission failed to address in making its decision, that gives

rise to an "inference of discrimination" under Wisconsin law.

The court is not required to defer to the interpretation by an agency. Morris v. Employee Trust Funds Bd., 203 Wis. 2d 172, 186-87 (Ct. App. 1996). The court finds that because the record evidences that Van den Boom, a white person holding similar qualifications to Oriedo, was appointed to the career executive position for which Oriedo applied, the final element under Malacara has been met. (FOF ¶ 10; Complainant's Ex. 7.) Accordingly, Oriedo met his burden of establishing a prima facie case of employment discrimination based on race under Wisconsin law.

ii. The Commission Correctly Concluded that the DOC Advanced a Legitimate, Non-Discriminatory Reason for Failing to Appoint Oriedo to the Career Executive Position.

Once Oriedo established a prima facie case of employment discrimination, the burden shifted to the DOC to show a legitimate, non-discriminatory reason for its failure to appoint Oriedo to the subject position. Burdine, 450 U.S. at 254. The Commission found that the position of Correctional Services Manager, Regional Chief was filled through a career executive reassignment pursuant to ER-MRS §§ 30.07 and 30.08, Wis. Adm. Code. (Decision and Order at 6.) The Commission properly held that this reason was legitimate and non-discriminatory on its face. ER-MRS § 30.07(1) and (2) provide:

(1) Career executive reassignment means the permanent appointment by the appointing authority of a career executive within the agency to a different career executive position at the same or lower classification level for which the employe is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.

(2) When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employe in a career executive position within the agency to another career executive position in the same or lower classification level for which the employe is qualified,

the appointing authority may make such reassignment, provided it is reasonable and proper. All such reassignments shall be made in writing to the affected employee, with the reasons stated therein.

ER-MRS § 30.08 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.

These rules evidence that the DOC articulated a non-discriminatory reason for its failure to appoint Oriedo to the position at issue. The Commission correctly concluded that the DOC met its burden.

- iii. The Commission Correctly Concluded that Oriedo Failed to Demonstrate that the DOC's Actions were Pretext for Racial Discrimination.

Once the DOC presented a legitimate, non-discriminatory reason for its failure to appoint Oriedo to the career executive position, the burden shifted back to Oriedo to prove that the stated reason was pretextual. McDonnell Douglas, 411 U.S. at 804. Oriedo asserts vague allegations of pretext, all of which the Commission correctly rejected in its decision.

In considering whether Oriedo established pretext, the question for the Commission was not whether the DOC's actions were correct or desirable, but whether the DOC honestly believed the reasons it gave for the action in question. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir 1997). If the DOC honestly believed in the non-discriminatory reasons for its actions, Oriedo "loses even if those

reasons are foolish or trivial or even baseless." Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir 1997). To prevail, Oriedo was required to produce information tending to show that the DOC is lying by "specifically [giving] a phony reason for some action." Russel v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir 1995). None of Oriedo's allegations rise to the level of proof required under the law.

First, Oriedo alleges that the application of ER-MRS § 30.07(1) and (2), Wis. Adm. Code, violated § III.D.2 of the DOC's delegation agreement with the Division of Merit Recruitment and Selection, and demonstrates pretext. § III.D.2 provides in pertinent part:

III. Scope of delegation

D. Actions Not Delegated to the Agency:

(2) Refuse to examine or certify an applicant, or remove an applicant from a certification or employment register; .

(FOF ¶ 15.)

The Commission accepted expert testimony that § III.D.2 is applicable only to competitive hiring processes and that the process followed in the present case was not a competitive one. (Transcript of hearing held July 22, 1999, at 35-40; FOF ¶ 16.) Nothing in the record counters the expert testimony on this issue or the Commission's interpretation of law. As this type of determination is exactly the kind long dealt with by the Commission, its conclusion is entitled to great weight.

Second, Oriedo asserts that the DOC's failure to give him equal consideration constituted discrimination per se because "the DOC thought Van den Boom's performance to be equal to a newly hired worker " (Petitioner's Mem. at 36.) In support

of this allegation, Oriedo cites a passage from the letter he received from the DOC which informed him that the recruitment had been cancelled. Id. The cited passage is the definition of career executive reassignment contained in ER-MRS § 30.07(1). Id. Oriedo's reliance on this passage is misplaced, as the definition does not speak to what DOC "thought" of Van den Boom's performance or qualities as an employee. Even if it did, it would not demonstrate the DOC's intent to discriminate.

Asserting that it is the DOC's burden to explain why it found him to be less qualified for the subject position than Van den Boom, Oriedo further argues that the DOC should have interviewed him to learn his qualifications. Id. Oriedo's assertion does not overcome the fact that the Commission correctly determined that the recruitment was properly cancelled. The DOC, then, was under no obligation to interview Oriedo. Furthermore, as Petitioner, it was Oriedo's burden to prove pretext. McDonnell Douglas, 411 U.S. at 804.

Third, Oriedo asserts that Jordan was unaware that career executive positions were underutilized for minorities at the DOC because Scherer "withheld information" and "lied" to him when she confirmed that Van den Boom's appointment was acceptable. (Petitioner's Mem. at 37.) Had it not been for her actions, Oriedo argues that Jordan would not have reassigned Van den Boom, a white male, to the Correctional Services Manager position. These allegations amount to speculation on the part of Oriedo, as there is no evidence in support of them in the record. In fact, Oriedo's "representative," Pastori Balele, admitted at the July 22, 1999, hearing that these derogatory remarks were based on "presumption" rather than personal knowledge of verifiable facts.

(Transcript of the July 22, 1999, hearing at 203-210.) The Hearing Commissioner properly reprimanded Balele on the record for his carelessness, as the above allegations clearly do not constitute proof of pretext.

B. The Commission Did Not Err When it Failed to Find that the Practice of Reassigning Career Executives From One Career Executive Position to Another Vacant Career Executive Position Violates the Wisconsin Fair Employment Act on the Basis of Color or Race.

Under a disparate impact theory of employment discrimination based on race or color, the burden on the complainant is to show that a facially neutral employment policy has a disproportionate impact on a protected group. Griggs v. Duke Power Co., 40 U.S. 424 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977). The Commission correctly concluded that Oriedo cannot meet his burden, as he is unable to establish that the practice of reassigning career executives from one career executive position to another vacant career executive position within the DOC, pursuant to a long-standing regulatory law, had a disproportionate impact on him or a protected group.

As noted in Section II, footnote 4, ten candidates submitted application materials to the DOC for the position of Correctional Services Manager, Regional Chief. (FOF ¶ 18.) As a result of Van den Boom's transfer via career executive reassignment, the candidates' applications were not reviewed. Two of the candidates were African-American, seven were white, and one did not identify his or her race. Id. The impact on each of the candidates was equal in that they were not considered for the position. There is nothing in the record that establishes that the policy in question had a disparate impact on Oriedo specifically or persons in protected classes generally.

Furthermore, the Commission correctly concluded that the policy of career

executive reassignment within an agency does not have a different impact on minority career executives than it has on white career executives, as both are eligible for reassignment. Additionally, the policy does not have any actual impact on the number of racial minorities in the career executive program because the pool of career executives merely *shifts* one career executive from a specific position to another, rather than changing the makeup of the pool itself.

Oriedo, however, asserts that the fact that racial minority candidates from outside the career executive pool were not allowed to compete for the subject position had an actionable disparate impact on racial minorities under the WFEA. He cites Caviale v. State of Wisconsin, Dep't of Health and Social Services, 744 F.2d 1289 (7th Cir 1984), in support of his assertion. In Caviale, the court struck down a state agency's use of career executive reassignment when the record indicated that doing so would result in an applicant pool composed entirely of men. Id. at 1291. The court did not, however, hold that career executive reassignment was unlawful per se.

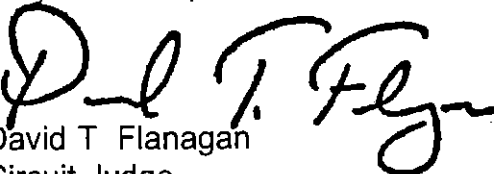
Unlike the record in Caviale, the record in the present case shows that, during the relevant time period, 7.1% of the employees in DOC's career executive positions were racial minorities and, as a result, eligible to compete for the subject position pursuant to the policy of career executive reassignment. (FOF ¶ 13.) The record further shows that the availability of racial minorities in the relevant labor pool was 7.5% at the time. (FOF ¶ 12.) The Commission correctly concluded that, on the basis of the difference between the two statistics, application of the policy in the present case did not have a significantly disproportionate effect on the opportunity of racial minorities to compete for the subject

position.

VI. CONCLUSION

For the reasons discussed above, the Commission's Decision and Order is affirmed.

BY THE COURT, this 14th day of March, 2001


David T. Flanagan
Circuit Judge

cc: Micah Oriedo
Michael J. Losse

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