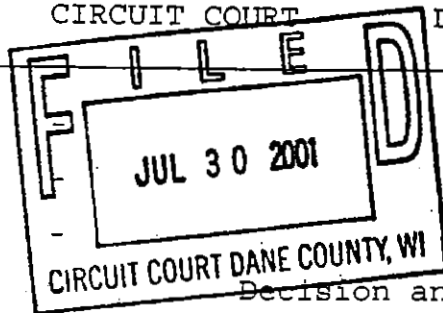


PASTORI M. BALELE,
Petitioner,

vs

WISCONSIN PERSONNEL
COMMISSION and the DEPARTMENT -
OF HEALTH AND FAMILY SERVICES, -
Respondents. -



D-36

Decision and Order

00 CV 2206

RECEIVED

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PERSONNEL COMMISSION

This matter comes before the Court on Pastori Balele's (Balele) petition for Wis. Stat. §227.57 judicial review of a Wisconsin Personnel Commission (WPC) Final Decision under the Wisconsin Fair Employment Act (WFEA). The WPC concluded that the Department of Health and Family Services (DHFS) did not unlawfully discriminate against Balele on the basis of race/national origin under either the "disparate treatment" or "disparate impact" theories of discrimination when it hired a white individual rather than Balele for a Quality Assurance Manager (QAM) position. Because the WPC properly applied and interpreted the WFEA and because substantial evidence in the record supports the WPC's conclusions, the decision is affirmed in its entirety.¹

¹ Balele applied for and was rejected for three separate positions: (1) Quality Assurance Manager, Section Chief, Health Services; (2) Human Service Manager, Bureau of Community Mental Health; and (3) Financial Supervisor, Chief, Institutions and Administrative Section. According to the WPC's Decision the parties agreed that, because the Human Services Manager position was the subject of a separate discrimination case, the circumstances underlying that hire should not be resolved in the WPC decision. Also, Balele withdrew his claim with regard to the Financial Supervisor position in his initial post-hearing brief. He requested inclusion of background information about these two positions in the present matter "to show a pattern to deny Balele and other racial minorities high management positions in DHFS and statewide." Therefore, this court's review, in conjunction with the WPC Final Decision, addresses only the remaining QAM hire.

FACTUAL BACKGROUND

Balele is a black individual born in Tanzania, Africa. Balele applied for three positions in DHFS: (1) Quality Assurance Manager; (2) Human Services Manager; and (3) Financial Supervisor. He was certified as eligible and was interviewed for each of the vacancies. However, he was not hired for any of the positions.

QAM Position

This position encompassed responsibility for managing the state's licensure, certification, and registration of a variety of health providers - such as hospitals, home health agencies, hospices, mental health and AODA programs, etc. The position was also responsible for federal Medicare and Medicaid certification surveys and for directing the investigation of nurse aide abuse complaints, maintaining a Nurse Aide Registry, and for conducting caregiver background checks and investigations of health and community workers with an allegation of abuse.

The following knowledge and skills were required: Medicare, Medicaid and state codes; state, federal and grant budget procedures; information technology/system concepts and ability to use data for management and outcome measurement; supervisory principles and techniques; develop, implement, manage, evaluate and re-engineer highly complex projects, establish and maintain effective relationships with administrators, legislators, agencies, providers, and consumers, and communicate effectively orally and in writing.

The QAM classification was underutilized for minorities. The DHFS hired a white individual, Beth Stellberg, who was not a civil service employee. Stellberg was required to go through the same testing and interview process as Balele, however, unlike

Balele, she was invited to participate in a second interview.

After certification, a panel conducted first interviews of the individuals on the certification list. The first interviews involved asking each candidate pre-prepared interview questions and having each interview panelist measure the candidate's responses against pre-prepared benchmarks. The interview questions and benchmarks were related to the duties of the QAM position.

Stellberg informed the panel that she possessed recent managerial experience in the health care field and that she had responsibility for licensure and survey of community health care providers. In addition, she was familiar with quality assurance measures and had over twenty years experience as a health care professional. The panel rated her as meriting further consideration on three out of four interview questions

Balele did not inform the panel that his experience in Tanzania included supervising people with licensure responsibilities similar to those identified in the QAM job announcement. One panel member rated Balele as not meriting further consideration on any of his answers to the four interview questions. The other two panel members rated Balele as meriting further consideration on two of the questions, but not on the other two questions. Ultimately the panel concluded that although Balele had management skills, his lack of experience specifically in the health care field warranted his not being considered further for the QAM position.

Financial Supervisor 6 Position

This position was underutilized for females. DHFS hired Amy Korpady for the position. Korpady was a state employee who was not in a career executive position and, like Balele, was subject

to the same testing and interview procedures as Balele. Unlike Balele, she was invited for a second interview. Korpady is white.

Like the QAM hiring process, the FS process involved developing a certification list and then conducting initial interviews with the candidates from that list. The first interviews involved asking each candidate pre-prepared interview questions and having each panelist measure each candidate's answers against pre-prepared benchmarks. The interview questions and benchmarks were related to the FS position duties.

Korpady had recent accounting and supervisory experience at the Department of Transportation. In addition, she had experience training staff, directing staff requiring motivation in learning new technologies, working through reorganizations, and had directed teams and functions comparable to what would be expected in the FS position.

By contrast, Balele's accounting experience was dated, having been gained approximately 24 years prior to the interview. Because of changes in accounting systems over that span of time, the panel did not think his past accounting experience was as relevant to the FS position as the more recent experience of other candidates and was not sufficiently corrected by some accounting classes Balele had taken 9-12 years prior to his interview. Balele did have experience using WisMart, but WisMart was only part of the entire accounting system used in the bureau where the FS position would function. Balele also had purchasing experience which had some slight relevance to the position. Balele's supervisory experience was dated with his most recent experience being approximately 13 years prior to his interview. The supervisory experience entailed supervising 2-3 limited term

employees.

Upon review of the interview responses to the benchmarks, all panelists placed Balele in the group not meriting further consideration.

HSM Position

This position was underutilized for minorities. Chris Hendrickson was ultimately hired for the job. Hendrickson was a state employee who was not in a career executive position and, like Balele, was subject to the same testing and interview procedures as Balele. Unlike Balele, he was invited for a second interview. Hendrickson is white.

Like the QAM hiring process, the HSM hiring process involved developing a certification list and then conducting initial interviews with the candidates from that list. The first interviews involved asking each candidate pre-prepared interview questions and having each panelist measure each candidate's answers against pre-prepared benchmarks. The interview questions and benchmarks were related to the HSM position duties.

Hendrickson's interview responses hit many of the benchmarks demonstrating experience in the mental health field. He had significant managerial/supervisory experience in the mental health field. He also had knowledge of the Governor's Blue Ribbon Commission on Mental Health, which outlined the recommendations and goals for state mental health program initiatives.

Balele's responses to the interview questions were considered by the panel to be incomplete and unfocused. His responses did not generally meet the benchmarks. He had no mental health field background. His managerial and supervisory experience was dated, having been gained 13-25 years prior to the

interview. All of the panelists rated Balele and insufficiently qualified to be given further consideration for the position.

Ch. 202 Of The DHFS Supervisors Manual

DHFS has a Supervisor's Manual. Supervisors are expected to be aware of the policies covered in the manual and to follow them. Section 202.3 of the manual covers the procedure for filling a permanent position. Section 202.3B4g(1) specifically states:

All division and institution supervisory, managerial and professional positions in pay range 18 and above (or equivalent) require the approval of the Secretary's Office before an offer of employment can be made. The Department's Affirmative Action and Equal Opportunity goals will be taken into consideration when reviewing hiring requests.

The Division Administrator forwards hiring information along with a resume and memorandum of explanation for the recommended hiring decision. When women and/or racial/ethnic minorities and/or people with disabilities are available for consideration but are not recommended for hire, their resumes must also be included. In these cases the transaction should be reviewed by the Department AA/CRC [Affirmative Action/Civil Rights Compliance] Office before it goes to the Secretary's Office.

DHFS acknowledges that pursuant to the procedure outlined above, the Secretary's Office should have been given Balele's resume and that the AA/CRC should have reviewed the QAM and HSM hiring transactions before hiring information was forwarded to the Secretary's Office. DHFS also acknowledged that John Bauer, the individual responsible for forwarding hiring documents to the Secretary's Office, did not submit resumes of female, minority and disabled candidates to the Secretary's Office, contrary to the policy noted above, nor did he have the AA/CRC office review the QAM and HSM hiring documents that went to the Secretary's

Office. However, Gladis Benavides, DHFS's AA/CRC Office Director, testified that a review of the hiring decisions for the QAM and HSM positions was done via consultation with Terri Rankin, AA designee for the Division. Benavides testified that she and Rankin discussed the hiring decisions and justifications without mentioning candidates by name.²

Documents Submitted To Secretary's Office

For both the QAM and HSM positions, Bauer submitted the following documents: (1) A form entitled "New Appointment - Executive Summary"; (2) A form entitled "Written Hiring Reason for Classified and Project Appointments"; and (3) an attachment to the Written Hiring Reasons form.

Section IV of the Written Hiring Reasons form deals with whether veterans, females or minorities were on the certification list and, if so, why they were not hired. The Commission found that the form submitted for each position was not accurately completed because for both positions, the form should have indicated, by checking a box, that the positions were in a job group that is underutilized for racial/ethnic minorities. For the HSM position, the attachment form did not indicate that the position was underutilized for minorities but did indicate that two candidates were minorities and explained why they were not as qualified for the job as the person recommended for hire. Neither minority candidate was mentioned by name or by race. For the QAM position, the attachment form contained a discussion of qualifications of the recommended hire but did not disclose that

² Balele disputes this finding by the Commission. He interprets Bauer's testimony that Bauer had no discussion with AA/CRC over the hiring decisions to mean that the AA/CRC conducted no review. However, Benavides, as discussed above, testified that a consultation was conducted with Rankin.

the position was underutilized for minorities, that minority candidates were interviewed, or contain a justification for not hiring minority candidates.

Balele contested DHFS's hiring for these positions and filed a discrimination complaint. A hearing was held and the Commission concluded that Balele had failed to meet his burden of proving that DHFS did not hire him for the QAM position because of his race or national origin. The Commission determined that DHFS's reason for hiring Stellberg for that position was not pretextual; Stellberg was more qualified than Balele. The Commission concluded that the cited procedural errors regarding information not submitted to the Secretary and inaccurately completed forms did not overcome the marked differences in qualifications between Balele and Stellberg so as to establish pretext. The Commission also concluded that Balele had failed to establish discrimination based upon a disparate impact theory. Balele now seeks judicial review of the Commission's Final Order.

STANDARD OF REVIEW

The standard of review of an administrative decision depends on whether the issues presented involve questions of law or fact. A court must separate the factual findings from the conclusions of law and apply the appropriate standard of review to each. See Badger State Agri-Credit v. Lubahn, 122 Wis. 2d 718, 723 (Ct. App. 1985).

Balele raises three assignments of error. First, he contends that DHFS denied him a constitutionally protected due process property interest by its failure to follow its own procedures as outlined in the Supervisor's Manual with respect to the DHFS Secretary's review of appointment recommendations when a position is underutilized for racial/ethnic minorities. Whether

a constitutional deprivation occurred is a question of law and a reviewing court is not bound by the agency's conclusions on matters of law. See City of LaCrosse v. Wisconsin Dept. of Natural Resources, 120 Wis. 2d 168, 179 (Ct. App. 1984).

As his second and third assignments of error, Balele contends that the WPC erred when it failed to find that DHFS discriminated against him on the basis of race when it failed to accord him equal appointment consideration or failed to appoint him for the QAM position and that the WPC abused its discretion when it failed to address his disparate impact theory of discrimination.

The substance of Balele's legal argument is that he presented evidence of discrimination on both his disparate treatment and disparate impact claims. To the extent Balele challenges the WPC's interpretation of the WFEA, that challenge is a question of law. A court will review agency interpretations of law independently. See Wis. Stat. §227.57(5). However, a court may defer to an agency's interpretation of the law and accord it great weight when the agency is charged by the legislature with the duty of administering the statute, the agency's interpretation is one of long-standing; the agency employed its specialized knowledge or expertise in forming the interpretation; and the agency's interpretation will provide consistency and uniformity in the statute's application. See Tannler v. DHSS, 211 Wis. 2d 179, 184 (1997). The WPC is charged by the legislature with the duty of hearing and deciding discrimination claims and applying provisions of the WFEA to particular cases. See Phillips v. Wisconsin Personnel Comm'n., 167 Wis. 2d 205, 216 (1992); see also Wis. Stat. §111.375(2). Accordingly, the WPC's conclusions of law are entitled to great

weight.

To the extent Balele challenges DHFS's motivation for not hiring him for the QAM position, this is a factual determination. See St. Joseph's Hospital v. Wisconsin Employment Relations Bd., 264 Wis. 396, 401 (1953). WPC's factual findings will be accepted by this Court if they are 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." See City of La Crosse Police & Fire Comm'n. v. LIRC, 139 Wis. 2d 740, 765 (1987). It is not required that the evidence be subject to no other reasonable, equally plausible interpretation. See Hamilton v. IHLR Dep't., 94 Wis. 2d 611, 617 (1980). Where two conflicting views of the evidence may be sustained, it is for the agency to determine which view of the evidence it wishes to accept. See Robertson Transport. Co. v. Public Service Comm., 39 Wis. 2d 653, 658 (1968). As a reviewing court, this Court must examine the record for credible and substantial evidence which supports the agency's determination. This court will not substitute its judgment for the agency's as to credibility or weight of the evidence on any finding of fact. See Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 250 (Ct. App. 1989).

DECISION

Violation of Constitutionally Protected Due Process And Property Interest.

Balele contends that DHFS's failure to follow the procedure outlined in Section 202.3B4g(1) of its Supervisor's Manual violated his constitutionally protected due process rights and property interests. This argument fails for two reasons.

First, Balele's argument is not sufficiently developed and

is unsupported by legal authority. Generally, claims of deprivations of constitutionally or statutorily protected rights against a person acting under color of state law are raised as a 42 U.S.C. §1983 claim. To recover on such claim, a plaintiff must establish that he was deprived of a protected right and that the deprivation was committed by a person acting under color of state law. See Weber v. City of Cedarburg, 129 Wis. 2d 57, 65 (1986). In a §1983 claim for violation of procedural due process, a plaintiff must show a deprivation by state action of a constitutionally protected interest in life, liberty or property without due process of law. See Zinermon v. Burch, 494 U.S. 113, 125 (1990). This showing requires that there exists, in this case, a property interest which has been interfered with by the State and that the procedures attendant on that interference were constitutionally insufficient. See Arneson v. Jezwinski, 225 Wis. 2d 371, 391 (1999).

Balele describes the specifics of the agency's failure to follow the procedure in the manual but he does not coherently identify the precise property interest interfered with, nor does he establish the legal underpinnings recognizing the interest as a protected property interest. This interest must be clearly identified before the court can engage in an evaluation of the constitutional right Balele claims was violated. See Arneson, 225 Wis. 2d at 391-92. Furthermore, Balele mischaracterizes the manual's procedure as a code, rule or regulation to argue that when a department acts in violation of its own regulations, the proceedings must be invalidated. The procedures detailed in the manual are neither promulgated code, rules or regulations, as the Commission determined in its July 19, 2000 Opinion issued in response to Balele's request for a rehearing. Finally, Balele's

reliance on Bergmann v. McCaughtry, 211 Wis. 2d 1 (1997) to argue that agency proceedings must be invalidated when it violates its own regulations does not apply here, as that case dealt with an agency's violation of Wisconsin Administrative Code notice provisions for inmates, not a Supervisory Manual without the force of law.

Second, this court notes that Balele filed a complaint and amended complaint in this matter alleging DHFS's violation of the WFEA. Nowhere in the pleadings does Balele raise his constitutional claims. Prior to the hearing, the parties agreed to the statement of issues for hearing and those issues are delineated in the WPC's Final Decision and Order. These issues related to Balele's disparate treatment and disparate impact claims under the WFEA. Accordingly, the WPC heard arguments regarding only those claims. Balele raised the additional constitutional argument in his post-hearing brief. The post-hearing briefs were not included in the record, although upon Balele's request and with WPC's permission, the briefs were submitted to this court on judicial review. Generally, an agency may not decide matters broader than the issues noticed for hearing. Any contrary action would be violative of Wis. Stat. §111.31 et. seq. See Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 62 Wis. 2d 392, 399-400 (1974). For these reasons, Balele's constitutional argument fails.

Discrimination Under WFEA Based Upon Disparate Treatment

Balele contends that the WPC erred when it failed to find that DHFS discriminated against him based on his race/national origin in violation of the WFEA. Specifically, Balele claims that he presented sufficient evidence of discrimination under both the disparate treatment and disparate impact theories of

discrimination.

Wisconsin fair employment law recognizes two theories of employment discrimination - disparate treatment and disparate impact. See Racine Unified School District v. LIRC, 164 Wis. 2d 567, 594-95 (Ct. App. 1991) Wisconsin courts have adopted the Title VII framework for allocating burdens and the order of presentation of proof in state discrimination suits. See Puetz Motor Sales, 126 Wis. 2d 168, 172 (Ct. App. 1985). Under the disparate treatment theory, a plaintiff first has the burden of proving a prima facie case of hiring discrimination by a preponderance of the evidence. A plaintiff establishes a prima facie case by showing: (a) he was a member of a protected class; (b) he applied for and was qualified for the position; (c) he was not offered the position; and (d) the position remained open to others after plaintiff was rejected, the employer continued to seek applications and hired someone not within the protected class. See Vitug v. Multistate Tax Comm'n., 88 F.3d 506, 515 (7th Cir. 1996). If the plaintiff succeeds in establishing all of these elements, he raises an inference of discrimination.

Next, once plaintiff proves a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for not hiring the employee. See Puetz, 126 Wis. 2d at 172. Then, should the defendant carry this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. The employer carries the burden of production. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff. See Texas Department of Community

Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

Here, the WPC concluded that Balele established a prima facie case of discrimination for the QAM position, but that DHFS met its burden of production in articulating a legitimate nondiscriminatory reason for hiring Stellberg and not hiring Balele - Stellberg was hired because she was more qualified than Balele. WPC also concluded that Balele had failed to establish that this reason was pretext for race or national origin pretext.

These conclusions are supported by substantial evidence in the record. Balele was rejected from consideration for this position after the first interview in the hiring process. Two of the three interview panelists rated Balele as meriting further consideration on two of the interview questions, but not meriting further consideration on two of the interview questions. The third panelist rated Balele as not meriting further consideration on all of the interview questions. Furthermore, the record reveals that although Balele had management skills, his acknowledged lack of experience in the health care field led the entire panel to conclude that he did not merit further consideration. He did not inform the panel that he had licensure experience similar to that identified in the job announcement.

By contrast, Stellberg had significant health care experience and recent managerial experience in the health care field that included responsibility for licensure and survey of community health care providers. She had strategic planning and program evaluation experience. The panelists rated her as meriting further consideration on her answers to three of the four interview questions. These facts evidence DHFS's articulated nondiscriminatory reason for rejecting Balele's application. As a reviewing court, this court is instructed to

look for evidence in the record to support the WPC's decision. Despite Balele's explanation of evidence which he alleges supports an inference of discriminatory intent, where two conflicting views of the evidence may be sustained, it is for the agency to determine which view of the evidence it wishes to accept. See Robertson Transport. Co. v. Public Service Comm., 39 Wis. 2d 653, 658 (1968). Here, substantial evidence in the record supports the WPC's determination and the WPC correctly held that DHFS met its burden.

Balele contends that the DHFS should have forwarded his application for additional consideration because "interview ranking was not dispositive for appointments consideration. The appointing official could choose anybody from the certified list." Balele maintains that he could have been appointed had his name been properly submitted to the Secretary pursuant to the procedure in the Supervisor's Manual. This argument fails to consider that even if his name been submitted to the Secretary's Office, other more qualified candidates could be appointed despite Balele's race and the classification's underutilization for minorities. Galdis Benavides, AA/CRC Director for DHFS, testified that when a racial minority is a candidate for a position underutilized for race/national origin, she makes sure that the agency has justified the non-hire appropriately and that the position was filled based on proper criteria such as skills and qualifications. She testified that there is no requirement under the law that a minority individual, even if certified, must be hired if there is underrepresentation. (Tr., Vol III, pp. 37-28). Therefore, Balele's contention fails.

The WPC also correctly concluded that Balele failed to demonstrate that DHFS's actions were pretext for racial

discrimination. Once DHFS presented a legitimate non-discriminatory reason for not hiring Balele, the burden shifted back to Balele to prove that DHFS's stated reason was pretextual. Balele contends that DHFS's failure to follow the procedures in the Supervisor's Manual demonstrates pretext. The WPC acknowledged that the problems regarding information that was not shared with the Secretary's Office was probative of pretext. However, the WPC further determined that this error was not sufficient to make suspect the evidence that Balele was not hired and was not considered beyond the first round of interviews simply because his qualifications were inferior to other candidates applying for the QAM position. This is an issue of what weight to accord the agency's failure to follow the procedure manual in relation to Balele's qualifications. This court may not substitute its judgment for the agency's as to weight of the evidence on any finding of fact. See Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 250 (Ct. App. 1989). Accordingly, the WPC properly rejected Balele's allegations of pretext.

Discrimination Under WFEA Based On Disparate Impact

Balele contends that the WPC erred by not addressing his disparate impact claim. The WPC's third conclusion of law states: "It is complainant's burden of proof to show that the QAM hiring process somehow discriminated against him because of his race based on a disparate impact theory. He failed to meet this burden."

Under a disparate impact theory of discrimination, a facially neutral employment practice may be discriminatory without evidence of the employer's subjective intent to discriminate. See Wards Cove Packing Co. v. Atonio, 490 U.S.

642, 645 (1989). A plaintiff must prove that the challenged practice is discriminatory because it has a disparate impact unjustified by the employer's legitimate business needs. See Allen v. Seidman, 881 F.2d 375, 379 (7th Cir. 1989). In the present case, Balele is not asserting that a facially neutral employment practice has a disparate impact, he is alleging that DHFS's failure to follow an employment practice has a disparate impact. This is not a proper disparate claim. Furthermore, federal courts require an individual Title VII plaintiff alleging disparate impact to establish that he was qualified for the position. See Melendez v. Illinois Bell Telephone, 79 F.3d 661, 668 (7th Cir. 1996). Here, substantial evidence in the record supported the conclusion that Balele was not hired because he was not as qualified as other candidates for the QAM position. The WPC's factual findings supported its conclusion that Balele failed to establish a disparate impact claim. The WPC, therefore, did address Balele's disparate impact claim.

ORDER

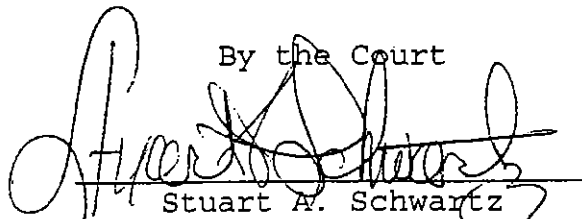
For the reasons stated above and based on the record herein, the WPC's Final Decision and Order is AFFIRMED.

So Ordered.

Dated and mailed this

30th day of July, 2001

By the Court



Stuart A. Schwartz
Circuit Court Judge
Branch 15