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STATE OF WISCONSIN

CIRCUIT COURT PERSONNEL COMMISSION DANE COUNTY
Branch 1

PASTORI M. BALELE,

Petitioner,

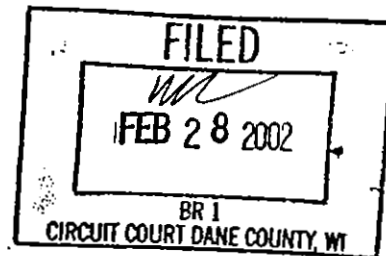
vs.

SN
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MEMORANDUM DECISION
AND ORDER
Case No. 01CV1182

WISCONSIN PERSONNEL COMMISSION,
UNIVERSITY OF WISCONSIN-MADISON,
UNIVERSITY OF WISCONSIN SYSTEM,
DEPARTMENT OF EMPLOYMENT RELATIONS,
DIVISION OF MERIT RECRUITMENT AND SELECTION,

Respondents.



ADMINISTRATIVE REVIEW

INTRODUCTION

Petitioner Pastori M. Balele seeks judicial review of a decision by Respondent Wisconsin Personnel Commission (the commission) concluding that Respondent University of Wisconsin-Madison (the UW) did not discriminate or retaliate against Balele when it appointed someone other than Balele to the position of Administrative Manager, Director of Business and Staff Services (BASS director). Specifically, Balele complains the commission erred when it failed to find that by not hiring him, the UW discriminated against him under both disparate treatment and impact theories because of his race and national origin, and that it retaliated against him for his protected activities under the Wisconsin Fair Employment Act (WFEA).

Balele further complains the commission erred when it did not order the UW to follow

its own procedural rules governing the filling of career executive¹ positions that are underutilized for racial minorities. Finally, Balele complains the commission erred when it failed to find that the UW denied him a due process right to "equal appointment consideration," and that it committed fraud in its selection process.

The commission responds first that it reasonably determined the UW did not discriminate or retaliate against Balele in deciding to hire someone other than Balele for the BASS director position. The commission points to evidence of record supporting the UW's contention that the person hired was substantially more qualified for the position than Balele. The commission next asserts that Balele failed to meet his burden to establish a *prima facie* case of disparate impact discrimination. The commission further rejects Balele's fraud and due process claims as not properly before the court on administrative review. Finally, the commission alleges a frivolous action and attorneys' fees claim against Balele for the instant proceedings.

For the reasons set forth below, the court affirms the commission's decision in its entirety, and dismisses Balele's petition. The court further finds that that this review constitutes a frivolous action by Balele under Wis. Stat. § 814.025(3)(b). Accordingly, the court orders Balele to pay the commission its costs and reasonable attorneys' fees incurred in the defense of this action.

¹The term "career executive" refers to a classified state civil service position, for which the selection procedures are set forth in Wis. Stat. § 230.24. The career executive program

"...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."

Wis. Stat. § 230.24(1). The BASS director position is within the career executive program.

FACTUAL AND PROCEDURAL BACKGROUND

Balele is an African-born black man who came here from Tanzania to attend college during the mid-1970's. Balele has worked for the State of Wisconsin Department of Administration (DOA) since being hired in May 1981. From that time until August 1985, Balele was a marketing coordinator for DOA's Federal Property Program. In September 1985, Balele moved to his current position in the Bureau of Procurement as a contractual services management assistant.

Balele applied for the BASS director position after seeing a job announcement for it in March 1999 on the internet. The position is within the UW's Division of Facilities Planning and Management (FPM), headed by Assistant Vice Chancellor Bruce Braun (Braun). The BASS director is one of eight administrative positions that report to Braun, including the directors of the Physical Plant Department and the Safety Department.

The announcement required applicants to submit a state employment application form, a current resume, and a three-page paper detailing their "professional and managerial experience" in a variety of specific areas deemed germane to the BASS directorship. Balele was one of 27 applicants certified² as at least minimally qualified for the position. He received a letter from the UW's Classified Personnel Office so notifying him and informing him that he was eligible for further consideration for the position.

Braun directed the incumbent BASS director, Paulette Harder, to form a panel of appropriate people to screen the certified candidates to find a significantly smaller number of

²The commission states in its Finding of Fact #15 that the UW, specifically the Vice Chancellor for the Division of Facilities Planning and Management, to whom the BASS director position reports, performed certification. However, Wis. Stat. § 230.25(1) suggests that the administrator of the Division of Merit Recruitment and Selection of the Department of Employment Relations performs that function.

those most qualified from whom Braun would make a final selection. Harder chose three panelists: herself, John Drummond, the director of the Safety Department, and David Harrod, the director of the Physical Plant Department. Harder believed a panel composed of some of the BASS director's professional peers would help ensure greater acceptance and cooperation by those peers with whomever was ultimately selected.

The panelists developed a list of interview questions they believed would address the candidates' qualifications for the position. All three panelists were familiar with the BASS director's functions, Harder by having performed the job for approximately a year and a half, and the other two by working closely with it in their own capacities. The panel conducted interviews of the 27 certified candidates by phone during May 1999. Each candidate was asked the same previously decided upon questions. The panel members took notes of the candidates' responses, and rated the candidates based on the panelists' own considerable knowledge of the position's requirements.

After completing the phone interviews, the panelists compared notes and agreed upon five candidates whom they believed were the most qualified of the original 27. Balele was not one of those five considered most qualified. The panel forwarded the list of five to Braun, who conducted personal interviews with each. Braun then offered the position to Michael Lovejoy. Braun believed Lovejoy was the most technically qualified of the five finalists. Braun also knew Lovejoy from both longstanding professional and personal contacts, and believed Lovejoy was ideally suited for the job.

The UW notified Balele that he had not been selected for the BASS director position in a letter dated May 21, 1999. On October 20, 1999, Balele filed a complaint with the

commission claiming that the UW's failure to hire him for numerous positions over a period of 14 years evidenced continuing discrimination against him based on his race and national origin. In particular, Balele complained of the UW's decisions not to appoint him to three posts, including the BASS director position, for which he had applied during the preceding approximately two years.

At a prehearing conference on January 31, 2000, Balele withdrew his claims as to two of the positions, maintaining only the claim about the BASS directorship. On March 22, 2000, upon motions by DER and DMRS, the commission dismissed both of those entities as respondents in this case.

The commission conducted an evidentiary hearing in this matter on August 2-3, 2000. The commission issued its Final Decision and Order on February 26, 2001. Balele petitioned the commission for rehearing on March 15, 2001. The commission denied the petition for rehearing on April 4, 2001. Balele filed the instant petition for review by the court on May 2, 2001. Briefing on the petition was completed on November 30, 2001.

Further facts will be set forth as necessary in this opinion.

ISSUES FOR REVIEW

In his petition to this court, Balele alleges several issues beyond whether the commission erred in not finding direct or indirect discrimination by the UW against Balele on the basis of his race or national origin, and in not finding retaliation for Balele's protected activities under the WFEA. Balele claims that the UW engaged in fraudulent practices in the process that resulted in the selection of someone other than Balele for the BASS director position. He also claims the UW denied him due process by failing to give him equal appointment consideration.

Finally, Balele claims the commission abused its discretion by not ordering the UW to follow its own affirmative action procedures in the appointment process.

However, none of those additional issues were decided by the commission in the proceeding below. The only two questions noticed for hearing before the commission were those involving direct discrimination or retaliation, or indirect discrimination. An agency cannot determine questions beyond those noticed for hearing. *Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis. 2d 345, 359-60, 228 N.W.2d 649 (1974). Likewise, this court, acting as an appellate court, will not review issues that have not first been raised before the initial forum or trier of fact. *See Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

Thus, notwithstanding that Balele lists seven issues for review in his petition, and four in his brief-in-chief, the issues properly before this court are as follows:

- (1) Whether the commission erred when it found that the UW did not discriminate against Balele based on his race or national origin, or retaliate against Balele for engaging in protected activities under the WFEA when the UW selected someone other than Balele for the BASS director position.
- (2) Whether the commission erred when it found that the UW's post-certification hiring processes for filling the BASS director position did not indirectly discriminate against Balele in that those processes have a disparate impact upon members of the minority group to which Balele belongs.

STANDARD OF REVIEW

Judicial review of an administrative agency proceeding is governed by Wis. Stat. §§ 227.52-57. The court must affirm the agency, unless it finds grounds to do otherwise under § 227.57(2). Thus, review under ch. 227 is not a trial *de novo*. *See Wis. Environmental Decade v. PSC*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977). Rather, such review is conducted

without a jury, and is limited to the record of the proceedings below generated by the agency. Wis. Stat. § 227.57(1).

An administrative review requires the court to evaluate and treat separately issues of agency procedure, the agency's interpretations of law, and its findings of fact. Wis. Stat. § 227.57(3). However, the court is not bound by the agency's characterization of any of its determinations as either a finding of fact or a conclusion of law. *Madison Teachers, Inc. v. WERC*, 218 Wis. 2d 75, 84, 580 N.W.2d 375 (Ct. App. 1998). Here, Balele does not claim any procedural error on the part of the commission.

A reviewing court must sustain the agency's findings of fact if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). *Hamilton v. DILHR*, 94 Wis. 2d 611, 617-18, 288 N.W.2d 857 (1980). Substantial evidence does not mean a preponderance of the evidence. *Id.*, at 617. Rather, substantial evidence is defined as relevant evidence that a reasonable person could accept as adequate to support the determination at issue. *Id.* Where the evidence is such that two conflicting conclusions may reasonably be drawn, it is for the agency to determine which view of the evidence it accepts. *Id.*

When reviewing questions of law, the court is not bound by an agency's conclusions. *Sauk County v. WERC*, 165 Wis. 2d 406, 413, 477 N.W.2d 267 (1991). Nonetheless, the general rule in Wisconsin is to afford a presumption of validity to the agency. *Id.* Varying levels of deference apply, depending upon the "comparative institutional capabilities and qualifications" between the court and the administrative agency. *Jarrett v. LIRC*, 2000 WI App 46, ¶9, 233 Wis. 2d 174, 607 N.W.2d 326.

The three levels of deference afforded an agency's interpretations of law are: great

weight, due weight, and no weight. *Sauk County*, 165 Wis. 2d at 413-14. The "great weight" standard is appropriate when the court finds that the agency is charged with administering the law in question, the agency has specialized knowledge or expertise in interpreting the law, and the agency's interpretation provides uniformity of application of the law. *Knight v. LIRC*, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (1998). Under great weight deference, the court must uphold the agency so long as its interpretation is at least reasonable and not contrary to the clear meaning of the law, even if another interpretation is may be more reasonable. *UFE v. LIRC*, 201 Wis. 2d 274, 286-87, 548 N.W.2d 57 (1996).

The requirements for great weight deference have been met in this case. The commission is charged by the legislature with the duty of hearing and deciding discrimination claims and applying the provisions of the WFEA to particular cases. Wis. Stat. §§ 111.375(2), 230.45(1)(b). *Phillips v. Wisconsin Personnel Comm'n*, 167 Wis. 2d 205, 216, 482 N.W.2d 121, 125 (Ct. App. 1992). Further, the commission has developed considerable expertise at interpreting and applying the provisions of the WFEA regarding disparate treatment and impact claims, given its lengthy performance of that function. *See History*, Wis. Stat. § 230.45.

ANALYSIS

I. Disparate treatment and/or retaliation

Under a disparate or differential treatment theory of employment discrimination, a complainant must show that the employer treats some people less favorably than others due to their status as members of a protected class. *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 595, 476 N.W.2d 707 (Ct. App. 1991). Thus, a complainant must show intentional discrimination by the employer on the basis of the complainant's race or gender, etc. *Id.*

A complainant raises an inference of differential treatment discrimination by showing: (1) he is a member of a protected class; (2) he applied and was qualified for the open position; (3) he was rejected despite being qualified; and (4) that, after the rejection, the employer continued to seek applicants among persons of complainant's qualifications. *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817 (1973), *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 173, 376 N.W. 2d 372 (Ct. App. 1985).

Having thus established a *prima facie* case of discrimination, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the action taken. *Puetz*, 126 Wis. 2d at 172, citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). The burden then shifts back to the complainant who must prove that the proffered reason is merely a pretext for discrimination. *Puetz*, at 172, citing *McDonnell Douglas*, at 804, 805. The ultimate burden of persuasion in any employment discrimination case rests with the complainant by a preponderance of the evidence. *Currie v. DILHR*, 210 Wis. 2d 380, 393, 565 NW.2d 253 (Ct. App. 1997).

Here, the commission determined that Balele clearly established a *prima facie* case of differential treatment discrimination on at least three of the elements. The commission noted that the parties disagree about whether Balele was qualified for the position given that the screening panel found him so much less qualified than the five finalists. In any event, as there was no dispute that Balele was at least minimally qualified, the commission decided to proceed with the *McDonnell Douglas* analysis and burden-shifting scheme.

The facts of record are that Balele is a member of a protected class, he applied and was certified as at least minimally qualified for the BASS director position, and his application was

rejected during the intermediate step of narrowing the field of 27 certified candidates to 5 by a panel of screeners. After the rejection, Braun, the employer's appointing authority, continued the selection process, ultimately offering the position to one of the five candidates whose names had been forwarded to him by the panel. Considering those facts, the court finds the commission's determination that Balele presented a *prima facie* case reasonable and not contrary to the meaning of the WFEA.

Next, the commission found that although Balele had some support for a case of pretext by the UW, on balance the UW's reasons for not hiring Balele as BASS director were legitimate. The commission considered evidence showing that the UW made a number of departures from state affirmative action standards, as well as from its own affirmative action plan for filling positions deemed underutilized for minorities during its selection process. However, the commission agreed with the UW that Balele's qualifications for the position were substantially less than any of the five finalists, and that his rejection was not based on considerations of race or national origin.

The court finds that the evidence adduced at the hearing amply supports the commission's conclusion. The evidence shows that Harder chose the screening panel members on the basis of their familiarity with and relationship to the BASS director position. She stated she sought input from the position's peers in an effort to foster acceptance by those peers with the person ultimately selected. The screening panel members all testified at the hearing. They related that they formulated questions based on their own substantial knowledge of the position's requirements, and rated all 27 candidates as consistently as possible in order to come up with the five most qualified. Finally, Braun testified that Lovejoy's qualifications stood out among

the five, and that Lovejoy was simply the best overall candidate for the job.

Balele argues variously that (1) Harder intentionally picked an all white panel in order to stack the deck against minority candidates; (2) that Harder chose "peers," defined as people who get along with each other or have common interests, for the screening panel; (3) that the results of the screening interviews were meaningless because the appointing authority has the discretion to choose from any of the certified candidates; and (4) that therefore the panel's failure to forward Balele's name as one of the five finalists denied him "equal appointment consideration," which he claims is a due process violation.

First, there is no evidence to support Balele's first contention. Second, Balele demonstrates his misunderstanding of the use of the word peers in this context. Third, that Balele calls the results of the screening interviews meaningless because the appointing authority has the discretion to select anyone from the certified list demonstrates a complete lack of understanding of the general selection process. It is simply not logical. If one continues along Balele's line of thought, one would have to believe that Braun would willingly select a candidate only minimally qualified over several others with far superior qualifications.

Finally, the court has already determined that Balele's due process claim is not properly before this court. Based on the evidence before the commission and the above considerations, the court finds reasonable the commission's conclusion that the UW did not discriminate against Balele on the basis of race or national origin when it hired someone other than Balele into the BASS director position.

Regarding Balele's retaliation allegation, the commission found that he had established at least a minimal *prima facie* case by showing that Harder knew of some of Balele's previous

employment discrimination cases before the commission, and that despite Balele's having been certified, he was not selected. However, the rest of the *McDonnell Douglas* analysis, i.e., that the respondent must meet the inference of retaliation by articulating legitimate reasons for the failure to hire the complainant, etc., tracks the preceding discussion of differential treatment discrimination, and leads to the same result.

The commission additionally noted that Harder was the only panelist aware of Balele's protected activities, and that her evaluation of his screening interview was consistent with the other two panelists'. That is simply more evidence of the absence of retaliation against Balele. The court again finds reasonable the commission's conclusion that the UW did not retaliate against Balele when it hired someone other than Balele into the BASS director position.

II. Disparate impact discrimination

Balele complained to the commission that the UW indirectly discriminated against him in that its post-certification selection processes affect members of his race or of foreign national origin adversely while not so affecting others. Specifically, Balele challenges the use of an all-white screening panel, the selection of "peers," meaning people having common interests who get along well together, for the screening panel, the use of screening interviews in and of itself, and the failure to follow certain affirmative action policies and procedures. The commission found that Balele had not presented a *prima facie* case of disparate impact discrimination, and thus rejected that claim.

In order to allege disparate impact employment discrimination *prima facie*, a complainant must first identify a specific employment practice that is facially neutral but that disproportionately adversely affects members of a protected class. *Watson v. Fort Worth Bank*

& Trust, 487 U.S. 977, 994, 108 S.Ct. 2777 (1988). "Facially neutral" practices are such as using standardized tests or criterion as conditions for employment, but which bear no demonstrable relationship to successful job performance. *Griggs et al. v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849 (1971). Whether or not Balele here meets the requirement of identifying such a practice is immaterial because he failed to meet the second element.

The second element of a *prima facie* disparate impact claim requires the complainant to offer proof of causation by providing reliable statistical evidence sufficient to show that the challenged practice has caused the exclusion of applicants for jobs or promotions due to their membership in a protected class. *Watson*, at 994-95. The commission concluded that the statistical data provided by Balele was not relevant, and did not evidence a disparate impact upon minorities. Balele presented evidence generally supporting the notion that career executive positions statewide are underutilized for minorities, something the UW does not deny. However, one of Balele's own witnesses, Greg Jones, administrator of DER's Affirmative Action Division, testified that underutilization does not necessarily signify discrimination.

Additionally, the data report Balele provided covering the relevant time period was merely a listing of individuals then employed as state civil service career executives, with a breakdown of how many were females or males. Although the report also showed the individuals' racial/ethnic category, it by no means addressed the question of whether the state's hiring practices had anything to do with the ratio of minority employees to non-minorities.

The only other statistical evidence Balele offered was for a time period not relevant to this case. Thus, the commission concluded that Balele failed to present any statistical data specifically aimed at or conclusive of his claim that the UW's post-certification hiring practices

for the BASS directorship had an adverse impact upon Balele as a member of a protected class. The court finds that the commission based its conclusion on a proper interpretation of the evidence, and reasonably came to its ultimate finding.

FRIVOLOUS ACTION/ATTORNEYS' FEES

The commission contends that Balele either knew or should have known his petition for review of the commission's decision was without any basis in fact or law, and could not be supported by a good faith argument for extension, modification, or reversal of existing law, pursuant to Wis. Stat. § 814.025(3)(b). The court agrees and accordingly grants the commission its costs as determined under Wis. Stat. § 814.04, and its reasonable attorneys' fees.

As stated above, the court affirms the commission's decision here in its entirety. The court finds the commission's factual findings well supported by the evidence of record. The court also finds that the commission's interpretations of law are due great deference, as dictated by the well-established standard of review for cases such as this. See Wis. Stat. §§ 227.57(2) and (8), *Wisconsin Environmental Decade v. PSC*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977). Balele did not plead any procedural errors by the commission.

Likewise well established are the standards for employment discrimination cases, both disparate treatment and impact. *McDonnell Douglas*, 411 U.S. at 802-005, *Puetz Motor Sales*, 126 Wis. 2d at 173-75, *Watson*, 487 U.S. at 994-95, *Caviale v. State of Wisconsin DHSS*, 744 F.2d 1289, 1293 (7th Cir. 1984). Although the commission determined that Balele presented at least a nominally *prima facie* case of differential treatment discrimination, it subsequently determined the evidence conclusively showed that the UW's reasons for not hiring Balele were legitimate and non-pretextual. The commission was also disturbed that the UW failed to follow

many of its own affirmative action guidelines in hiring the BASS director, but again, that issue was satisfactorily resolved by the evidence presented.

There was simply no reason for Balele not to accept the commission's decision other than his own unhappiness with it. Balele was unable to prove any of his contentions other than the UW's failure to follow affirmative action procedures. However, Balele could not show that that failure had anything to do with the UW's decision not to hire him. Balele failed to present even a *prima facie* case of disparate impact discrimination due to his failure to provide any relevant evidence of such a claim. Balele should have been able to figure that out by acquainting himself with the well-established case law on the requirements, e.g., *Watson*.

Finally, if for no other reason, Balele should have known his petition to this court was frivolous based on the long-standing standard of judicial review of administrative agencies. It is *not* a trial *de novo*. The court cannot overturn the commission's factual findings unless they are not supported by substantial evidence in the record. Wis. Stat. § 227.57(6). Further, the court must not substitute its own judgment of the weight or credibility of the evidence for that of the commission. *Id.* The commission's interpretations of law are afforded great weight deference. *Balele v. Wis. Personnel Comm'n*, 223 Wis. 2d 739, 744, 589 N.W.2d 418 (Ct. App. 1998). Given all of those considerations, the court finds that it should have been clear to Balele that his petition had no basis in law, and that it could not be supported by a good faith argument for an extension, modification, or reversal of existing law.


CONCLUSION

For all of the reasons set forth above, the court **AFFIRMS** the commission's decision, and accordingly **DISMISSES** Balele's petition. The court further finds Balele's petition frivolous pursuant to Wis. Stat. § 814.025(3)(b), and accordingly **ORDERS** Balele to pay the commission's costs and reasonable attorneys' fees incurred in the defense of this action.

IT IS SO ORDERED.

Dated this 28 day of February, 2002.

BY THE COURT:


The Honorable Robert A. DeChambeau
Dane County Circuit Court Judge - Branch 1