

MICHAEL CARRATT,
Petitioner,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**
Respondent.

DECISION
AND
ORDER

Case Nos. 98-0063-PC, 98-0143-PC-ER

The issues for hearing in these matters are as follows:

Case No. 98-0063-PC

Whether respondent's decision not to select [petitioner] for the subject Institution Treatment Specialist 1 position at TCI in 1998 was illegal or an abuse of discretion.

Case No. 98-0143-PC-ER

Whether there is probable cause to believe that [petitioner] was discriminated against on the basis of arrest/conviction record when he was not selected by respondent for the subject Institution Treatment Specialist 1 position at TCI in 1998.

Petitioner has stipulated that he is not contesting the appropriateness of the questions asked during the interview in question.

By letter dated August 18, 2000, the designated hearing examiner denied the request of petitioner, who was represented by counsel, for a second extension to file a post-hearing brief. The hearing examiner gave an extensive explanation for the basis of his ruling. The examiner granted respondent until September 18, 2000, to file its brief but denied petitioner an opportunity to respond. Petitioner, nevertheless, submitted a post-hearing brief via fax at 7:04 p.m., on August 28, 2000. Respondent submitted a post-hearing brief, dated September 18, 2000, that was received by the Commission on September 19th. The Commission declines to consider the petitioner's brief because it

was received well after the period petitioner had been granted for filing his post-hearing arguments and because it was submitted despite the rationale set forth in the hearing examiner's August 18th letter

FINDINGS OF FACT

1. Complainant has been employed by respondent for nearly 25 years as a Social Worker at Waupun Correctional Institution, which is a maximum security facility for male prisoners. Petitioner is the coordinator for the AODA (Alcohol and Other Drug Abuse) programs at Waupun Correctional.

2. Respondent has developed a numerical system for rating the relative intensity of the AODA programs at its institutions. Level 1 programs are the least intensive. They are self-help support groups that are directed by volunteers. Levels 2 and 3 are drug education programs that are informational or instructional in nature. Programs above level 3 may include actual counseling and group work. The highest level of AODA programs provided by respondent are rated at level 6. Those are therapeutic community programs where the inmate/patient is "torn down and built back up." Level 5 programs are distinguished between those in which the inmates all live together as a group (Level 5A) and those in which the inmates do not live together (Level 5B).

3. The AODA programs at Waupun Correctional Institution are at Level 1 and Level 3.

4. Respondent also operates the Taycheedah Correctional Institution (TCI), a correctional facility for females, and the Kettle Moraine Correctional Institution. Both of these institutions offer AODA programs at level 5B.

5. These cases relate to a vacancy in an Institution Treatment Specialist 1 position at TCI. The position description includes the following position summary (Resp. Exh. 101):

Under the general supervision of the Treatment director, this position will have responsibility for the development, evaluation and coordination of all chemical dependency programming for offenders.

This position will act independently to: appropriately screen candidates; provide appropriate counseling techniques including alternate Adult Learning strategies; provide liaison coordination and consultation services to all offenders and institution staff, and act as conduct [sic] to other institutions and community based programs

6. Mary Jo Nelson is the Human Resources Manager/Personnel Manager at TCI.

7. Kristine Krenke is the TCI Warden.

8. Petitioner took the relevant examination and was certified for the Institution Treatment Specialist 1 vacancy.

9. Ms. Nelson contacted the certified candidates by letter dated May 11, 1998 (Pet. Exh. 46), to see if they wished to be interviewed for the vacancy. The letter stated in part:

The Department of Corrections conducts criminal history checks and related employment background checks prior to hire. Information gathered will be confidential. Conviction or criminal history will be used to determine whether the conduct engaged in has a substantial relationship to the essential functions of the position.

If an interview is scheduled, please bring the following: updated resume, three supervisory references and completed Application Supplement-Conviction Record to the interview.

If we do not hear from you by 12:00 Noon, Tuesday, May 19, 1998, we will assume you are not interested in being considered for this position.

Petitioner asked to be interviewed.

10. By letter dated May 18, 1998, respondent confirmed that petitioner's interview had been scheduled for May 28th. The letter (Resp. Exh. 121) stated, in part:

The Department of Corrections conducts criminal history checks and related employment background checks prior to hire. Information gathered will be confidential. Conviction or criminal history will be used to determine whether the conduct engaged in has a substantial relationship to the essential functions of the position.

We request you bring the completed Application Supplement-Conviction Record (previously sent), an updated resume and three supervisory references (names and phone numbers) and proof of eligibility of Social

Worker Licensure to the interview. Resumes and references will be considered in ranking.

11 All candidates must complete the Application Supplement-Conviction Record whether or not they have an arrest record or a criminal record. The standard procedure is for the candidate to place the completed form in an envelope at the interview and seal it. The envelope is then only opened in the event a tentative decision is made to offer a position to a candidate. At the point the envelope is opened and if there is a criminal history, respondent analyzes the information in relation to the duties of the position.

12. Respondent applies its conviction record policy equally to all vacancies, regardless of the pay range of the vacancy.

13. Respondent's practice is to check references after the interviews have been completed and after the candidate's responses have been scored. TCI's standard procedure is to check references for the top "clump" of candidates. Typically, TCI does not check references for all candidates.

14. Respondent formed an interview panel to conduct the interviews for the Institution Treatment Specialist 1 vacancy. The panel consisted of:

- a. Mark Heise, Treatment Director at TCI and supervisor for the position in question. Mr. Heise's immediate supervisor was Warden Krenke.
- b. William Turner, Food Services Administrator at TCI.
- c. Marcy Wittek, the TCI business manager.

15. Warden Krenke was the appointing authority for the vacant Treatment Specialist position at TCI. Before the hiring decision in question, the last significant contact between petitioner and Warden Krenke was a job interview in 1993 when Ms. Krenke was on the interview panel.

16. Petitioner was one of three persons interviewed for the subject position. The other candidates were Carole Pagel and Angela Pierstorff. Ms. Pagel was ultimately selected to fill the vacancy.

17 All interviews were conducted on May 28, 1998.

18. At the commencement of each interview, the panel read a set of instructions, out loud, to the candidate.

19. All candidates were asked the same questions.

20. At the beginning of his interview, petitioner submitted a packet of materials, approximately 21 pages in length. These materials included: a) a three-page typed resume with updates in pen; b) a list of four references; c) multiple pages of materials from petitioner's Institution Treatment Specialist 1 exam which was an Achievement History Questionnaire; and d) a 3-page document (including cover page) dated April 15, 1977, that was entitled "A Basic Comprehensive Drug Program Effecting [sic] Residents of Wisconsin State Prison -- Waupun." (Pet. Exh. 28) Petitioner intended this last document serve as a work sample.

21. When Mr. Heise told petitioner that he could only submit three references, petitioner volunteered that he had a criminal record and that his fourth reference, Richard Verhagen, Administrator of the Division of Adult Institutions, served as a reference regarding the criminal history. Mr. Heise followed respondent's standard procedure and immediately told petitioner not to discuss the topic of petitioner's criminal record any further. Mr. Heise told petitioner to put his Application Supplement-Conviction Record form in a white envelope with his name on it and to seal the envelope. There was no discussion as to the nature of petitioner's conviction record.

22. Initially, Mr. Heise accepted the "updated resume" [document c) in Finding 20] but on further review he recognized it as an Achievement History Questionnaire response.

23. Mr. Heise consulted with Mary Jo Nelson, TCI's personnel manager, because of the multiple written submissions by petitioner. Ms. Nelson also recognized petitioner's "updated resume" as a copy of the Achievement History Questionnaire examination. Both Mr. Heise and Ms. Nelson concluded that this document should be kept confidential because it was part of a civil service examination. They concluded, based upon the confidential nature of the examination process, that it would be inappro-

priate to consider the petitioner's "updated resume" in addition to his 3-page "resume." They destroyed the excess materials.

24. It is extremely unusual for someone to submit an Achievement History Questionnaire as a resume.

25. The standard practice at TCI is not to accept anything other than a standard resume plus the names of three supervisory references. In an effort to keep the process fair for all of the candidates, TCI does not accept, for example, letters of recommendation, training certificates or work samples.

26. The three panelists used benchmarks for scoring the interviews. They scored the interviews independently, although if there was a significant disparity between their scores for a given question, they were permitted to confer in an effort to understand the basis for the discrepancy. There were no significant disparities between the scoring of the 3 panelists.

27. The following charts reflect the scoring by each panelist of the candidates' responses to each question.

Interview scores for Carole Pagel

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Oral</i>	<i>Written</i>	<i>Total</i>
Heise	18	7	4	6	5	5	5	50
Turner	15	7	5	6	5	5	5	48
Wittek	17	6	5	6	6	5	5	50
Total	50	20	14	18	16	15	15	148

Interview scores for Angela Pierstorff

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Oral</i>	<i>Written</i>	<i>Total</i>
Heise	9	10	4	3	5	5	4	40
Turner	9	9	5	3	5	6	5	42
Wittek	9	10	4	3	5	6	5	42
Total	27	29	13	9	15	17	14	124

Interview scores for petitioner

	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>Oral</i>	<i>Written</i>	<i>Total</i>
Heise	11	2	3	4	5	2	2	29
Turner	12	3	3	4	5	1	2	30
Wittek	11	3	3	5	6	3	3	34
Total	34	8	9	13	16	6	7	93

Scoring maximums were 20 points for questions 1 and 2, 10 points for questions 3, 4, 5 and oral communication skills, and 5 points for written communication skills. The panelists reviewed a letter prepared by each candidate to assess their written communication skills.

28. Respondent was looking for a candidate who would be appropriate to coordinate AODA programs for females, in light of the fact that TCI was a facility for females. Respondent also sought someone who was easily understood and well-organized.

29. The panelists took notes during each interview. The panelists made the following notes regarding petitioner:

"Mumbles, hard to understand." (Resp. Exh. 119)

"Hard to understand." (Resp. Exh. 118)

"Difficult to understand. 'Mumbles.' Disorganized." (Resp. Exh. 117)

30. Panelist William Turner had difficulty taking notes during petitioner's interview because it was hard to understand what he was saying. Mr. Turner asked petitioner to slow down.

31. Petitioner's criminal record was not reflected in the points assigned by the interview panelists.

32. Carole Pagel had 15 years of experience with respondent, including 6 years as a Social Worker. At the time of the interview, Ms. Pagel was working as a Social Worker-Senior at TCI and had a caseload of 150 female offenders. She had facilitated and presented a variety of programs including several that are part of the Level 5B AODA program at TCI. She had experience working with male offenders as a social worker in STOP, a full-time drug treatment program at the Kettle Moraine Correctional Institution. She had also worked in WAC, an AODA program at TCI, for approximately 6 months. (Resp. Exh. 103)

33. Because Ms. Pagel had a significantly higher score than the other two candidates, respondent only checked Ms. Pagel's references. This was consistent with

respondent's standard practice. ViAnne Nelson, a Program Assistant-Confidential employed by the Business Director at TCI, checked the references.

34. Ms. Pagel listed Mr. Heise, her supervisor, as one reference. Respondent followed its standard practice of reviewing the candidate's most recent performance evaluation when the candidate names an immediate supervisor as a reference. Ms. Nelson obtained a copy of Ms Pagel's performance evaluation for the one-year period ending in November of 1997. The evaluation was positive. (Resp. Exh. 106)

35. Ms. Pagel also listed a former supervisor at Kettle Moraine Correctional Institution as a reference. Ms. Nelson contacted the KMCI reference. That reference was very positive. (Resp. Ex. 106)

36. Ms. Pagel listed Warden Krenke as her third reference, but because Ms. Krenke was to make the final hiring decision as the appointing authority, no formal reference check was made with Ms. Krenke.

37. Mary Jo Nelson then provided the score sheet, the results of the reference checks and Ms. Pagel's personnel file to Warden Krenke.

38. Warden Krenke approved the selection of Ms. Pagel for the vacancy.

39. Warden Krenke did not recall having met petitioner, and was not aware he had a conviction record.

40. Respondent reviewed Ms. Pagel's Application Supplement-Conviction Record form but did not open the envelopes containing the forms for petitioner or the other unsuccessful candidate, Ms. Pierstorff. Those envelopes were destroyed after Ms. Pagel accepted the job offer.

41. By letter dated June 2, 1998, petitioner was informed another candidate had been selected for the position. (Resp. Exh. 122)

CONCLUSIONS OF LAW

Case No. 98-0063-PC

1. This matter is properly before the Commission pursuant to §230.44(1)(d), Stats.

2. The petitioner has the burden to prove that respondent acted illegally or abused its discretion when he was not selected to fill the Institution Treatment Specialist 1 position at Taycheedah Correctional Institution.

3. Petitioner has failed to sustain his burden.

Case No. 98-0143-PC-ER

4. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

5. Petitioner has the burden to establish probable cause to believe that he was discriminated against based on his conviction record when he was not selected for the Institution Treatment Specialist 1 position at Taycheedah Correctional Institution.

6. Petitioner has failed to sustain his burden.

OPINION

I. Case No. 98-0063-PC

This case is reviewed pursuant to the Commission's authority under §230.44(1)(d), Stats.

A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

In *Ebert v. DILHR*, 81-64-PC, 11/9/83, the Commission held:

The term "abuse of discretion" has been defined as "a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Lundeen v. DOA*, 79-208-PC, 6/3/81. The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of the appointing authority may be said to have been "clearly against reason and evidence." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Petitioner does not contend that any particular statute or rule was violated. Petitioner contends that respondent abused its discretion when he was not selected for the vacant position.

Petitioner offered little, if any, evidence tending to support his appeal.

Respondent followed its standard procedures when it filled the Institution Treatment Specialist 1 position, both during the interviews and throughout the selection process. All three candidates were asked the same questions, their responses were rated separately by the three panel members, the resulting scores were combined and the candidate with the highest cumulative score, Carole Pagel, was recommended by the panel. Respondent then contacted that candidate's references and reviewed her current performance evaluation. That information was all positive. The personnel manager submitted the interview scores, the reference check results and Ms. Pagel's personnel file to the appointing authority, Warden Krenke, who approved the recommendation. Respondent checked Ms. Pagel's arrest/conviction record disclosure. There were no problems on that front, so they offered the position to her.

Ms. Pagel had extremely relevant experience providing AODA services and programs at TCI as well as at Kettle Moraine Correctional Institution. She had experience working with female inmates. In contrast, petitioner did not have experience with the same level of AODA programs offered at TCI and he did not have experience with female inmates. Ms. Pagel's writing sample was better than petitioner's sample in terms of grammar and organization. In addition, all three panelists found it difficult to understand petitioner during the interview. The three panelists were quite consistent in their scoring of the three candidates. The interview panel awarded Ms. Pagel 148 points out of a possible 255. In contrast, the petitioner received only 93 points. When the petitioner volunteered that he had a criminal record, the panel immediately advised him not to discuss that topic any further. Respondent followed its policy of not considering conviction record information regarding any candidate unless and until a tentative decision had been made to offer the position to the that candidate. The interview panel ranked petitioner the lowest of the three interviewees and the top candidate was hired. There was never any reason to review the materials supplied by petitioner regarding his conviction record, nor to contact his references.

Respondent directed the three candidates to supply specified written information when they appeared for their interview. Petitioner attempted to add materials to this list. He tried to submit a work example. He tried to submit 4 references instead of three. He tried to submit extensive information in addition to a resume. The additional information was in the form of confidential examination materials. Respondent concluded that it would not be fair for petitioner to submit information beyond that which was requested. This action was consistent with respondent's standard practice. A different conclusion would have disadvantaged the other two candidates for the vacant position.¹

Petitioner had worked as a social worker for respondent for nearly 25 years while Ms. Pagel had 6 years of experience in that capacity. Length of service was not a factor in the benchmarks that had been established for scoring the responses of the candidates during the interviews. While respondent might have chosen to consider length of service as a factor, it decided that other factors were more appropriate, and that decision was not "clearly against reason and evidence." *Harbort v. DILHR*, 81-74-PC, 4/2/82.

Respondent's practice of only checking the references for the highest "clump" of candidates, is logical in that it means not spending more time than necessary on the selection process if the references for the highest ranked candidate(s) are positive.

Petitioner failed to show that respondent had abused its discretion when it did not select petitioner as the best candidate for the Institution Treatment Specialist 1 vacancy at TCI.

¹ This result is consistent with the facts in *Balele v. DOC et al.*, 97-0012-PC-ER, 10/9/98, where the complainant had been instructed to submit a two-page Achievement History Questionnaire addressing four factors, but he, alone among the applicants, had submitted 4 pages. The specialist who administered the selection process removed 2 pages of complainant's submission after deciding it would be inappropriate and unfair to evaluate complainant on the basis of all 4 pages.

II. Case No. 98-0143-PC-ER

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on the complainant to show a prima facie case of discrimination. If petitioner meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken, which the petitioner may, in turn, attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

This complaint of discrimination is before the Commission at the probable cause stage. In order to make a finding of probable cause, facts and circumstances must exist that are strong enough in themselves to warrant a prudent person to believe that a violation probably has been or is being committed as alleged in the complaint. §PC 1.02(16), Wis. Adm. Code. In a probable cause proceeding, the evidentiary standard applied is not as rigorous as that which is required at the hearing on the merits.

In the context of a hiring decision, the elements of a prima facie case are that 1) the petitioner is a member of a class protected by the Fair Employment Act (FEA), 2) petitioner was qualified for an available position, and 3) he was rejected under circumstances which give rise to an inference of unlawful discrimination.

The petitioner has a conviction record so he is within a protected class with respect to his claim of discrimination based on arrest/conviction record.

The Commission has already described the selection procedure used by the respondent and the results of the interviews and the reference check. Due to the nature of the position, respondent required that all three candidates complete a form indicating whether they had a conviction record. Had petitioner followed the respondent's instructions, the panelists would never have known if petitioner or any of the other candidates had a conviction record. Petitioner did not follow that procedure and he blurted to the panel that he had a conviction record. Mr. Heise told him to change the subject and the panelists never knew the nature of the conviction record. The panelists went

ahead and rated the candidates based on the questions asked and the previously established benchmarks. Their scores were consistent and they did not discuss or consider petitioner's conviction record when they analyzed the candidates' responses.

At the time of the selection decision, Warden Krenke was not aware the petitioner had a conviction record.² Warden Krenke agreed with the recommendation to select Ms. Pagel. Respondent followed its standard and appropriate procedure by not reviewing those conviction record (Application Supplement-Conviction Record) forms except for Ms. Pagel, the individual tentatively identified as the selectee. The conviction record forms for the unsuccessful candidates were destroyed.

Petitioner has failed to establish *any* circumstances giving rise to an inference of unlawful discrimination based on his conviction record with respect to the decision to reject him as a candidate for the position in question. Even if petitioner had established a prima facie case of discrimination, he failed to establish (in the context of a probable cause determination) pretext with regard to respondent's evidence that Ms. Pagel was better qualified and did a better job during the interview than petitioner

² According to petitioner, he had told Warden Krenke of the conviction record while she was a member of an interview panel in 1993. (Finding of Fact 4) However, Ms. Krenke did not recall this event and, at the time she made the decision to hire Ms. Pagel, Warden Krenke was not aware that petitioner had a conviction record. (Finding of Fact 39)

ORDER

These matters are dismissed.

Dated: January 19, 2001 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

KMS:980063Adec1


JUDY M. ROGERS, Commissioner

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NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also

serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.

2/3/95