

STATE OF WISCONSIN

PERSONNEL COMMISSION

MICAH A. ORIEDO,
Complainant,

v.

**Secretary, DEPARTMENT OF
CORRECTIONS,**

Respondent.

Case No. 98-0124-PC-ER

DECISION AND ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of color, race, and national origin and ancestry. A hearing was held on July 21 and 30, 1999, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the briefing schedule was completed on October 22, 1999.

FINDINGS OF FACT

1. Complainant is a black male of African (Kenyan) national origin.
2. In the February 23, 1998, edition of the Current Job Opportunities Bulletin, recruitment for the career executive position of Correctional Services Manager, Regional Chief (Milwaukee-area 5), was announced. This announcement indicated that candidates who did not have career executive status should request application/examination materials from respondent; and candidates who did have career executive status should submit to respondent an application for state employment form and a current resume. A deadline of March 13 was established for the submission of application materials. The announcement also stated that, "Application 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.”

3. Complainant, who did not have career executive status, requested the application/examination materials from respondent. These materials included an Achievement History Questionnaire (AHQ), among other things. Complainant completed the AHQ and other application/examination materials and submitted them by the established deadline.

4. Prior to February of 1998, complainant had applied and had been certified for other career executive positions in state service.

5. The supervisor of the subject position was Eurial Jordan, Administrator of the respondent's Division of Juvenile Corrections. Mr. Jordan's position is a career executive position. Mr. Jordan is a black male.

6. Some time on or around March 13, 1998, Mr. Jordan was contacted by Thomas Van den Boom. Mr. Van den Boom is a white male. Mr. Van den Boom, who held a career executive position with respondent at the time, indicated to Mr. Jordan that he would be interested in reassignment to the subject position. Mr. Van den Boom filed an application for career executive reassignment prior to the March 13 deadline. No other career executive employees within the Department Corrections applied for reassignment into this position.

7. Mr. Jordan, who had known Mr. Van den Boom for over 20 years, was well acquainted with Mr. Van den Boom's work history with respondent and history of volunteer activities in the Milwaukee area. Mr. Jordan was aware of Mr. Van den Boom's outstanding work record with respondent's probation and parole unit and adult corrections unit, and with the Department of Health and Social Services. Mr. Jordan was of the opinion that Mr. Van den Boom had worked effectively with relevant community groups, including racial minorities, in the Milwaukee area both as a state employee and as a volunteer.

8. The former incumbent of the subject position was a black male. The subject vacancy was created when this individual was promoted to a different career executive position in the Racine area.

9. Mr. Jordan was aware there were other applicants for the subject position. Mr. Jordan was not aware of the race or identity of these other applicants.

10. After he was contacted by Mr. Van den Boom, Mr. Jordan contacted Alison Scherer, a Human Resources Specialist in respondent's personnel unit. Mr. Jordan asked Ms. Scherer whether the reassignment of Mr. Van den Boom to the subject position would satisfy all necessary requirements and Ms. Scherer indicated that it would. Mr. Jordan also discussed the reassignment of Mr. Van den Boom with Michael Sullivan, DOC Secretary. Mr. Jordan was authorized to make the final hiring decision, and he approved the career executive reassignment of Mr. Van den Boom to fill the subject position.

11. This career executive reassignment did not require approval by respondent's Affirmative Action unit since it did not involve a competitive process.

12. The subject position is included in the Administrator/Senior Executive job group for affirmative action reporting purposes. This job group is underutilized for racial minorities in state service. The availability factor for racial minorities for this job group was 7.5% during the time period relevant here.

13. During the time period relevant to the subject reassignment, respondent employed 70 individuals in career executive positions. Of this 70, five were classified by respondent as racial minorities. Complainant disputes that one of the five, Hamdy Ezalarab, is correctly classified as a racial minority since his nation of origin is Egypt.

14. Between July 1, 1997, and June 30, 1998, respondent filled 11 career executive positions, two with racial minorities.

15. Respondent had authority delegated to it by the Division of Merit Recruitment and Selection (DMRS), Department of Employment Relations, to carry out the recruitment for the subject position. The relevant delegation agreement stated as follows, in relevant 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; . . .

16. Once the decision was made to reassign Mr. Van den Boom into the subject position, respondent cancelled the recruitment without assessing the examination/application materials submitted by the other candidates or generating an employment register or certification list. An appointing authority has the authority to cancel a recruitment under the circumstances present here.

17. The candidates other than Mr. Van den Boom who had filed examination/application materials for the subject position were advised by letter from respondent that the recruitment had been cancelled. Complainant's letter was dated April 8, 1998, and stated as follows, in relevant part:

This letter is being written to inform you that the Department of Corrections canceled the recruitment for the Correctional Services Manager – Regional Chief position due to the reassignment of a current Career Executive staff member. This action is permissible under ER-MRS 30.07 (1) and (2), which state:

“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 employee is qualified to perform the work after being given the customary orientation provided to newly hired workers in such positions.”

“When an appointing authority determines that the agency's program goals can best be accomplished by reassigning an employe in a 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 employe, with the reasons stated therein.”

18. Of the ten candidates other than Mr. Van den Boom, two identified themselves as African-American, seven identified themselves as white, and one failed to identify a race.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden to show that he was discriminated against as alleged.
3. Complainant has failed to sustain this burden.

OPINION

The statement of issues for hearing to which the parties agreed are as follows:

1. Whether respondent discriminated against complainant based on color, national origin or ancestry and/or race with respect to the failure to appoint complainant to the career executive position of Correctional Services Manager - Regional Chief (differential treatment theory).
2. Whether the practice of reassigning career 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).

Differential Treatment

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 complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which the complainant 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).

In the context of a hiring decision, 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. Here, as a black person of African national origin, complainant was a member of a class of persons protected by the FEA. It is undisputed that complainant applied for the subject position and, for purposes of analysis, it will be assumed that he was qualified for this position. The record here, however, does not present a fact situation which gives rise to an inference of discrimination. The person who made the decision to cancel the recruitment, which is the action actually being complained of here, was Eurlial Jordan, a black person. The record shows that Mr. Jordan was not aware and had no reason to be aware of the race, color, or national origin of the ten candidates, including complainant, who were notified that the recruitment had been cancelled after they had submitted their application/examination materials. Moreover, of these ten candidates, seven or eight of them were white, so it is a necessary conclusion that the decision to cancel the recruitment had an equal impact on all of these candidates, white and black. It should be noted that, at hearing, complainant could not explain how he, as a black person, had been treated differently than these white candidates. Complainant has failed to show a prima facie case of discrimination here.

If complainant, however, had succeeded in demonstrating a prima facie case, the burden would then have shifted to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent explains in this regard that the recruitment was canceled because the position was filled through a career executive reassignment pursuant to §§ER-MRS 30.07 and 30.08, Wis. Adm. Code. This reason is legitimate and non-discriminatory on its face.

The burden would then shift to complainant to demonstrate pretext. In this regard, complainant argues that respondent's action violated §III.D.2. of respondent's delegation agreement with DMRS. However, expert testimony in the record shows

that this provision of the delegation agreement is applicable only to competitive hiring processes and the process followed here was not a competitive one.

It is not entirely clear what complainant's other pretext arguments are. However, given the fact that both white and black candidates for the position were affected equally by the canceled recruitment and the fact that the decision-maker had no reason to be aware of the races of the candidates at the time he made the decision to cancel the recruitment militate against a conclusion that race discrimination based on a differential treatment theory occurred here.

Disparate Impact

Under a disparate impact theory, 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, 3 FEP Cases 175 (1971); *Dothard v. Rawlinson*, 433 U.S. 321, 15 FEP Cases 10 (1977).

It should first be noted that the facially neutral policy which complainant challenges here, i.e., career executive reassignment within an agency (career executive recruitment option 1), does not have a different impact on minority career executives than it does on white career executives, i.e., both are eligible for reassignment; and does not have any actual impact on the number of racial minorities in the career executive program since it doesn't change the pool of career executives, it simply shifts one of them from one position to another.

Complainant, 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 FEA, and cites *Caviale v. State of Wisconsin, Dept. of Health and Social Services*, 744 F.2d 1289, 35 FEP Cases 1642 (7th Cir. 1984) in support of this assertion. In *Caviale*, the court struck down a state agency's use of career executive reassignment when the record showed that there were no females among the agency's career executive employees (limited to employees in pay range 18 and above); 20.8 percent of the agency's

employees in pay ranges 15 and above and 10% of the agency's employees in the "officials and administrators" job group were women; the agency had, during the recruitment process for the subject position, decided to open the position to competition by all state employees, and had then reversed its position and restricted the competition to career executive reassignment within the agency; and the agency failed to undertake a review of the successful candidate's qualifications for the position. The standard for a finding of disparate impact, as articulated in *Caviale* and *Dothard, supra*, and as applicable here, is that the policy have a significantly disproportionate effect on the opportunity for racial minorities to compete for the subject position. Unlike the record in *Caviale*, the record here shows that, during the relevant time period, 7.1% of the employees in respondent's career executive positions were racial minorities and, as a result, eligible to compete for the subject position pursuant to the policy at issue here, i.e., career executive reassignment within an employing agency. The record also shows that the availability of racial minorities for administrator/senior executive positions in the relevant labor pool was 7.5%. The difference between these two statistics does not meet the standard of "significantly disproportionate" as set forth in *Caviale* and *Dothard, supra*.¹ Moreover, the record here is also distinct from that in *Caviale* in that the respondent here² undertook an examination of the reassignment candidate's qualifications for the position and demonstrated at hearing that this candidate's qualifications were unusually well tailored for this position.

Complainant has failed to demonstrate discrimination based on differential treatment or disparate impact.

¹ Complainant has failed to show that Mr. Ezalarab (See Finding of Fact 13, above) is not appropriately classified in the manner in which he has self-identified, i.e., as a racial minority. Even if this classification was not correct, complainant has failed to show that the resulting 5.7% figure for minority career executives within DOC would meet the standard for a finding of significantly disproportionate opportunity when compared to the 7.5% figure offered by complainant as the relevant labor force availability factor.

² A phrase which had been included in the Proposed Decision and Order was deleted here to clarify the actual bases for the Commission's rationale.

ORDER

This complaint is dismissed.

Dated: February 11, 2000

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:980124Cdec1


JUDY M. ROGERS, Commissioner

Commissioner Murphy did not participate in the decision of this matter.

Parties:

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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