

STATE OF WISCONSIN

PERSONNEL COMMISSION

FRANKIE JOHNSON,
Complainant,

v.

Secretary, DEPARTMENT OF CORREC-
TIONS,
Respondent.

FINAL DECISION AND
ORDER

Case No. 99-0014-PC-ER

NATURE OF THE CASE

This case involves a charge of discrimination alleging respondent, the Department of Corrections (DOC), discriminated against complainant because of his age and/or race/color in violation of the Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. The issue for hearing is as follows:

Whether respondent discriminated against complainant on the basis of age and/or race/color when it did not promote him to the Power Plant Operator-In Charge [PPOIC] position on March 27, 1998. (Conference report dated June 21, 2000.

FINDINGS OF FACT

1. Complainant was born on January 7, 1943, and was age 55 at the time of the appointment in question. Complainant is a Native American.
2. Complainant has been employed by respondent as a Power Plant Operator since May 1989. On March 30, 1997, complainant was promoted from Power Plant Operator-Senior at Waupun Correctional Institution (WCI) to Power Plant Operator in Charge (PPOIC), the same position which is at issue in this case. Complainant was required to pass a six-month probationary period in connection with this promotion. On August 17, 1997, complainant's probationary employment was terminated for failure to meet PPOIC probationary standards, and he was restored to his previous position of Power Plant Operator-Senior

3. Following his restoration to Power Plant Operator-Senior, complainant's work was generally satisfactory. However, he was involved in two rule violations of which his supervisors were aware. He made and lost an unauthorized copy of an institutional key, and he smoked a cigar in a non-smoking area in the power plant. Similar violations had figured in his probationary termination from the PPOIC position in 1997

4. Complainant filed a complaint of discrimination with this Commission with regard to his probationary termination, alleging that respondent discriminated against him on the basis of race or WFEA retaliation. The Commission processed this complaint as case number 98-0029-PC-ER.

5. Following a full hearing of the aforesaid case, the Commission issued a final decision and order dated April 25, 2000. In that decision, the Commission concluded that respondent did not discriminate against complainant as he alleged. Complainant never filed a petition for judicial review of the Commission's decision.

6. In the *Current Employment Opportunities Bulletin* dated December 1, 1997, respondent sought applicants for WCI's PPOIC position, which indicated, in part, that "[w]ell qualified candidates will have three or more years of progressively responsible and competent power plant operator and maintenance work experience."

7. The PPOIC Position Description includes the following "Goals and Worker Activities:" 35% of the time, operate three 40,000 lb. coal fired boilers, one 45,000 lb. gas/oil boiler with 410 lb. pressure; 35% of the time, operate two 1,000 K.W steam generators and one 750 K.W. diesel generator; 7% of the time, operate two 800 G.P.M. well pumps and one 100,000 gallon water tower; 5% of the time, provide for general cleaning of plant and equipment; 3% of the time, maintain plant records; 7% of the time, maintain all plant equipment; 8% of the time, provide for lead worker duties and responsibilities relative to power plant operation, including all boilers, generators, well pumps and water tower Required knowledge, skills and abilities include the following:

Considerable knowledge of the operation of coal, gas and oil operated steam boilers, water pumps, steam turbines, steam reciprocating engines, pressure

gauges, temperature gauges, flow meters, feed water heaters, coal and ash handling equipment, diesel engines, demineralizers, etc.

Knowledge of electric generators, synchronizers, electric control panels and electrical distribution.

Knowledge of water testing and water treatment.

Knowledge of power plant occupational hazards and safety precautions for high pressure power plant operations.

Ability to operate and maintain all power plant equipment.

Ability to instruct and guide the work of subordinate employees.

Ability to handle emergency situations.

Ability to use respirator and Scott Air Pak.

Physical ability to perform manual labor, climb, bend, crawl, and work under unpleasant conditions such as dust, dirt and extreme temperatures.

Knowledge of OSHA, DILHR and DNR regulations pertaining to power plant operations and maintenance.

8. In February 1998, complainant and sixteen other individuals were certified for the PPOIC position. On March 18, 1998, complainant and three other applicants were interviewed by an interview panel consisting of the following individuals: Steven Bach (white, age 37), Susan Wallentin (white, age 42), Robert Newberg (white, age 51) and Jeff Smith (white, age 40).

9. The panelists asked each candidate the same nine questions, which were prepared to elicit information about the candidates' qualifications and/or job experiences to perform the duties of the position. Each question had numerical rating guidelines and the candidates' responses to the questions were evaluated against the same numerical guidelines. The candidates' responses to the first two numerically rated questions could fall into the categories of "More than Acceptable," "Acceptable," and "Less than Acceptable." The candidates' scores were totaled, with the following results: Robert Ziegenbein, 213.25 points; complain-

ant, 174 points; James Wehrli, 167 points, Stephen Miller, 82 points. Robert Ziegenbein withdrew from consideration.

10. Complainant and Mr. Wehrli scored high enough in their interviews to warrant reference checks. Each provided the names of three references, and Helen Holz, Secretary-Confidential, contacted each of them. The references were asked to respond to the same questions, which were related to work performance and qualities one might expect for the PPOIC position.

11. Mr. Wehrli had excellent overall references.

12. The references checked for complainant included Al Johnson, the Superintendent of Buildings and Grounds at WCI, and Steve Bach, the Power Plant Superintendent at WCI.

13. Johnson indicated complainant's performance as a power plant operator, the position he had held prior to his previous promotion to the position in question, had been adequate, but noted problems in "response to supervision," "disciplinary problems," "relationship with co-workers, supervision, clients," "initiative," "judgment" and "supervisory skills." Johnson indicated he would rehire him as a power plant operator, but did not say anything about rehiring him as a PPOIC (the position in question).

14. Bach stated that complainant's performance as a power plant operator had been adequate, but noted problems in regard to "response to supervision," "disciplinary problems," "relationship with co-workers, supervision, clients," "judgment," and "supervisory skills." Bach indicated that he would rehire complainant as a power plant operator, but not as a PPOIC.

15. Respondent also checked a reference with regard to the position complainant had held from 1984-1987, which was before he came to work for the respondent in 1989. That reference did not answer the specific questions except to verify employment. Under the space for "anything to add" he stated "no problem."

16. Wehrli is white and was born in October 1968, making him 29 at the time of the hiring decision. He had 10 years of specialized training and experience as a machinist in the US Navy associated with steam turbine engineering systems and associated auxiliary equip-

ment. In the interview, Wehrli was rated lower than complainant with respect to his experience with coal fired or gas/oil boilers. He had been a power plant instructor for 3 years and possessed "supervisory traits" having supervised up to 80 students.

17 Complainant had eighteen years of experience in power engineering and nine years of experience at the WCI power plant. All of that experience involved the use of coal, which is the primary fuel at the power plant at WCI. In the interview, complainant was rated higher than Wehrli with respect to his experience with coal fired or gas/oil boilers. Complainant has completed course work and holds a First Class Engineer License a commercial driver's license.

18. In letters dated March 27, 1998, complainant was informed that he had not been selected, and James Wehrli was informed that he had been selected for the PPOIC position.

CONCLUSIONS OF LAW

1. This case is appropriately before the Commission pursuant to §230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish that respondent discriminated against him on the basis of age and race/color in connection with the decision not to hire him for the PPOIC position in question.
3. Complainant failed to sustain his burden of proof.
4. Respondent did not discriminate against complainant on the basis of age or race/color in connection with the decision not to hire him for the PPOIC position in question.

OPINION

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 case of a failure to hire, the elements of a prima facie case are that: 1) the complainant is a member of a group protected under the FEA, the complainant applied for a job, 2) complainant was qualified for the job yet was not hired, 4) a person in a protected group or groups different from complainant was hired for the job instead of the complainant. *See, e. g., Trimble v. UW-Madison*, 92-160-PC-ER, 11/29/93. Complainant established a prima facie case by showing that he is an American Indian over the age of 40 (complainant was 55), that he applied for the position in question, that he was qualified for the position but he was not hired, and that the person hired was white and age 29.

The burden of proceeding then shifts to the employer to articulate a legitimate non-discriminatory reason for not hiring complainant. Respondent met this burden by saying complainant was not hired for: 1) duplicating keys without permission, 2) failing to report lost key chits and 3) poor work performance, in particular his failure to maintain positive working relationships with other plant staff, 4) misconduct following the termination of his probation as PPOIC and restoration to his PPO-Sr position, and 5) all of which was reflected in complainant's poor references. The complainant then has the burden of proof to attempt to show that respondent's stated reason is a pretext for discrimination and/or FEA retaliation. In this regard, complainant argues that he was the best qualified person for the position based on having more relevant training and experience than the selected candidate.

All three interview panelists rated successful candidate Wehrli lower than complainant with respect to coal fired boiler experience. This did not disqualify him; he had additional power plant operator and maintenance work experience, which qualified him for the PPOIC position. Mr. Wehrli's various skills were borne out by his references, who provided more than positive support for his abilities, which included leadership skills that are required in the position. Two of the three¹ references had worked with complainant since 1989 and were supervisors in WCI's power plant and maintenance areas. One reference thought complainant's

¹ The third reference provided very little information.

supervisory skills were “sub-par,” and another thought they were “for the most part—good. Although he did have some personality conflicts.” Complainant’s references had a number of other negative comments about complainant’s performance, which had been marked by interpersonal conflict and attitudinal and disciplinary problems. Also, since his probationary termination less than a year previously, complainant had been involved in two other incidents² very similar to the issues which had precipitated his probationary termination.

In conclusion, complainant had very little evidence to support his position. While his training and experience exceeded Wehrli’s in some respects, this was far outweighed by the complainant’s poor work record when he had held the very job in question less than a year previously, and his involvement in similar problems after he had been removed from the PPOIC position. It seemed that complainant was interested in re-arguing his earlier termination, but he did not prevail in his earlier case and could not relitigate that matter.

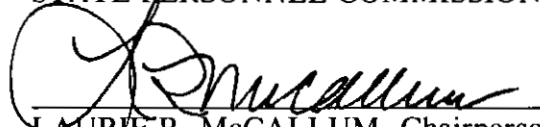
² These involved copying and losing an institutional key and smoking in a non-smoking area.

ORDER

The Commission having determined that the respondent did not discriminate against complainant as he alleged, this case is dismissed.

Dated: March 21, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


JUDY M. ROGERS, Commissioner

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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 re-

view 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