

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JOHN E. HOLTON,**  
*Complainant,*

v.

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

Case No. 99-0032-PC-ER

FINAL DECISION AND  
ORDER

#### NATURE OF THE CASE

This case involves a complaint of discrimination on the basis of arrest/conviction record.

The issues for hearing were:

1. Whether respondent discriminated against complainant on the basis of arrest/conviction record in violation of the Fair Employment Act with respect to the failure to hire him for a LTE position in October of 1996.
2. Whether respondent discriminated against complainant on the basis of arrest/conviction record in violation of the Fair Employment Act with respect to the failure to hire him for [a] YC 1 position in October of 1998. Prehearing conference report dated December 18, 2000.

At the hearing, respondent moved to dismiss the first issue as untimely filed. The hearing examiner indicated that it would be recommended that this motion be granted, and this motion will be granted, for the reasons set forth below.

#### FINDINGS OF FACT

1. The failure to hire complainant for the LTE position occurred in October 1996.
2. This complaint was filed on February 19, 1999.
3. Complainant has an arrest/conviction record in that in 1972 he was convicted of resisting arrest.
4. On October 8, 1998, complainant and Robert Schick, the appointing authority for the vacancy in question, were involved in a conversation concerning an earlier (1996) non-hire for an LTE (limited term employment) position, which is not part of the issue in this case

because complainant did not file a timely complaint with regard to that failure to hire. In that conversation, Schick mentioned that complainant had been rejected because of his arrest/conviction record. In that conversation, Schick mentioned a DWI (driving while intoxicated) record. What had occurred in 1996 was that complainant had been rejected by respondent's central personnel office in Madison, based on complainant's arrest/conviction record set forth in Finding of Fact 3. However, at that time the personnel office never informed Schick of the specific nature of the arrest/conviction record. In the October 8, 1998, conversation, Schick mentioned a DWI record as a possible source of complainant's arrest/conviction record.

5. Complainant interviewed at YLTC (Youth Leadership Training Center) for the YC 1 job on October 28, 1998. Mike Lackey, Mark Pressler and Pam Wolski made up the interview panel, while Robert Schick, YLTC superintendent, was the appointing authority who had the authority to effectuate the hiring for this position. Eight candidates were interviewed.

6. The panel asked each candidate the same questions and scored them on the basis of pre-determined, objective benchmarks. None of the panelists were aware of complainant's conviction record, and none of them had the impression that complainant had an arrest/conviction record of any kind.

7. After these interviews were concluded, complainant scored a total of 95 points. Four candidates scored lower and one other candidate also scored 95 points. There were two candidates who scored 154 and 150 points, respectively. The names of the two candidates with the highest scores were provided to Schick for his consideration for hiring. The person with the top score was selected for the YC 1 job. Schick only considered the two highest-scoring candidates for hiring. Because complainant's name was not forwarded to Schick, he never considered complainant as a candidate for this position.

8. A criminal information background check was only done on the top two candidates. Accordingly, no criminal information background check was done on complainant.

9. Respondent's decision to hire someone other than complainant for this position was not influenced in any way by either complainant's arrest/conviction record or any perception by respondent of an arrest/conviction record.

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case pursuant to s. 230.45(1)(b), Stats.
2. Complainant has the burden of proof to establish by a preponderance of the evidence the facts necessary to show that respondent discriminated against him on the basis of arrest/conviction record with respect to the failure to hire him for the YC 1 position in October 1998.
3. Complainant has not sustained his burden of proof.
4. Respondent did not discriminate against complainant on the basis of arrest/conviction record with respect to the failure to hire him for the YC position in question in October 1998.
5. This complaint was not timely filed pursuant to s. 111.39(1), Stats., with regard to the decision on the YC 1 position that was made in October 1996.

### OPINION

This complaint was filed more than 300 days after the decision was made to reject complainant for the LTE position in October of 1996. Therefore, this complaint was not timely filed pursuant to s. 111.39(1), Stats., with regard to that hiring decision, and the Commission can not consider the merits of complainant's claim with regard to that hiring decision.

In a case of this nature, the initial burden of proceeding is on the complainant to show a prima facie case of discrimination. If the complainant meets this burden, the employer then has the burden of articulating a legitimate, nondiscriminatory reason for the action taken which the complainant then attempts to show was a pretext for discrimination. The complainant has the ultimate burden of proof. *See Puetz Motor Sales Inc. v. LIRC*, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985).

In a failure to hire case such as this, the complainant may establish a prima facie case by showing: (1) he is a member of a group protected by the WFEA, (2) he applied and was qualified for a job which the employer was seeking to fill, (3) despite his qualifications he was rejected, and (4) the employer continued with its attempt to fill the position. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d. 668, 93 S. Ct. 1817, 5 FEP Cases 965 (1973). Here, complainant is protected by the WFEA because he has an

arrest/conviction record. He applied for the position in question, and was certified for consideration which shows that on this record he was at least minimally qualified. *See* §230.25(1), Stats. The respondent filled the position with another candidate<sup>1</sup> Respondent articulated a legitimate, non-discriminatory reason for its decision based on its determination that the two candidates who were scored higher by the panel and were forwarded for consideration by the appointing authority were better qualified than complainant, and the person who was hired was considered better qualified than complainant. At this point, complainant has the burden to show that respondent's articulated reasons were pretextual.

The only evidence of pretext presented by the complainant related to a conversation involving Schick which occurred on October 8, 1998, concerning an earlier (1996) non-hire for an LTE (limited term employment) position, which is not part of the issue in this case because complainant did not file a timely complaint with regard to that failure to hire. In that conversation, Schick mentioned that complainant had been rejected because of his arrest/conviction record. At the time of that conversation, Schick mentioned a DWI (driving while intoxicated) record. What had occurred in 1996 was that complainant had been rejected by respondent's central personnel office in Madison, based on complainant's arrest/conviction record set forth in Finding of Fact 3. However, at that time the personnel office never informed Schick of the nature of the arrest/conviction record. In the October 8, 1998, conversation, Schick mentioned a DWI record as a possible source of complainant's arrest/conviction record.

While this conversation is probative of pretext, the record reflects that the members of the interview panel had no information on, or belief concerning, any arrest/conviction record on complainant's part. The panel provided the names of the two highest scoring candidates to Schick to consider for the 1998 appointment. Since complainant was not one of these two, Schick did not consider him for this appointment. Therefore, on the basis of these facts, complainant's arrest/conviction record could not have played any role in the hiring decision in

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<sup>1</sup>In this case, it is not known whether the candidate who was appointed had an arrest/conviction record. If that candidate did not have an arrest/conviction record, that circumstance would be one way of establishing a prima facie case. While it is questionable whether the complainant has established a prima facie case, both parties proceeded to address the question of pretext. Where the case has been tried fully, it is unnecessary to analyze whether a prima facie case has been established, and the Commission should go ahead and address the question of pretext. *See United States Postal Service Board of Governors v. Aikens*, 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 403, 1983 U. S. LEXIS 141 (1983).

question, and the evidence does not support a conclusion that respondent discriminated against complainant on the basis of arrest/conviction record with regard to the October 1998 hiring decision, which is the only one the Commission can consider.

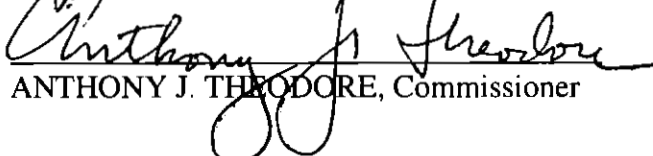
ORDER

The Commission having concluded that respondent did not discriminate against complainant as alleged, this complaint is dismissed.

Dated: December 14, 2001.

STATE PERSONNEL COMMISSION

  
JUDY M. ROGERS, Commissioner

  
ANTHONY J. THEODORE, Commissioner

Laurie R. McCallum, Chairperson, did not participate in the consideration of this matter.

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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 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.)

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