

STATE OF WISCONSIN

PERSONNEL COMMISSION

PASTORI BALELE,
Complainant,

v.

**Secretary, DEPARTMENT OF HEALTH
AND FAMILY SERVICES,**
Respondent.

DECISION AND ORDER

Case No. 99-0123-PC-ER

This is a complaint of discrimination on the bases of race, color, and national origin or ancestry relating to a hiring action for the position of Deputy Director, Disability Determination Bureau. A hearing was held on December 4 and 19, 2000, before Laurie R. McCallum, Chairperson. The parties were permitted to file post-hearing briefs and the schedule for doing so was completed on March 9, 2001. The Commission, after reviewing the arguments of the parties and consulting with the hearing examiner, adopts the Proposed Decision and Order with minor modifications, as reflected in alpha footnotes. The Commission did not overturn any of the hearing examiner's credibility determinations in making these modifications.

FINDINGS OF FACT

- 1 Ruth Belshaw was employed by respondent from 1975 or earlier until March of 1996.
2. While employed by respondent, Ms. Belshaw worked:
 - (a) in the Disability Determination Bureau (1975-1978), reviewing the work of adjudicators and clerical staff;
 - (b) as staff assistant to the Director of the Bureau of Health Care Financing (1980-1983), developing and implementing the Medical Assistance program operating budget, developing program policies, coordinating the administration of federal contracts, and managing bureau personnel functions for a staff of 125;

(c) as Personnel Manager for the Division of Health (1873-1987), managing all personnel, affirmative action, and training services for the division's 800 employees;

(d) in the Division of Health, Bureau of Health Care Financing, as a Contract Monitor (1987-1992), Planning Analyst 5 (1992-1995), and as Health Care Financing Supervisor of the Managed Care Unit (1995-1996)—as Health Care Financing Supervisor, Ms. Belshaw was responsible for overall management of Medical Assistance managed care programs, including program and budget development, implementation, and monitoring, and supervision of upper level unit staff.

3. In this Health Care Financing Supervisor position, Ms. Belshaw was supervised by Peggy Bartels, Health Care Financing Manager 1. As of 1996, Ms. Bartels had been a supervisor or co-worker of Ms. Belshaw's for 12 years, and was of the opinion that Ms. Belshaw's performance in state service had been excellent.

4. Ms. Belshaw resigned from her position with respondent in March of 1996 to accept the position of Government Programs Director with Dean Health Plan. In this position, she was responsible for developing and implementing Dean's Medical Assistance and Medicare HMO (managed care) product in a seventeen-county service area, including developing policies in the areas of provider relations, utilization management, customer service, and state and federal reporting, as well as developing and monitoring budgets and providing training to Dean providers in the areas of Medical Assistance and Medicare.

5. At the time of Ms. Belshaw's resignation from state service in March of 1996, her Health Care Financing Supervisor position was being reviewed for reclassification purposes. The reclassification of this position, to the Administrative Officer 3 (AO 3) level, was approved after Ms. Belshaw's resignation, and resulted in the position becoming a career executive position. This reclassification was based on duties and responsibilities Ms. Belshaw was performing immediately prior to the effective date of her resignation and at least six months before that date. This position was subsequently reallocated to the Health Care Financing Manager classification

effective February 1, 1998. This reallocation had no effect on the pay range or career executive status of the position.

6. In December of 1998, Ms. Belshaw contacted Ms. Bartels and indicated an interest in reinstatement to a position with respondent. Ms. Bartels advised Ms. Belshaw that there were several vacancies.

7 In December of 1998, after her conversation with Ms. Bartels, Ms. Belshaw saw the announcement for the position of Deputy Director, Disability Determination Bureau, Division of Health Care Financing, Department of Health and Family Services in the state's Current Opportunities Bulletin. This announcement stated as follows, in pertinent part:

JOB DUTIES: Plan, coordinate and monitor the operations and activities of the Disability Determination Bureau, including the general supervision of 280 staff. Direct the development and review of agency policy, legislative proposals and budget initiatives. As the Deputy Director for the Bureau and as a supervisor, develop and implement the Bureau's goals and objectives, including work plans, and performance measures. Provide primary operational leadership and technical assistance to develop and maintain fiscal controls and appropriate staffing levels, including oversight of all personnel actions. **KNOWLEDGE, SKILLS:** Federal and state laws related to Title II and Title XVI of Social Security Act; practices and operations of business operations and organizational management; human resources management and other fiscal and administrative functions, skill and ability to establish and maintain liaison with individuals and groups with different agencies and bureau personnel, leadership and supervisory skills, interpersonal, oral and written communication skills. **Well-qualified candidates will have at least five years of progressively responsible administrative and supervisory experience.** Materials will be evaluated and the most qualified will be invited to participate in the next step of the selection process.

8. In December of 1998, Ms. Bartels was the Administrator of the Division of Health Care Financing. Ms. Bartels was looking for a candidate with strong management and personnel experience for the position of Deputy Director, Disability Determination Bureau.

9. In December of 1998, Ms. Bartels contacted Randy Parker, Deputy Director of respondent's Bureau of Personnel and Employment Relations, and asked him whether Ms. Belshaw could be reinstated into a career executive position. Mr. Parker advised Ms. Bartels that such a reinstatement was permissible in view of the reclassification of the position from which Ms. Belshaw resigned in 1996. Mr. Parker encouraged Ms. Bartels to consult with Gladis Benavides, the manager of respondent's affirmative action function, for input on the possible reinstatement of Ms. Belshaw into a career executive position. Ms. Benavides was contacted and indicated that such a reinstatement was a viable option for the Division of Health Care Financing, was not inconsistent with any legal requirements or any policies or procedures, and did not raise any concerns on her part. Ms. Benavides was not aware of the identities of applicants for the position of Deputy Director, Disability Determination Bureau, other than Ms. Belshaw, prior to providing this opinion.

10. Ms. Belshaw submitted the required application materials before the application deadline of January 6, 1999. On her application, Ms. Belshaw indicated that she was not a career executive employee because her position had not been classified as a career executive position at the time she left state service.

11. Some time after January 5 or 6, 1999, Ms. Bartels' deputy, Priscilla Boroniec, contacted Ms. Belshaw and scheduled a meeting with her to discuss two vacant positions in the Division of Health Care Financing, one of which was the position of Deputy Director, Disability Determination Bureau. Present at this meeting were Ms. Belshaw, Ms. Bartels, and Ms. Boroniec.

12. Some time after this meeting, Ms. Bartels and Ms. Boroniec concluded that Ms. Belshaw would be a strong candidate for the position of Deputy Director, Disability Determination Bureau. Ms. Bartels recommended to Richard Lorang, respondent's Deputy Secretary, that Ms. Belshaw be appointed to this position, and Mr. Lorang accepted this recommendation. Once this recommendation was accepted, respondent discontinued the recruitment/selection process for the position.

13. At the time this recommendation was made and accepted, neither Ms. Bartels, Ms. Boroniec, nor Mr. Lorang was aware or had any reason to be aware of the identities of applicants for the position of Deputy Director, Disability Determination Bureau, other than Ms. Belshaw.

14. In a letter dated February 12, 1999, and signed by Mr. Lorang and Ms. Bartels, the reinstatement of Ms. Belshaw to the career executive position of Deputy Director, Disability Determination Bureau, effective March 1, 1999, was confirmed. In processing this appointment, BPER reinstated Ms. Belshaw to the career executive program and then reassigned her to the subject Deputy Director position.

15. Complainant, who is black and of Tanzanian national origin, submitted an application for the subject Deputy Director position by the required deadline.

16. As of January 16, 1999, 7 of respondent's 81 career executive positions (8.6%) were held by members of a racial/ethnic minority.

17 Complainant contends that, during the time period relevant to this matter, 5.38% of career executive positions in state service were held by members of a racial/ethnic minority,¹ 8.8% of candidates certified for career executive positions in state service were members of a racial/ethnic minority,² and the statewide labor pool availability factor for racial/ethnic minorities was 7.26%³

18. The job group of which the subject Deputy Director position was a part was underutilized for racial/ethnic minorities during the time period relevant to this matter.

19. It is a typical practice for an individual seeking reinstatement to contact an agency manager directly.

¹ This 5.38% figure is derived from data in an exhibit (C-9) reflecting statewide career executive position statistics as of January 16, 1999.

² This 8.8% figure is derived from data in an exhibit (C-8) not received into the hearing record. Exhibit C-8 was a printout of certain data relating to career executive staffing transactions during FY '94, '95, and '96.

³ This 7.26% figure is derived from an exhibit (C-6) not received into the hearing record. Exhibit C-6 was an affidavit executed by the Administrator of the Division of Affirmative Action, Department of Employment Relations, on March 31, 1989, which stated that, as of June 30, 1987, the statewide labor pool availability figure for racial/ethnic minorities was 7.26%.

20. It is a typical practice for a reinstatement/career executive reassignment and a competitive recruitment process for a position to proceed simultaneously.

CONCLUSIONS OF LAW

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

OPINION

The statement of issue for hearing is as follows:⁴

Whether complainant was discriminated against based on his race, color, or national origin or ancestry when respondent failed to select him for the position of Deputy Director, Disability Determination Bureau, Division of Health Care Financing.

Sub-Issue:

Whether alleged pre-selection of candidates for career executive positions had a disparate impact or constituted disparate treatment of complainant based on his race.

Complainant advances both a disparate treatment and a disparate impact theory of discrimination here.

It should be noted that complainant relies in his post-hearing briefs upon "facts" which are not part of the evidence of record here. The Commission's decision is based only on the evidence of record.

⁴ In his post-hearing brief, complainant states that the issue of certification (in addition to selection) as well as a subissue relating to career executive applicants advancing in the recruitment process without being examined, remained in the statement of issue for hearing. However, at the commencement of the hearing, complainant withdrew these issues. In his post-hearing reply brief submitted on March 7, 2001, complainant misrepresents what occurred in this regard at hearing.

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).

Complainant has failed to explain how the use of the reinstatement process here, which complainant characterizes in some of his arguments as “pre-selection,” had a disproportionate impact on minorities, and the factual record is devoid of evidence supporting or even relating to any such disproportionate impact. Complainant focuses his arguments relating to the reinstatement process instead on Ms. Belshaw’s alleged lack of eligibility for reinstatement, and on respondent’s lack of authority to suspend or halt the recruitment process once a decision to reinstate Ms. Belshaw was made. Although it is not apparent how such arguments dovetail with a disparate impact analysis, they will be addressed here nonetheless.

Complainant argues that Ms. Belshaw was ineligible for reinstatement to the career executive program because she was not a career executive employee at the time of her resignation. However, the record shows that, based on the duties and responsibilities assigned to the position at the time of, and prior to, Ms. Belshaw’s resignation, a reclassification of the position to the career executive program was approved; and that it had been respondent’s practice under such circumstances to confer career executive status on the previous incumbent of the reclassified position for purposes of reinstatement. Ms. Belshaw was reinstated/reassigned within three years of the date of her resignation from state service to a position in a classification to which she would have been eligible to transfer had there been no break in employment, consistent with the relevant requirements of §§ER-MRS 1.02(29)(b), 16.035(1), and 30.07, Wis. Adm. Code. Complainant has failed to demonstrate that this practice violated any relevant requirement, or that this practice supports a finding of discrimination.

Complainant also argues that respondent lacked the authority to halt the recruitment process once applications had been solicited and accepted. Complainant appears to base this argument on a delegation agreement between respondent and the Department of Employment Relations. The first problem with this argument is that this delegation agreement is not part of the record here and is not the type of document of which the Commission would take judicial (administrative) notice. Furthermore, even if this delegation agreement had become a part of the record, the Commission has already decided in another case, *Oriedo v. DOC*, 98-0124-PC-ER, 2/11/00, that the terms of the agreement to which complainant cites in support of his argument do not apply in circumstances such as this where the hire did not involve a competitive process.

Complainant's remaining disparate impact arguments relate to Ms. Belshaw's career executive reassignment to the subject Deputy Director position. It should first be noted, as it was in *Oriedo v. DOC*, 98-0124-PC-ER, 2/11/00, that the facially neutral policy which complainant is challenging 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.^A

Complainant, however, appears to assert that the fact that minority candidates from outside respondent's career executive pool were not allowed to compete for the subject position had an actionable disparate impact on racial minorities under the FEA. A similar assertion was addressed by the Commission in *Oriedo, supra*^B:

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

^A This sentence was modified from that originally set forth in the Proposed Decision and Order to make it more compatible with the fact situation present here.

^B Complainant represented Mr. Oriedo in this cases and, as a result, would be aware of its holding.

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, 71% 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*. Moreover, the record here is also distinct from that in *Caviale* in that the respondent here 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.

The record here (See Finding of Fact 16, above), shows that 8.6% of the employees in respondent's career executive positions during the relevant time period were minorities. Accepting for purposes of argument complainant's representation that the availability of racial minorities for this type of position in the relevant labor pool was 7.26% (See Finding of Fact 17, above), the difference between these two figures does not meet the "significantly disproportionate" standard articulated in *Caviale* and *Dothard, supra*. In fact, the percentage of minorities in respondent's career executive positions actually *exceeds* the percentage of available minorities in the relevant labor pool. Clearly, complainant has failed to demonstrate a disparate impact here. It should also be noted, in applying the court's rationale in *Caviale*, that the respondent here fully

reviewed Ms. Belshaw's qualifications for the position and justifiably concluded that she was well qualified for the position.^c

Complainant argues that the statewide figure of 5.38% (See Finding of Fact 17, above), rather than the agency figure of 8.6% should be applied as a part of this analysis. However, since Ms. Belshaw was reassigned within the career executive program of the Department of Health and Family Services, i.e., the relevant pool of eligible candidates would be respondent's career executive employees, the agency figure, not the statewide figure, would be the appropriate one to apply. Complainant should have known that agency figures control due to decisions issued in his prior cases: *Balele v. DATCP, DER & DMRS*, 98-0199-PC-ER, p. 9, 4/19/00; *Balele v. DOT*, 99-0103-PC-ER, p. 9, 11/15/00 and *Balele v. DOA*, 00-0057-PC-ER, p. 7, 9/20/00 affirmed *Balele v. WPC & DOA*, 00-CV-2876 (Dane Co. Cir. Ct., 5/30/01). Also, complainant represented another complainant in the following additional pertinent cases: *Oriedo v. DPI*, 98-0042-PC-ER, pp. 12-13, 8/28/00 and *Oriedo v. DOC*, 98-0124-PC-ER, pp. 7-8, 2/11/00 affirmed *Oriedo v. WPC & DOC*, 00-CV-1116 (Dane Co. Cir. Ct. 3/14/01).^d

Disparate 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).

^c This sentence was added the language of the Proposed Decision and Order to more accurately reflect the Commission's rationale.

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, 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.

It will be presumed for purposes of this analysis that complainant established a prima facie case of discrimination.^E

If complainant had established a prima facie case, the burden would shift to respondent to articulate a legitimate, non-discriminatory reason for its action. Respondent has satisfied this burden by explaining that it exercised its discretion to reinstate/reassign an individual well qualified for the subject position.

The burden would then shift to complainant to demonstrate pretext. Complainant argues that pretext is demonstrated by the fact that respondent lacked the authority to halt the recruitment process. This argument was addressed above in this discussion and found not to be meritorious.

Complainant also appears to be arguing that pretext is demonstrated by respondent's alleged failure to abide by its affirmative action plan. This argument appears to be premised upon complainant's contention that, if a job group is underutilized for minorities, the appointing authority is required to appoint a minority candidate, if there is one, to the position. Complainant has offered this argument in previous cases, and the Commission has concluded that it is not meritorious (e.g., *Balele v. UW*, 98-0159-PC-ER, 10/20/99; *Balele v. DOA*, 00-0057-PC-ER, 9/20/00), and, in fact, it could constitute reverse discrimination to implement such a practice.^E

^D The final two sentences in this paragraph were added to the language of the Proposed Decision and Order to demonstrate that complainant should have been aware that his argument in this regard was not meritorious.

^E The prima facie case analysis set forth in the Proposed Decision and Order was deleted because it was not essential for the resolution of this matter.

^F The paragraph represented the hearing examiner's understanding of the basis for certain of complainant's arguments. At the oral argument, complainant indicated that he was not in fact asserting that underutilization requires hiring of a minority candidate.

Finally, even if the selection process would have proceeded to the point where complainant's and Ms. Belshaw's qualifications had been compared, the evidence of record supports a conclusion that this comparison would not demonstrate pretext. Ms. Belshaw had numerous years of recent management experience, including management experience in the relevant division of DHFS, and numerous years of recent experience with the particular state and federal programs with which the subject position worked. Complainant had no comparable experience.

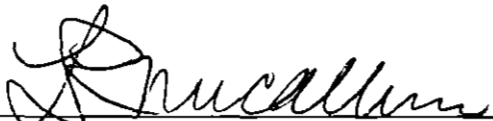
Regardless of whether a disparate impact or disparate treatment theory is applied to this case, it is concluded that complainant has failed to show that he was discriminated against as he has alleged.

ORDER


This complaint is dismissed.

Dated: June 29, 2001

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:990123Cdecl


JUDY M. ROGERS, Commissioner

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