

**ALLEN BEDYNEK-STUMM,**  
*Complainant,*

v.

**Superintendent, DEPARTMENT OF  
PUBLIC INSTRUCTION,**  
*Respondent.*

FINAL  
DECISION  
AND  
ORDER

Case No. 99-0186-PC-ER

Complainant filed objections to the proposed decision and order that had been prepared by the designated hearing examiner. After considering those objections, the Commission adopts the proposed decision and order, a copy of which is attached, as its final decision on the issue for hearing.

After he filed his objections to the proposed decision, the complainant also filed a written request for "all Transcripts/Tape Cassette and/or other similarly recorded materials, without costs." The Commission notes that it has no transcript of the hearing. The January 24, 2002, hearing was tape-recorded, as was the January 17<sup>th</sup> hearing on the motion to compel discovery.

Pursuant to §227.44(8), Stats., the Commission has promulgated §PC 5.03(9), Wis. Adm. Code:

A stenographic, electronic or other record of all hearings and such other proceedings as the commission may designate shall be made. Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. Copies of tape recordings or transcripts shall also be furnished at the expense of the party making the request. However, upon a showing of indigency and legal need, a party may be provided a copy of the transcript or tape recording without charge. Where indigency and legal need have been found, the commission, shall, in its discretion, determine whether to provide a copy of the transcript or to provide a copy of the tape recording.

In his request, the complainant offered the following statement regarding his "need" for the transcripts or tapes:

The Transcripts/Tape Cassette documentations, and/or other products of these proceedings/procedures, inter alia; are required for the continuances of these matters, appeals, objections, or other legal matters which require records acquired as a result of official processes.

In *Newbold v. SPD*, 96-0053. 0095-PC-ER, 12/13/2000, the Commission rejected complainant's request for a transcript. The request was made nearly a year after the Commission had issued a decision, after hearing and in favor of the respondent, and dismissed the complaint. In *Newbold*, the complainant was still pursuing a claim in federal court arising from the same facts and she anticipated that a motion for summary judgment would be filed in the federal proceeding. She asked for the transcript in order to be thoroughly prepared for the anticipated motion. In its ruling in *Newbold*, the Commission referenced its previous holding in *Pugh v. DNR*, 86-0059-PC-ER, 7/13/88, by noting:

The Commission held as follows: "the Commission has no responsibility to provide the complainant with a transcript in order to assist him in commencing or pursuing unspecified other legal options that may be available to him before other forums. The reasons advanced by the complainant are quite different from the more typical situation where a transcript (or copy of the recording) is important for adequately preparing a post-hearing brief or for supporting a motion." *Pugh, Id.* Implicit in the Commission's decision is that "legal need" for a free transcript will not (at least usually) be found where a party's need is premised on pursuit of a claim or cause of action in another forum. This is consistent with the entire administrative procedure act which addresses procedures for pursuing claims before agencies, and judicial review of those proceedings in circuit court, *see, e.g.*, §227.53, Stats.

In the present case, the complainant has failed to identify any "legal need" relating to the matter now before the Commission.<sup>1</sup> Therefore, his request is denied. If complainant files a petition for judicial review, the Commission will presumably prepare a transcript as part of the record on review pursuant to §227.55, Stats.

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<sup>1</sup> The Commission's rules provide that before a tape or transcript is supplied without cost, there must also be a showing of indigency. The only portion of complainant's request relating to this additional requirement was complainant's statement that his request was "[b]ased upon financial indigency" Complainant's statement, by itself, is insufficient to satisfy §PC 5.03(9), Wis. Adm. Code.

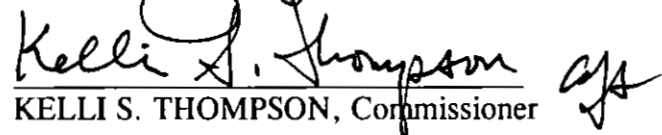
ORDER

The complainant's request for a copy of the transcripts or tapes without cost is denied, the Commission adopts the proposed decision and order, and the complaint is dismissed.

Dated: April 25, 2002 STATE PERSONNEL COMMISSION

  
ANTHONY J. THEODORE, Commissioner

KMS:990186Cdec2

  
KELLI S. THOMPSON, 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

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**Superintendent, DEPARTMENT OF  
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PROPOSED  
DECISION  
AND  
ORDER

Case No. 99-0186-PC-ER

This matter is before the Commission after a hearing on probable cause. At the commencement of the hearing, the examiner addressed various motions of the parties, including complainant's request to reconsider a previous ruling by the examiner denying the complainant's motion to compel discovery. The examiner denied that request. Various exhibits were then admitted pursuant to the agreement of the parties. During his opening statement, complainant stated that he was unable to proceed further in light of the previous rulings. Complainant did not call any witnesses. Respondent then also declined to offer further evidence. Therefore, the following findings of fact are based solely on the exhibits admitted into the record.

The scope of the dispute is reflected in the issues for hearing as set forth in the report of the prehearing conference held on September 27, 2001, and confirmed in the Commission's ruling dated January 9, 2002:

Whether there is probable cause to believe that respondent discriminated against complainant in violation of the Wisconsin Fair Employment Act with respect to the following:

1. On the basis of retaliation with respect to his non-selection for the Education Specialist position in June 1999;
2. On the bases of age, race, sex or disability with respect to his non-selection for the Education Specialist position in June 1999.
3. On the basis of disability by failing or refusing to reasonably accommodate complainant's alleged disability during the interview for the Education Specialist position in May 1999.

## FINDINGS OF FACT

1. Early in 1999, respondent announced a vacancy for the position of Education Specialist (Teacher Licensing) in its Division of Learning Support. The position description for this position includes the following position summary:

The licensing team within the Division for Learning Support: Instructional Services provides a personnel quality control service to the public school districts in the state of Wisconsin by processing all qualified applications for licensure and by investigating the backgrounds of, and complaints against, licensed PK-12 educators in the State.

The major responsibility of this position is to ensure that, for the safety of Wisconsin's school children, school and district personnel meet and maintain standards of conduct. This is accomplished through the review and processing of license applications including identifying evidence of applicants' misconduct, by ascertaining whether an applicant's misconduct record constitutes a basis for denial of licensure, by investigating formal and informal misconduct complaints, providing technical assistance to departmental attorneys in the initial stages of the process, and by maintaining accurate records of license denials and revocations, as well as complaints against licensees.

2. Complainant applied for the vacancy and was among 12 persons who were certified as eligible for further consideration in the hiring process. The certification was prepared on or about April 19, 1999.

3. Respondent scheduled interviews for the individuals on the certification list.

4. Complainant was interviewed on May 18, 1999.

5. The interview panel consisted of Sheri Berkani, Larry Allen and Peter Burke.

6. After the interviews were completed and the candidates ranked, Mr Burke prepared a memorandum dated May 28, 1999, setting forth the panel's recommendation that Mike Mottl be hired for the vacancy. The memorandum included the following information:

Internal candidate acceptable for promotion

Mike Mottl. Mike has knowledge of the department and more specifically of the area of license investigation, background checks and revocation proceedings. He has the experience of preparing documentation for legal proceedings both at DPI and elsewhere and the knowledge of the DPI computer technology. One weakness is his experience and training with interview techniques.

Internal candidate recently reassigned

E C-G.<sup>1</sup> E interviewed for the position but has since accepted a different transfer position in the department.

Acceptable and recommended external candidates (in rank order)

1. JR. Mr R is a Regulation Compliance Investigator 5 with the Division of Gaming at DOA. He has extensive experience with investigations of businesses and financial records and shows strength in interview techniques. His weakness is knowledge of the DPI and its operations. His recommendations from references who are state employees were very high.
2. JM. Mr M is a retired police officer who is a village trustee in Williams Bay. His strengths include a long history of criminal investigation experience, training in police work, knowledge of the criminal justice system and knowledge of interview and confidentiality techniques. His weaknesses include little computer skill and a lack of understanding of the DPI. His professional references from individuals in criminal justice and police work were very good.
3. SS. Ms. S is a Regulation Compliance Investigator 5 with the Department of Regulation and Licensing. Her work is in specialized investigative work for the Medical, Social Work, Marriage & Family Therapists, Professional Counselors and Psychology Examining Boards. Her strengths include experience with investigating complaints, preparing documentation for board review, handling evidence and interviewing witnesses or complainants. Her weaknesses include a lack of knowledge of the DPI background check system and license processing.
4. LC. Ms. C is a Coordinator for the Impaired Professionals Procedure for the Department of Regulation and Licensing. Her strengths are interviewing skills and technology. Her weaknesses

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<sup>1</sup> The Commission has used initials in lieu of the full name of this and other candidates.

are a lack of experience in actual revocation proceedings as her background is in the area of social work.

5. WG. W is the LTE now working in the position. He is doing a very good job with the position and has the ability to learn more about it. His strength is his educational background and his work in schools. His weaknesses are in the lack of experience with the criminal investigation system and with revocation proceedings.

#### Candidates qualified but not recommended

RF. Ms. F's response to interview questions did not rise to the level of those listed above. The interview team felt that she would be qualified for the position, but would need much more on site training than those recommended.

LS. Mr. S also was found to be qualified for the position but was not recommended by the interview panel. His knowledge of the DPI and the licensing area was much less than the other candidates.

#### Candidates not qualified

Allen Bedynek-Stumm [complainant]. Mr. Bedynek-Stumm did not show a connection to the work of the position or to the position description in his responses to the interview questions. The interview panel agreed that he is not qualified for this position.

RO. Mr. O is a claims specialist for the Department of Revenue. His work includes assisting claimants for unemployment insurance. He lacks experience or training in the areas essential for this position including computer skills.

#### Candidate who withdrew

DF. Ms. F interviewed for the position but subsequently sent a letter withdrawing from the competition.

7 Complainant has employment experience for more than 15 years as an "Employment Examiner" with U.S. Office of Personnel Management, but did not express any direct employment experience dealing with background checks or legal proceedings, or in conducting investigations. Complainant also has an extensive education, but it is not related to the position in question. He also has substantial experience as a teacher/instructor



8. Mr. Mottl had worked since 1997 as a legal secretary in respondent's Office of Legal Services, had experience requesting background checks when he worked for many years in the legal services area of the United States Air Force, conducted investigations, organized case files and prepared materials for involuntary discharge boards and courts-martial in the military service, prepared related reports and developed or collaborated on claim tracking systems, and had significant experience with confidential materials and open records.

9. The interview panelist's conclusions regarding the various applicants reflected the information presented by the candidates to the panel.

10. Mike Mottl, was hired to fill the vacancy.

11. Respondent notified complainant by letter dated June 30, 1999, that he had not been selected for the position.

#### CONCLUSIONS OF LAW

1. The Personnel Commission has jurisdiction over this matter pursuant to §230.45(1)(b), Stats.

2. The complainant has the burden of proof in this matter.

3. The complainant has failed to sustain his burden of proof.

4. There is no probable cause to believe that respondent discriminated or retaliated against complainant as alleged.

#### OPINION

At the commencement of the hearing in this matter, the respondent moved to limit the scope of the proceeding to exclude evidence relating to certain information exchanged between respondent and the Department of Revenue arising from complainant's status as a licensee of respondent and as an allegedly delinquent taxpayer. Complainant was unable to show how information on this topic related to the issues before the Commission. Therefore, the examiner granted respondent's motion and excluded evidence on that topic.

The initial burden of proof under the Fair Employment Act is 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, in turn, may attempt to show was a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This analysis must be performed in the context of the probable cause standard set forth in §PC 1.02(16), Wis. Adm. Code.

While no evidence was offered to establish complainant's age, race or sex, respondent does not appear to dispute that complainant is a white male over the age of 40. However, there is no information in the record bearing on the question of whether the complainant is disabled, has a history of disability, or was perceived as being disabled by respondent or whether complainant ever requested any accommodation during his interview on May 18, 1999. There is also no information in the record that complainant engaged in any protected activity that would serve as the basis for pursuing a claim of retaliation under the Wisconsin Fair Employment Act. The Commission concludes that complainant has failed to establish a prima facie case of discrimination based on disability, of a failure to accommodate, or of retaliation under the Fair Employment Act.

Even if the Commission finds that, for purposes of establishing a prima facie case of discrimination, complainant were "qualified" for the Education Specialist Teacher Licensing position because he was certified as eligible for that vacancy, the evidence of record clearly established that the interview panel properly concluded that Mr. Mottl was far better qualified for the vacancy than the complainant. Mr. Mottl had experience that was very directly related to the position in question. His work as a legal secretary at DPI meant he was very familiar with the programmatic responsibilities of the respondent and with the workings of its Office of Legal Services. Mr. Mottl also had extensive experience with background checks, preparing for hearings, organizing cases, and conducting investigations, all of which were directly related to the responsibilities of the vacant position. Complainant did not dispute the statement by respon-

dent's counsel that Mr. Mottl is also a white male. Complainant's work experience was not nearly as relevant as Mr. Mottl's in terms of the Education Specialist (Teacher Licensing) position.

Therefore, the Commission must conclude that the complainant has failed to sustain his burden of proof at the hearing on "probable cause." §PC 1.02(16), Wis. Adm. Code.

The Commission also notes that it has no reason to disagree with the rulings of the examiner, as reflected in the examiner's letter dated January 18, 2002, on complainant's motion to compel discovery and on complainant's subsequent request for a postponement of the hearing.

ORDER

This complaint is dismissed.

Dated: \_\_\_\_\_, 2002 STATE PERSONNEL COMMISSION

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LAURIE R. McCALLUM, Chairperson

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JUDY M. ROGERS, Commissioner

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ANTHONY J. THEODORE, Commissioner

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