

**STATE OF CONNECTICUT  
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES  
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights and  
Opportunities ex rel. Josephine O'Halloran,  
Complainant

CHRO No. 0620146  
Fed No. 16aa600018

v.

Town of Fairfield,  
Respondent

May \_\_\_\_, 2009

**Memorandum of Decision**

***Procedural Background***

On September 25, 2005, Josephine O'Halloran (complainant) filed a complaint with the commission on human rights and opportunities (CHRO or commission) alleging her employer the Town of Fairfield (respondent or the town) discriminated against her in failing to promote her to the position of zoning inspector on the basis of her sex in violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes §§ 46a-60 (a) (1), 46a-58 (a) and Title VII of the Civil Rights Act of 1964 as amended, 42 USC. 2000e and the Civil Rights Act of 1991.

The commission investigated the aforementioned complaint and found reasonable cause to believe that an unfair practice was committed and attempted to eliminate the unfair practice by conference, conciliation and persuasion. These efforts having failed, the complaint was certified to public hearing on April 17, 2007, in accordance with General Statutes § 46a-84 (a). On April 20, 2007 the office of public hearings sent to all parties of record a notice of contested case proceedings and hearing conference

accompanied by the complaint. The respondent filed its answer to the complaint on May 7, 2007.

On October 3, 2007, notice was given to all parties that the pending matter had been reassigned to the undersigned as presiding referee.

The public hearing on this matter was held on various dates between April 28, 2008 and August 25, 2008. For the reasons stated herein the complainant has failed to sustain her burden of proof and her complaint is hereby dismissed.

### ***The Parties' Position***

The complainant in 2000 commenced her employment with the town as a "Secretary C" in the conservation department. She subsequently moved to the planning and zoning department as a "Secretary B" in 2003. In April 2005, the complainant timely applied along with three other employees (two women and one male) for the position of zoning inspector. The complainant alleges that despite being the most qualified candidate, this position was wrongfully denied to her as a consequence of her gender. She argues that this claim of discrimination is amply supported by the fact that the interviews given to the three women candidates each lasted approximately 5 minutes while the only male candidate's interview took longer than 30 minutes. Furthermore, she proffers that the town failed to follow the then collective bargaining agreement (CBA) which by her interpretation would have required that she be selected for the open position.

The respondent denies any discriminatory action on its part in the selection process for the vacant position of zoning inspector. Furthermore, it counters the allegations of the complainant, arguing the complainant was not qualified for the position of zoning inspector and the CBA was followed in the selection of the successful candidate.

### ***Findings of Fact<sup>1</sup>***

1. Statutory and procedural prerequisites to the public hearing were satisfied and the complaint is properly before the undersigned human rights referee for decision.
2. The complainant is a female and has been employed by the respondent since August 2000 (TR 84, CHRO Ex. 1).
3. The respondent is a town in Connecticut that employs more than 15 people (ans. para 3).
4. The complainant's first position with the respondent was that of a Secretary C in the town's conservation department, a position held for 3 years (TR 8, 1395, CHRO Ex. 1, 4).
5. The town's classification system for secretaries was designated by the letters C (lowest), B and A (highest). The Secretary C was graded as a TH-3, Secretary B was graded as a TH-5, and Secretary A as a TH-6. Included in this classification was a step that identified the pay scale for

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<sup>1</sup> References to exhibits are by party designation, number and page. The commission's exhibits are denoted as "CHRO Ex." followed by the exhibit number and page. The respondents' exhibits are denoted by "R Ex." followed by the exhibit number and page. References to testimony are to the transcript page (TR) where the testimony is found.

each designation along with criteria for taking into consideration the number of years in the position (CHRO Ex 19 pg 25).

6. The complainant in September 2003 commenced working in the town's planning and zoning department as a Secretary B and has been working in that position since that time (TR 84-85, CHRO Ex. 6).
7. The complainant's job as a secretary in the planning and zoning department also included the duty of preparing the return of record of any decision of the zoning board of appeals (ZBA) that was appealed to the Superior Court. This duty entailed copying all documents in the file pertaining to the matter appealed and typing a list of those documents and sending those items to the town's attorney (CHRO ex. 40, TR 231).
8. The complainant took no part in arriving at any decision of the ZBA (TR 229).
9. The position of Secretary B in the zoning and planning department is described generally and specifically as follows:

General Department Duties and Responsibilities

Perform a variety of duties to assist supervisor such as: take and transcribe dictation; compose and type routine correspondence form oral instructions or written notes; keep supervisor's calendar; scheduled appointments; receive and screen visitors and phone calls providing information where possible; set-up and maintain department's files and records; prepare payrolls; maintain supplies and materials; type and collate department budget; where required train, assign and check the work of other clerical employees; operate standard office machines such as typewriters, calculators, video terminals, word processors, copying, etc. and perform other related duties as requested.

Specific Department Duties

Set up notices for zoning enforcement meetings. Balance, record, and prepare transmittals for all TPZ receipts. Prepare, distribute and record board of appeals notice of public hearing and notice of decision. Take and transcribe minutes of code enforcement meetings and distribute.

(CHRO Ex. 13)

10. The complainant's employment with the respondent is governed by a collective bargaining agreement (CBA) between her union, which at all relevant times was AFSCME (TR 125, CHRO Ex. 19).
11. The complainant's job also included being the clerk for the ZBA which required her to prepare an agenda for the monthly meeting and to keep and prepare minutes of the meetings (TR 135, 219-220, 324-325).
12. The information contained in the ZBA agenda is prepared and provided to the complainant in draft form by the zoning enforcement officer (TR 216-217, 219, 1401-1404, R Ex. 37, R Ex. 39).
13. The complainant had no role in any decision of the ZBA (TR 229).
14. The complainant in August 2004 prepared a "Duties Questionnaire" the purpose of which was to detail the duties that she was performing in the planning and zoning department which she had hoped would justify a re-classification from Secretary B to Secretary A. Joseph J. Devonshuk (Devonshuk) director of the planning and zoning department signed the duties questionnaire as being satisfactory and correct (CHRO Ex. 5).
15. The complainant's request for re-classification was reviewed by a committee made up of the town's finance director, human resources director and an individual designated by the union who concluded that her position and duties as presently being performed warranted her position remaining at Secretary B and denied her request (TR 166, CHRO Ex. 19 pg 20).

16. The complainant after having not been promoted to the position of zoning inspector applied for a Secretary A position in the respondent's fire marshall's office. The complainant did not receive this promotion believing that the individual with more seniority than her was selected for the position per her understanding of sec. 5.01 of the CBA. The complainant concluded this without knowing the selected individuals previous training and experience, demonstrated ability and proficiency, length of service and overall work record (TR 509-511).
17. Devonshuk viewed the complainant's job as a Secretary B in the planning and zoning department as clerical (TR 1398).
18. Matthew Decker (Decker) some months prior to the zoning inspector's opening being posted spoke to Jack Wendt (Wendt), assistant director of the town's planning and zoning department and indicated how interested he was in becoming the town's zoning inspector if it were to become open. Decker further sought information from Wendt as to what would assist him in becoming more knowledgeable about the position. Wendt provide Decker a copy of the regulations, and a website relating to obtaining certification for zoning enforcement officials. Decker after reviewing the material determined that to become certified he needed to work in the zoning and planning department for minimum of a year before he could start taking classes (TR 706).
19. Wendt made Devonshuk aware of Decker's interest in the zoning inspector's position if it ever became open (TR 1749-1750).

20. On March 22, 2005 a vacancy opening for the position of zoning inspector was posted, the posting stated the following:

General Department Duties and Responsibilities  
Review, check, advice, and assist applicants submitting proposals for zoning approval, zoning compliance, subdivision of land, special permits, zone changes and amendments, zoning board of appeal waivers, and special exceptions. Advise and provide zoning information pertaining to land uses, setbacks, location of structures to be erected, or additions to existing structures, etc. Investigate and resolve complaints concerning zoning violations; issue verbal and written warnings and stop work orders; prepare affidavits for arrest warrants and attend court if required. Perform field inspections on structures and development projects for compliance with approved planning and zoning regulations' maintain accurate records of all activities; attend meetings as required, and perform other related duties as requested.

Knowledge and Experience  
Thorough knowledge of a specialized field such as planning and zoning equivalent to two years' college. One to three years experience. Diversified duties involving an intensive knowledge of a restricted field, and the use of a wide range of procedures. Require the use of judgment in the analysis of facts and circumstances surrounding individual problems or transactions and in the determination of actions to be taken within the limits of standard or accepted practice.  
(CHRO Ex. 3).

21. The position of zoning inspector was a grade TH-7 (CHRO Ex. 3)
22. The CBA required that a job posting for a vacancy be posted for five work days (CHRO Ex. 19, Article V, Section 5.01, pg. 4).
23. The complainant was the only employee in the planning and zoning department to submit an application for the position of zoning inspector (TR 131).
24. The human resource department forwarded all submitted applications to Devonshuk (TR 1451).

25. Devonshuk prior to reviewing the applications determined he would interview everyone who applied (TR 1451).
26. The posting for the zoning inspector's position was sent to all departments in the town (TR 1450).
27. The town's human resources department maintains a job posting board which contained all available jobs within the town (TR 1087-1088).
28. All employees had access to the posting board maintained by the town's human resource department (TR 1088).
29. The posting for the zoning inspector position required that anyone wishing to be considered for this opening must submit their application by Tuesday, March 29, 2005.
30. March 25, 2005 was Good Friday and a town holiday (stipulation of the parties 8-18-08, CHRO Ex.-19, Article VIII, Section 8.01 pg. 7).
31. The zoning inspector posting was developed by the town's human resources department (TR 806).
32. The town's director of human resources in 2005 was Holly Francis (Francis) (TR 798).
33. Francis had 18 years experience in administering CBA's. Her role as human resources director was to make sure employees of the town were properly evaluated and compensated for their work (TR 789-798).
34. Prior to posting the vacancy announcement Devonshuk met with Francis in her office and discussed the open position of zoning inspector (TR 825-826).



35. Generally Francis, when meeting with a department head regarding an open position, would ascertain the duties of the position along with any specific or any special requirements for the position (TR 924).
36. In a matter such as preparing the job posting Francis would ask Devonshuk if the job to be filled comported with what was already on file and which described the position (TR 934).
37. Francis did not screen any applications that were submitted (TR 938).
38. The respondent has no requirement that an applicant submit a resume with his or her application.
39. The town had no policy or practice that required anyone interviewing candidates for job openings to review those candidates personnel files (TR 828).
40. The complainant was unaware of any requirement that the respondent must go through an employee's personnel file in the process of reviewing a candidate application for promotion (TR 288-289).
41. To be qualified to apply for the position of zoning inspector a candidate need only be a town employee and have submitted an application within the time specified (TR 994-996).
42. The individuals who submitted applications to be considered for the zoning inspector's position were: Rose Ann Carlson (Carlson) female; Betty

Gabriel (Gabriel) female; Decker, male; and the complainant (TR 122, 1451, CHRO Ex. 8, 9, 7, 2, complaint para. 14).<sup>2</sup>

43. The complainant believed that she was well qualified for the position of zoning inspector (complaint para. 11).
44. Devonshuk after reviewing the four applications believed at that time that Decker was the most qualified (TR 1452).
45. Devonshuk prior to the interviews for zoning inspector prepared an outline of areas he wished to cover and questions he would ask all four candidates (TR 1551 – 1552, CHRO Ex. 17).
46. Francis as human resources director was of the opinion that sec. 5.01 of the CBA meant that employees being considered for promotion would be considered on the basis of their previous experience and training, demonstrated ability and proficiency after which candidates' length of service would be looked at (TR 835-836, 841-842).
47. Francis as human resource director was of the opinion that if additional questions were asked of one candidate and not of the other candidates no human resource policy would be violated. The additional questions could be the result of responses to earlier questions or relating to information a candidate brought up in the interview (TR 943).
48. Devonshuk questioned the human resources department as to what factors would be considered under the CBA in hiring for the position of

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<sup>2</sup> Facts relating to the Carlson and Gabriel were made and provided to offer context as to panel that Devonshuk had to pick from. These facts are not meant to offer any opinion as to the strength or weakness of cases they currently have pending at this commission.

zoning inspector. He specifically asked if seniority was the sole criteria for hiring. The human resources department responded, that it was one of the things considered but the entire section of the CBA (sec. 5.01) should be considered in determining who is best qualified or qualified for the position (TR 1514-1515).

49. Devonshuk contacted the four candidates and arranged a time and date to interview each (TR 592, 708, 1470-1471, 1520, 1560).
50. All interviews of the candidates were conducted in Devonshuk's office (TR 114, 421, 595, 710, 1471).
51. Devonshuk used the same interview format for each candidate. He first would ask if the candidate had any questions about the job description (TR 1471, 1520, 1539, 1562).
52. Devonshuk also highlighted areas that he believed were important to the position of zoning inspector. These included front desk work (dealing with processing applications), providing information precisely, and conducting site inspections for enforcement requirements (TR 592-593, 1520-1521, 1526-1527, 1561-1562, CHRO Ex. 17).
53. Devonshuk then asked each candidate the following two questions:
  - Why do you feel you are suitable for this position;
  - Why do you want this position (TR 147, 1520-1521, 1599, 1561-1562, CHRO Ex. 17).
54. Decker in response to the application as to his qualifications stated the following:

“I have years of experience of reading blueprints and in the construction field past the years that are listed on my resume: I spent two years at Norwalk Tech. prior to changing my major, studying architecture.” Resume attached. (CHRO Ex. 9).

55. Decker was the only candidate to attach a resume to his application (TR 704, 1559).

56. Decker’s resume provided a breakdown of his employment history which included his current employment with the town from January 2001, which identified his position as buyer and detailed the position as follows:

- Responsible for purchasing products needed for day to day operations for the Fairfield Police Department, Fire Department, Park and Recreation Department, Building Department, First Selectmen’s Office and Fairfield Public Library.
- Maintenance of all cellular and pager communications.
- Responsible for obtaining best pricing via public bidding and/or for order exceeding \$1,000.00.
- Writing PDF’s for contracts pertaining to town requirements for lease and purchase for a variety of departments.

57. Decker’s resume further detailed his employment with Marx Living Design from April 1990 to July 1995. The position was identified as project coordinator and detailed the position as follows:

- Worked closely with contractors to complete jobs in a timely manner.
- Designed renovations for kitchen, baths, small additions and decks.
- Read and reviewed blueprints (CHRO Ex. 9).

58. The complainant stated in her application that her qualifications for zoning inspector were:

“In my position with the town planning and zoning department, I current assist, in addition to the general public, engineers, building contractors, surveyors, title searchers, attorney and other applicant representatives on a daily basis. The assistance I provide includes reading zoning maps, site plans, plot plans, determination of which zone a property lies in, reviewing compliances and previous variances, preparation of receipts and notices of filings.

Additionally, I currently assist the zoning enforcement officer, director, assistant director and coastal planner. This generally includes preparation of correspondence, CAM reports, daily compliances and file cards, monthly ZBA agenda and minutes, return of record for court appeals of ZBA decisions, quarterly information of state fees. My responsibilities also include setting up for the monthly ZBA meetings, opening of complaint files, interviewing, training of personnel, and supervisory functions.

I am a notary public and am proficient in Excel, Word Perfect, dictation, typing and calculator.” (CHRO Ex. 2).

59. The complainant in order to determine what zone a particular piece of property was in, utilized a color key and found the property on the zoning map. The color of the area of the map would then tell her what zone the property was in. She then would use a chart that would explain the requirements or restrictions in that zone (TR 208-209, 1413, R Ex. 2).
60. Gabriel’s stated in her application that her qualifications for the zoning inspector’s position were:

“I have worked in the conservation department since October of 1998. That position has provided me with broad knowledge and experience, including familiarity with the town permitting process, familiarity with regard to land use/restrictions, supervisory experience, and the ability to review various maps and plans. My background includes approximately 11 years paralegal experience. My strengths include the ability to work independently, problem solving capabilities, dedication to accuracy, attention to detail, thoroughness, and excellent communication, writing and organizational skills.

I feel that I am qualified to take on the position of zoning inspector and will be an asset to the planning and zoning department.”

(CHRO Ex. 7).

61. Devonshuk after interviewing Gabriel concluded she did not have the experience or training to perform the duties of zoning inspector and therefore was not qualified (TR 1533).
62. Devonshuk believed that the qualifications (Gabriel) failed to meet were that she did not have two years experience and/or one to three years experience in a related field. As to knowledge and experience, Gabriel provided him with nothing in the interview or in her application that indicated that she met any of the stated requirements (TR 1534 – 1535).
63. Carlson stated in her application that her qualifications for the zoning inspector’s position were:

“I have been employed with the town since 1996. The departments that I have had the opportunity to work in include the tax department (3 years), planning and zoning department (2 years), conservation department (1 year), and finance department (3 years). I am currently clerk of the zoning board of appeals. This exposure has provided me with broad knowledge with the town permitting procedures as well the familiarity with plans and maps associated with the zoning inspector position. I would also like to note that my position as secretary of the zoning enforcement officer result in my working closely with and for the zoning inspector to two

years, and I have already performed many of the related duties required of the inspector.

I possess the personal characteristics required of the zoning inspector position, including the ability to work independently, strong problem solving capabilities, professional integrity, and excellent organizational skills.” (CHRO Ex. 8).

64. Carlson’s application did not provide Devonshuk with any information beyond what he already knew prior to receiving her application (TR 1508).
65. Carlson responded to the question as to why she was suitable for the position, stated that her experience as a secretary in the planning and zoning department gave her the abilities to do the job (TR 1541).
66. Devonshuk knew Carlson before she applied for zoning inspector as she had previously worked for two years in the planning and zoning department as a secretary (TR 1536).
67. Carlson’s duties as a secretary, while working in the planning and zoning department were, as understood by Devonshuk, as clerical and secretarial work, assisting, filing, retrieving files, directing clients to appropriate people in the office and providing information over the phone (TR 1536).
68. Carlson told Devonshuk during the interview that on several occasions she had gone with her fiancé who was an architect when he performed field inspections (TR 594).



69. Devonshuk was familiar with Carlson's duties as Secretary B in the town's planning and zoning department. Devonshuk was also aware of her experience as a Secretary C in the conservation department (TR 1390, 1442, 1535-1537).
70. Carlson was not asked by Devonshuk how she would handle an irate member of the public (TR 592-595).
71. Devonshuk in interviewing Carlson followed the same format as he did with Gabriel and that of his outline prepared prior to conducting the interviews (TR 1540).
72. Devonshuk did not select Carlson as he did not think she was qualified. Her experience as a secretary did not meet the requirements or experience necessary for performing the duties of zoning inspector (TR 1552).
73. The complainant in responding to Devonshuk's question as to why she believed she was qualified for the position stated: "I was in the department and on a daily basis I handle each, you know - - in relation to the position, I handle certain areas in the position, so I feel like I was qualified to go for that position" (TR 240-241).
74. The complainant while asked open-ended questions during her interview chose to provide Devonshuk with only brief responses (TR 245).
75. The complainant felt that her interview with Devonshuk was not a proper interview, both on her part as well as Devonshuk's (TR 113).

76. The complainant believed that taking credits in architectural courses would be relevant to the position of zoning inspector despite having not taken any herself (TR 288).
77. The complainant had no experience in preparing all the information needed to file a permit application which would be relevant to the position of zoning inspector (TR 286).
78. The complainant could not remember whether her resume was in her personnel file at the time she applied for zoning inspector (TR 291).
79. Decker, during the interview with Devonshuk, advised him that he was familiar already with some of the zoning regulations based on the information he had obtained earlier. He also explained his prior experience doing plot plans, site plans and construction plans and permitting process. He further explained his work history with Marx Living Design along with his education received at Norwalk Tech. Decker was attempting to sell himself to Devonshuk and establish that he could perform the job of zoning inspector (TR 712).
80. Decker also advised Devonshuk that in setting up walk-throughs in his current job he had to coordinate times and deadlines for a particular project and instruct contractors or specific individuals who were bidding on projects of what was required (TR 714).
81. Decker responded to Devonshuk (when asked why he was interviewing for the job) that based on his background and the direction he wanted to go in the town, he would be better served working for the zoning

department as opposed to purchasing and that at it would a perfect fit (TR 715).

82. Decker during the course of the interview did most of the talking in an attempt to sell himself to Devonshuk for the position of zoning inspector (TR 727, 1570).
83. Decker during the course of his interview with Devonshuk described all of the projects he had worked on while in the purchasing office. These included the redesign by Decker of the kitchen of the town's golf course. Because the cooler and freezer required modification these need to be approved by zoning. Decker did the drawing for this aspect of the project (TR 737, 1570).
84. Decker informed Devonshuk during the interview of his familiarity with reading blueprints and surveys so as to understand location and size (TR 737).
85. Devonshuk after having interviewed all four candidates informed Francis that Decker had the experience and training that was required for the position of zoning inspector, and that he had far more experience than was required and that he showed enthusiasm (TR 838-839).
86. Devonshuk during the interview with Decker found his work at Marx Living Designs would have given him a certain amount of experience and qualifications that would be required for the zoning inspector's position (TR 1569).

Devonshuk also believed that Decker's education background was relevant to the requirements of working in the planning and zoning department (TR 1566)

87. Devonshuk thought Decker's work with interior construction relevant due to compliances in some instances needing to be issued by a zoning inspector. Were someone to wish to put in a kitchen or bathroom, building permits would be required these can be off by the zoning inspector (TR 1565).
88. Decker during the interview discussed the courses he took in architecture. Devonshuk thought this relevant as architects submit plans and applications to planning and zoning for approval (TR 1566).
89. Devonshuk believed Decker's past experience and training (as he was then aware) met the requirement of one to three years of experience in the job posting and were consistent with the general department duties and responsibilities as described in the job posting (TR 1574-1575).
90. Devonshuk did not think it was significant that Decker did not receive an architect's degree as it wasn't required (TR 1577).
91. Devonshuk believed Decker's construction experience would be useful, as a part of the zoning inspector's job is to review construction applications and act upon them (TR 1578).
92. Devonshuk and Francis (in the course of Devonshuk informing Francis of the post interview result) compared Decker's experience and background to that required for the job of zoning inspector as they did for the three

other candidates. This was in response to Francis asking why Decker was chosen (TR 979, 987).

93. Devonshuk over his career as director of planning and zoning for the respondent has had five positions to fill other than secretarial. Of the hiring's to fill these positions three went to women and two went to men (TR 1393).

### ***Analysis***

The complainant has alleged that the respondent's failure to promote her to the position of zoning inspector was as a consequence of her gender, and that the town has violated General Statute § 46a-60 (a) 910, 46a-58a and Title VII of the Civil Rights of 1964 as amended. General Statute 46a-60 (a) (1) provides in pertinent part that "it shall be a discriminatory practice in violation of this section 91) for an employer... to refuse to hire or employ... any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex marital status, national origin, ancestry, present or past history of mental disability, mental retardation, learning disability or physical disability, including but not limited to, blindness."

"Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a) (1).

According to General Statutes § 46a-58 (a), “[i]t shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability.” In *Trimachi v. Connecticut Workers Compensation Committee* (sic), 2000 WL 872451, \*7 (Conn. Super), the Superior Court reiterated the legal tenet long espoused in commission administrative decisions that § 46a-58 (a) expressly converts a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws. See, e.g., *Commission on Human Rights & Opportunities ex rel. Dexter v. Connecticut Dept. of Correction*, 2005 WL 4828672 (CHRO No. 0320165, August 31, 2005); *Commission on Human Rights & Opportunities ex rel. Scarfo v. Hamilton Sundstrand Corp.*, 2000 WL 35457586 (CHRO No. 9610577, September 27, 2000). Thus, this tribunal has jurisdiction to adjudicate a Title VII claim that has properly been raised under the aegis of § 46a-58 (a).” *Commission on Human Rights and Opportunities ex rel. Onwuazor v. State of CT, DOT*, 2008 WL 4512121, CHRO No. 0510132.

The case brought by the complainant is of disparate treatment. “The principal inquiry of a disparate treatment case is whether the [complainant] was subjected to different treatment because of his or her protected class.’ *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96, 104 (1996). In most instances where the complainant bring claims of discrimination, analysis of liability is performed under one of two theories, these being the pretext model stated in *McDonnell-Douglas v. Green*, 411 U.S.

292 (1973) or the mixed-motive theory of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Under *Price Waterhouse*, a “‘mixed motive’ case exists when an employment decision is motivated by both legitimate and illegitimate reasons.... In such instances a [complainant] must demonstrate that the employer’s decision was motivated by one or more prohibited statutory factors. Whether, through direct evidence or circumstantial evidence, a [complaint] must ‘submit enough evidence that if believed, could reasonably allow a [trier of fact] to conclude that the adverse employment consequences resulted ‘because of an impermissible factor.’” (internal citations omitted) *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96, 105 (1996).

If the complainant can establish a prima facie case that burden then shifts to the respondent to prove by a preponderance of the evidence that it would have made the same decision even if the impermissible factor was not taken into account. *Taylor v. Department of Transportation*, 2001 WL 10435 (Conn. Super.); *Levy v. Commission on Human Rights and Opportunities*, supra, 236 Conn. 106-107; *Price Waterhouse v. Hopkins*, supra, 490 U.S. 228 (1989); *Commission on Human Rights and Opportunities ex rel. Baroudjian v. North East Transportation Company, Inc.*, 2008 WL 3019695 CHRO No. 0430505 (2008).

“If the [complainant] is unable to produce evidence that directly reflect the use of an illegitimate criterion in the challenged decisions, the employee may proceed under the

now-familiar three-step analytical framework described in [*McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)]. Under this test, the burden of persuasion never leaves the [complainant], but there is a shift in the burden to come forward with evidence: 1) the [complainant] must present a prima facie case consisting of four distinct elements; 2) the [respondent] must rebut the prima facie case by showing non-discriminatory reasons for [failure to promote]; and 3) the complainant must show the reasons are pretextual” *Stacks v. Southwestern Bell Yellow Pages*, 996 f.2d 200, 202 (1993).

Applying the burden-shifting paradigm set forth by the Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) the complainant bears the initial burden of establishing a prima facie case of discrimination. To this end the complainant must establish; 1) that she belongs to a protected class; 2) she was qualified for the position sought; 3) she suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances given rise to an inference of discrimination. *McDonnell-Douglas Corp v. Green*, supra, 411 US 787; *United Technologies Corporation/Pratt and Whitney Aircraft, Division v. Commission on Human Rights and Opportunities*, 72 Conn. App. 212, 225-26 (2002); *Texas Department of Community Affairs v. Burdine*, 450 US 248, 252-56 (1981).

The complainant's burden in establishing a prima facie case is not a heavy one to meet and has been described as minimal. *Craine v. Trinity College*, 259 Conn. 675, 638 (2002). “[T]hat however, is not to say that the burden is non-existent... (granting motion for summary judgment where plaintiff claimed discrimination based on disability but



failed to show that he was qualified for this position)” *Commission on Human Rights and Opportunities ex rel. Mather v. New Britain Transportation*, WL 2006 2965494. CHRO No. 0330303.

If the complainant establishes a prima facie case under the McDonnell-Douglas analysis, the burden shifts to the respondent to produce a legitimate non-discriminatory reason for the adverse employment action. *Reeves v. Sanderson Plumbing*, 530 US 133, 142 (2000). Were the respondent to produce a legitimate non-discriminatory reason for the adverse employment action, the burden of persuasion then shifts back to the complainant to prove that the proffered reason by the respondent is pretextual. *Ann Howard’s Apricot Restaurant, Inc. v. Commission on Human Rights and Opportunities*, 220 Conn 192, 203 (1991). “Although the burden of production shifts to the [respondent], the ultimate burden of persuading the trier of fact of intentional discrimination remains at all times with the [complainant]” *Darrell Morris v. Yale University School of Medicine*, 477 F.Supp 2d 450, 458 (2007); *Searea v. Rebin*, 117 F.3d 652 (2d cir. 1997).

“Because the Connecticut legislature intended the pertinent provisions of the state statute to mirror those of the federal antidiscrimination laws, the *McDonnell Douglas* analysis also applies to alleged violations of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq.; *Burbank v. Blumenthal*, 75 Fed. Appx. 857, 858 (2<sup>nd</sup> Cir. 2003); *Department of Transportation v. Commission on Human Rights & Opportunities*, 272 Conn. 457, 463 n.9 (2005); and Connecticut courts—as well as his

tribunal—may look to federal interpretation of Title VII for guidance in their interpretation and enforcement of CFEPA. See *Kelley v. Sun Microsystems, Inc.*, 520 F.Supp.2d 388, 400-01 (D. Conn. 2007); *Board of Education of the City of Norwalk v. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 n. 18 (2003); *Williams v. Hartford Public Schools*, 2007 WL 2080554, \*4 (Conn. Super.); *Commission on Human Rights & Opportunities ex rel. Leftridge v. Anthem Blue Cross & Blue Shield*, CHRO No. 9830218, p. 8 (January 22, 2001).” *Commission on Human Rights and Opportunities ex rel. Onwuazor v. State of CT, DOT*, supra 2000 WL 4512121.

“The Second Circuit has defined an adverse employment action as a materially adverse change in the terms and conditions of employment.... To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.... Examples of such a change include termination of employment, demotion evidenced by a decrease in wage or salary, less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices...unique to a particular situation (citations omitted; internal quotation marks omitted.) *Sanders v. New York City Human Resources Administration*, 361 F.3d 749, 755 (2<sup>nd</sup> Cir. 2004) *Commission on Human Rights and Opportunities ex rel. Maher v. New Britain Transportation Co.*, supra 2006 WL 2965494 (citations omitted).”

In determining which method of analysis to employ the pretext model or the mixed motive model the parties themselves have been most helpful in that decision. The complainant and commission have chosen to make no argument that the mixed motive

theory is the appropriate model. The respondent has simply offered a simple explanation of the mixed motive argument but has focused as did the complainant on the pretext model as the appropriate mode of analysis. Having presided over the entire public hearing and after a thorough review of the evidence, I too am in agreement that the pretext model is the method to be employed in analyzing whether the complainant was a victim of disparate treatment. This determination is arrived at by the fact that there was no direct evidence presented that the complainant's failure to be promoted to zoning inspector was the consequence of an impermissible factor playing a motivating or substantial role in Devonshuk's decision to promote Decker as opposed to the complainant.

In applying the McDonnell-Douglas pretext model the burden initially placed on the complainant has been lessened to some degree by concessions made by the respondent. Specifically, respondent has conceded that the complainant as a female is a member of a protected class. Furthermore, the town has also conceded that the complainant's failure to be selected the successful candidate for zoning inspector is an adverse action.<sup>3</sup>

There remains then for the complainant to initially establish the two remaining prongs of her prima facie case. The first being that she was qualified for the position. Second that the failure to promote her was done under circumstances giving rise to an inference of discrimination. The respondent argues that these have not been established. The

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<sup>3</sup> See respondent's post hearing brief dated January 8, 2009 at page 31.

result of that would be that the complainant has failed to establish a prima facie case, thus relieving the respondent of producing a legitimate business reason for its decision in not giving the position of zoning inspector to the complainant

Of the two remaining elements necessary to establish a prima facie case I find that the complainant has established that the decision to promote Decker and not her occurred under circumstances giving rise to an inference of discrimination. This element is a “flexible one that can be satisfied differently in differing factual scenarios.... For example, the complainant may satisfy the fourth element in a failure to promote case by demonstrating that the desired promotion was award to someone outside of [her] protected class... (discrimination may be inferred when and preferential treatment is given to employees outside the protected class) ... (black plaintiff satisfied the fourth criterion by showing that the desired promotions were given to white co-workers)...” *Commission on Human Rights and Opportunities ex rel. Onwuazor v. State of Connecticut, Department of Transportation*, supra 2008 WL 4512121. (citations omitted)

As in the pending matter, the position was awarded to the only male in a field of four candidates. Furthermore, the interviews given to the female candidates lasted approximately five minutes while that given to the only male candidate was approximately 30 minutes. The complainant’s burden at this juncture is minimal or de-minimus. It must be concluded that the decision not promote the complainant occurred under circumstances giving rise to the inference of discrimination.

The complainant to satisfy the second prong of establishing a prima facie case must prove she was qualified for the position for which she applied. To this end, she “need not prove that she was the most qualified candidate, nor must [she] ‘demonstrate that [her] performance was flawless or superior; because the prima facie threshold is minimal, [she] merely must show that [she] ‘possesses the basic skills necessary for the performance it [the] job.’ *De La Cruz v. New York City Human Resources Admin.*, 82 F.3d 16, 20 (2<sup>nd</sup> Cir. 1996) (citations omitted; internal quotation marks omitted); *Farricelli v. Bayer Corporation*, 116 F.Supp. 2<sup>nd</sup> 280, 284 (D. Conn. 1999); *Commission on Human Rights and Opportunities ex rel. Leftridge v. Anthem*, supra, CHRO No. 0=9830218, p. 9.” *Commission on Human Rights and Opportunities ex rel. Onwuazor v. State of Connecticut, Department of Transportation*, supra, 2008 WL 4512121.

The complainant in an effort to sustain her burden in establishing that she was qualified offered testimony and exhibits as to her education and background. These included her resume (CHRO Ex. 4) which described her work history from 1998 through a point in time where she was working with the town planning and zoning department. It further briefly described her education as her having received a high school diploma from Sister’s of Mercy in Dublin, Ireland and a diploma (no degree specified) from the College of Fashion and Design in Dublin, Ireland. The complainant also offered testimony that she had on two separate occasions sketched a deck for her own home.

Along with the above, the complainant offered her own testimony that while working for the respondent in the conservation department as a Secretary C she had to deal with

surveyors, builders and the conservation commission. The complainant further offered testimony to support that she was minimally qualified for the zoning inspector's position and that she could read zoning maps and routinely answered questions from the public at the counter or on the phone regarding setbacks, height restrictions and zones. The complainant also testified that as clerk of the ZBA she dealt directly with waivers and compliances and she drafted the return of the record in the event someone appealed denial of their requested waiver. In so doing, she had to review the documents and legal notices.

While the complainant has performed well as a Secretary B in the planning and zoning department, the items she argues that make her qualified for the zoning inspectors position, were and are clerical. She typed correspondence, filed documents and took minutes at meetings where she was designated the clerk. These tasks, however, required her to use little or no discretion or analysis in their performance. This is as opposed to her having to use "judgment in the analysis of facts and circumstances surrounding individual problems or transactions and in the determination of actions to be taken within the limits of standard or accepted practice." (See CHRO Ex. 3).

Of significant import here is the issue of the knowledge of the complainant's background and experience that Devonshuk had prior to making the decision to select Decker. The complainant has offered a number of items she claims, when taken together with her two jobs with the town, make her qualified. The problem however is that many of these items were not known to Devonshuk when his decision was made.

Specifically, the complainant testified she had prior to being interviewed by Devonshuk placed in her personnel file a copy of her resume. This testimony was later on cross examination called into serious question. The complainant testified that she now wasn't sure when she submitted her resume and it was possibly after having been turned down for the zoning inspectors position but submitted in applying for a Secretary A position with the fire marshall's office. Additionally, in an effort to support her qualification claim, she testified that she drew two deck sketches for her home. While this information may be interesting, she failed to offer any testimony as to the quality of the design or the purpose for their use. What is known is she never told Devonshuk she had drawn the sketches and he was not aware of her resume or the contents therein.

In point of fact, Devonshuk's knowledge of the complainant's capabilities primarily came from his interaction with her as the director of the department. He was not aware of her education, her resume, or her ability to sketch decks.

While the complainant has argued and proffered a number of items she claims would cause someone to conclude she was qualified for the zoning inspector's position, she however failed to mention them to the person who was making the decision of whom he would select for the open position. While arguing that her resume was in her personnel file, she offered no evidence that there was a policy in place that required Devonshuk to look at her personnel file. Furthermore, the complainant accepted no responsibility for failing to provide Devonshuk with any information as to her claimed qualifications

despite being asked both on the application and in the interview, open ended questions as to her qualifications.

Clearly the complainant or any of the candidates could not claim ignorance as to what the town was looking for. The job posting (CHRO Ex. 3) specified the job's duties and responsibilities along with the knowledge and experience necessary. In both the application and Devonshuk's interview, the complainant was given a full opportunity to, identify, detail and explain her experience, skill, education and how these would provide her the skill set that the town was seeking. No evidence has been presented that would indicate that the complainant or any candidate was precluded from giving a thorough and thoughtful answer as to their qualifications for the job and the time necessary to do such.

The information which complainant claims would cause someone to conclude she was qualified is dubious at best. The college credits were in fashion and design and her sketching of decks, while presumably offered to show she was familiar with blueprints or surveys, fails to offer any meaningful evidence to the trier of fact. Had she testified they were to scale, were drawn taking into account setback lines, or were filed with an appropriate agency and made known to Devonshuk, he would at least had something meaningful to evaluate. However, he knew none of this. Information not known to the decision maker "at the time the decision was made could not have entered in the calculus of the decision and would be entirely irrelevant." *Norris v. City of San Francisco, et al.*, 900 F.2d 1326, 1331 (1990). Devonshuk made his decision on the



information known to him, not what complainant raised during the course of the public hearing.<sup>4</sup>

In determining whether the complainant was minimally qualified the determination must be made on the information known at the time of the decision by Devonshuk. What remains, as to the complainant's qualifications is her clerical duties as a Secretary B in the zoning and planning office. While the complainant can stress she can read maps and answer questions, these two items offer no significant movement towards being qualified. The maps she reads are color coded to differentiate the different zones within the town. By looking at the color key anyone can determine the applicable zone, and then refer to the chart as to that zone's requirements and/or limitations. The degree of difficulty in this appears relatively modest and could be performed by any member of the general public without any special training or experience. As to her answering

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<sup>4</sup> During to course of the pubic hearing a great deal of testimony was admitted primarily regarding the qualifications of both the complainant and Decker. Much of this testimony after hearing the entire matter, concerns matters unknown to Devonshuk at the time the decision was made to select Decker. The taking of this testimony resulted in some large measure to witnesses being taken out of order so that it was unclear what was and what was not known to Devonshuk at the time of his decision.

Despite the order in which witnesses were called and the testimony received the parties were certainly aware that as the trier of fact I believed what was crucial was "what Devonshuk was aware of as opposed to what qualifications anyone had or my not have had..." (See TR 700).

The relevance of information not known by Devonshuk (and as expressed in my comments above) was clearly acknowledged by the commission counsel when she objected to testimony by Decker as "not relevant if [Devonshuk] did not have this information at the time his decision was made. What is relevant is what was taken into consideration when this promotion was made...None of this is relevant unless that information was available at the time he was interviewed and he provided that information to Devonshuk ..." (See TR 702-03).

questions from the public, this to does not make a finding of her being qualified any easier, as part of her job is to provide information where possible (See CHRO Ex. 13).

Regarding her duties, the complainant put significant emphasis on her having to prepare the agendas for the ZBA meetings and the preparation of the legal record in the event of an appeal or a waiver. While both tasks are important and need to be done correctly, neither require the complainant to analyze anything nor require her to use any discretion as to what to include. The agenda is drawn up by Peter Marsala (Marsala) and the complainant merely types the agenda from the notes provided to her and in the order prescribed by Marsala. As to the record for an appeal, she again simply lists and copies each and every document in the subject file and prepares a cover letter and sends everything to the town attorney. Again, while the job she performs is important and accuracy is essential she simply types or copies what has already been created. She makes no determination as to what documents to include or the legal significance of any document.

In virtually any task she was responsible for in her job, other than providing the most basic information, they required little or no analysis or for her to use any discretion other than to decide who possibly should answer or respond to the person asking for help other than basic information.

Having concluded that the complainant has failed to establish a prima facie case and that it should warrant dismissal on that basis alone, I will for purposes of the

thoroughness assume *arguendo* that she has established the four prongs of her prima facie case. Were this to have been found the burden to produce or articulate a legitimate non-discriminatory reason for selecting Decker would now be required of the respondent. *Reeves v. Sanderson Plumbing*, 530 U.S 133, 142 (2000). In this instance, the respondent argues that Decker was the more qualified – if not the only qualified candidate – that applied for the position of zoning inspector. This decision is based on a comparison of the education and background stated in his resume that was attached to his application and the interview conducted by Devonshuk as opposed to the applications, interviews and knowledge of the three remaining candidates.

In this comparison of information utilized by Devonshuk, the complainant argued that the interviews conducted by Devonshuk were unfair towards the three female candidates in both time and content. In evaluating the interview process of Devonshuk, it must first be understood that the Connecticut Supreme Court has stated that “a personal interview is particularly important for ultimate job selection in today’s complex and demanding economy where not only the education, training and experience count, but where personality, motivation, articulation, the ability to withstand pressure and communicative ability must also be considered as essential criteria. It is a fact of life that those latter subjective elements can only be ascertained through a personal interview.” *Reliance Insurance Company v. Commission on Human Rights and Opportunities*, 172 Conn. 485, 491 (1997). Respondent’s can consider somewhat subjective factors including interview performance as well as candidates qualifications found in an application or resume in arriving at a decision on who promote. *Comotey v.*

*State of Connecticut, Department of Transportation*, 2009 WL 8250 1 \* 8. Furthermore, “[t]here is nothing unlawful about an employer’s basing its hiring decision on subjective criteria, such as the impression an individual makes during an interview.” *Byrnie v. Town of Cromwell*, 243 F.3d. 93, 104 (2001).

In the present matter, Devonshuk, with the assistance of the director of human resources, developed a template of how he was going to conduct the interviews (CHRO Ex. 17). While the complainant and certainly the two other female candidates may argue as to the length of the interview all were fairly consistent with the questions asked of Decker, were in keeping with the questions asked of them and were initiated with the same overview of the job to be filled. The real and only variable was the manner in which each responded to the questions asked. This clearly was the difference. Decker chose to go into detail as to his background and relevant (as he saw it) work experience, which certainly led to the give and take between him and Devonshuk. Decker obviously attempted to leave no stone uncovered, which explains the discrepancies in the time for the interviews and provided Devonshuk with a plethora of information.

Certainly, a logical explanation as to why the complainant was so brief in both her application and interview was that she believed that she was the only person under the CBA<sup>5</sup> (see 5.01) who Devonshuk could select. This is a consequence of her believing

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## ARTICLE V- JOB POSTINGS

### Section 5.01

that the person with the most seniority in the department had to be selected before looking at previous experience and training, demonstrated ability and proficiency. If in fact this was her belief it was mistake. It was the town's position that seniority of the candidates comes into play only in the event of a tie between competing candidates. No credible evidence was presented that challenged this position. The position she advances as to the CBA interpretation, is not helped by the fact that not one instance was proven where the town utilized the interpretation of sec. 5.01 as understood by the complainant.

While the complainant argues that the respondent has prior to her not bring promoted to zoning inspector and since then interpreted the CBA sec. 5.01 of the CBA in the manner she suggests she only can point to one example where she claims such an interpretation was utilized. Regrettably in this sole instance the complainant is without any facts other then she did not get the job to support her conclusion (See F.F. 16).

Of all the witnesses who testified Holly Francis, the director of human resources who had 18 years experience in the area of dealing with and interpreting CBA's was the only witness who could with authority testify as to the town's consistent interpretation of sec. 5.01. While complainant may differ with the respondent on the appropriate

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Vacancies in the jobs above the lowest labor grade shall be posted on the bulletin boards for a period of five (5) working days unless the present opening has occurred within thirty (30) working days of the previous position for the same job classification. Employees who request the job during this period will be considered on the basis of their previous experience and training, demonstrated ability and proficiency, length of service and overall work record. Priority for selection will be given in the following order:

1. The senior qualified bargaining unit employee in a lower labor grade in the department for jobs in labor grade six (6) or higher.

interpretation, I can find no credible evidence to suggest that in this instance the town changed how it interpreted sec. 5.01 to simply deny the complainant a promotion due to her gender.

Having concluded that the respondent followed its interpretation of the CBA in the selection process for zoning inspector there remains next to determine the question of whether the complainant presented sufficient evidence to establish that the reasons offered as to why the complainant was not chosen were a pretext for gender discrimination. On this issue the complainant has again failed to sustain her burden.

The complainant's argument is that she was qualified. Again, the complainant and commission in post hearing briefs set forth a litany of items to either justify the complainant being qualified or attempting to call into question the education and experience that Decker proffered to justify being selected. While the commission has left no stone unturned in its efforts, a great number of the items, whether pro complainant or anti Decker, were not known to Devonshuk and no matter how many times they are repeated the facts don't change as to what Devonshuk knew or did not know. He did not know of her resume and that she went to college. Having heard the testimony and reviewed her resume, I conclude that if known they would not have likely changed or altered Devonshuk's decision. Her college courses were in fashion design, I find it difficult to see the connection of the courses to the zoning inspector's job. While true that Devonshuk did not ask any questions other than what was outlined in his pre-interview notes (CHRO Ex. 17) nothing prohibited the complainant from offering

information she thought relevant to make her case for being selected. She however chose not to offer anything. Devonshuk did not review her or anyone else's personnel file. However, the complainant has failed to offer any evidence that Devonshuk was under any duty or that there was a policy in place that he should have followed. Furthermore, complainant has not offered anything that was in her file but for her resume (which based on her own testimony is questionable as to it being there) as to what he would have learned that was not presented to him by the complainant that would have offered some fact or facts which if known would have caused him to select the complainant.

This lack of authority requiring Devonshuk to review the complainant's personnel file also relates to Decker's file. While Devonshuk may have discovered that Decker may have had too many absences or had to reimburse the town for phone usage, the important point is Devonshuk didn't know and there was no policy violated by Devonshuk in not reviewing Decker's file and as such it could not have entered in the "calculus" of Devonshuk's decision.

As to Decker, the complainant in both the public hearing as well as post hearing briefs, attempted to undercut Decker by again bringing into the equation items that Devonshuk did not know then. The complainant again cites to no authority that would call into question Devonshuk's motivation for not knowing. Clearly, the admonition given by commission counsel during the hearing, while articulating her own objection is

applicable at this point in the proceedings, that being that if Devonshuk did not know of it at the time he made his decision it is irrelevant (see footnote 4).

While the interview process employed by the respondent was not without minor flaws, I can find no evidence that the decision not to promote the complainant was based on her gender. As stated earlier in this decision some responsibility must be borne by an applicant to respond and provide complete information to the decision maker and not to blame the questioner for the candidates failing to respond appropriately to questions asked.

As to the time involved in interviewing the candidates in this matter, the time used was dictated by the candidates. If no new information was supplied, is it incumbent on the interviewer to keep asking questions that should have been responded to earlier?

In this instance Decker demonstrated his motivation, education, background work in construction, reading of maps, drawing plans to be used in the permitting process, having had to meet deadlines and having taken on large projects. The fact that Devonshuk may have asked additional questions when faced with Decker's background and work experience, does not seem odd or evidence of an animus against women. While Devonshuk may have asked Decker some additional question, his intent (as he testified to and which is noted in CHRO Ex. 17) was to follow the same pattern in each interview. The fact that he asked Decker some additional question is not proof that he discriminated against the complainant. "There is no legal requirement that an



interviewer ask all job applicants the exact same questions.... Applicants for a job typically come to the process with diverse professional backgrounds. Exploring those backgrounds may require an interviewer to ask different questions of different applicants. Job interviews are often a give and take process. An applicant's answer to one question may prompt the interviewer to ask follow-up questions that the interviewer might not need to ask of another applicant.... A job interview will often involve 'fleshing out' an applicant's resume [if provided] (for instance, an interviewer may ask an applicant to explain the work a previous job involved). ... [T]here is no doubt that an interview also allows an interviewer to get a sense of the applicants personality, poise and manners" *Blise v. Antaramian*, 409 F.3d 861, 868 (7<sup>th</sup> Cir. 2005).

It is not the role of this tribunal to act as the super personnel department that second guesses employers' business judgments but to prevent unlawful hiring practices. *Byrnie v. Town of Cromwell*, supra, 243 F.3d 103 (2<sup>nd</sup> cir. 2001). In this instance I find the fact that Devonshuk may have asked some follow-up questions to Decker not to be evidence of discriminatory animus towards women.

What this case boils down to is not how Devonshuk treated Decker but how Devonshuk would have treated the complainant had she been a male. *Brown v. Henderson*, 257 F.3d 246 (2<sup>nd</sup> Cir. 2001). After having reviewed the record, the complainant has not satisfied her burden of establishing that her sex played any part in Devonshuk's decision. Were the facts the same but for the complainant being a male, Decker would still have been found to be the most qualified candidate if not the only qualified

candidate. The complainant cannot show pretext simply by claiming her own personnel belief that she was the most qualified candidate or by the mere fact that she disagrees with the town's evaluation of her qualifications. *Richane v. Fairport Central School District*, 179 F.Supp. 2<sup>nd</sup> 81 (W.D. New York 2001).

### **Conclusion**

For the reasons set forth above, I find that the complainant and commission have failed to sustain their burden in presenting a prima facie case. Furthermore, had I found that a prima facie case had been established the complainant and the commission have failed to demonstrate that the reasons produced by the respondent for not promoting the complainant were in fact a pretext for discrimination. Therefore I order that the complainant's complaint be dismissed.

It is so ordered this 20<sup>th</sup> day of May 2009.

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Thomas C. Austin, Jr.  
Presiding Human Rights Referee

cc.

Cheryl Sharp, Esq.  
Rose Kallor, Esq.  
Eileen Kennelly, Esq.  
Josephine O'Halloran