STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

WILBUR DEVINE, JR., Appellant, and STATE OF IOWA (DEPARTMENT OF NATURAL RESOURCES and DEPARTMENT OF PERSONNEL), Appellee.	)	89-MA-08 ADJUDICATOR'S DECISION

APPEARANCES

For the Appellant:

Robert A. Wright, Sr. - Attorney at Law

For the Appellee:

Linda G. Hanson - Attorney at Law
Fae Brown-Brewton - Iowa Department of Personnel Representative

I. JURISDICTION

Pursuant to Iowa Code Section 19A.14(2) (1987) and 621 Iowa Admin. Code, Chapter 11 (1987), Wilbur Devine, Jr., (hereinafter Devine or Appellant) alleges that the State of Iowa, Department of Natural Resources (hereinafter DNR): (1) violated Chapter 19B when it discriminated against the Appellant on the basis of race, by denying the Appellant a promotion to Associate Superintendent in the DNR's Bureau of Law Enforcement; and (2) violated Chapter 19B and Iowa Department of Personnel (hereinafter IDOP) rules when it failed to follow its Affirmative Action Plan (hereinafter AAP). Devine also alleges that the State of Iowa, IDOP and DNR, violated Chapter 19B and IDOP rules when IDOP failed to require DNR to

conduct pre- and post-employment studies, and failed to collect and maintain applicant flow data.

A closed hearing on Devine's appeal was held on January 24 & 25, 1990, at the Public Employment Relations Board (hereinafter PERB). The hearing was recorded by a certified shorthand reporter. The parties were given full opportunity to present evidence and arguments. The parties filed post-hearing briefs on March 20, 1990.

II. ISSUES

There are three issues in the instant case. The first issue is whether DNR discriminated against the Appellant on the basis of race by denying the Appellant a promotion to the Public Service Executive 3 (hereinafter PSE 3) position of Associate Superintendent in DNR's Bureau of Law Enforcement, thereby violating Chapter 19B. The second issue is whether DNR violated Chapter 19B and IDOP rules when DNR failed to promote Devine in violation of DNR's 1988 Affirmative Action Plan. The third issue is whether IDOP and DNR violated Chapter 19B and IDOP rules when IDOP failed to require the DNR to conduct pre- and post-studies and failed to require the DNR to collect and maintain data on applicants considered for promotion.

II. FINDINGS OF FACT

The Department of Natural Resources has eight divisions.[1] The Fish & Wildlife Division has three bureaus: Wildlife Bureau, Fisheries Bureau and Law Enforcement Bureau. The Law Enforcement Bureau is where the PSE 3 (Associate Superintendent) vacancy, at issue in this case, was located.

Statutorily, IDOP is responsible for the administration and promotion of equal employment opportunity and affirmative action within State governmental agencies. Iowa Code §19B.3(1) (1987). One of IDOP's responsibilities is to conduct pre-employment and post-employment studies in order to "evaluate employment practices and develop improved methods of dealing with all employment issues related to equal employment opportunity and affirmative action." Iowa Code §19B.3(1)(e) (1987). IDOP Rule 10.1(3) provides that "Agencies shall collect and maintain data on the characteristics of applicants considered for promotion in accordance with equal employment opportunity and affirmative action reporting requirements and these rules." 581 Iowa Admin. Code 10.1(3). Nevertheless, IDOP, not the agencies, maintains this employment data.

Each agency is required to prepare an affirmative action plan which is submitted to IDOP for review. Iowa Code §19B.4(1) (1989).

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[1]These eight divisions are Coordination & Information Division; Administrative Services Division; Waste Management Authority Division; Parks, Recreations & Preserves Division; Forest & Forestry Division; Energy & Geological Resources Division; Fish & Wildlife Division; and Environmental Protection Division. (State Exhibit 10).

DNR has complied with this statutory provision. DNR's Affirmative Action Plan encompasses all of its divisions and bureaus; each division or bureau does not prepare a separate affirmative action plan.

All jobs within State government are categorized into an EEO-4 category.[2] The position of Associate Superintendent, PSE 3, is in EEO category 01 (officials/administrators).

An agency is required to conduct, for its Affirmative Action Plan, a numerical utilization analysis in order to determine whether underutilization of protected classes of employees exists within the agency, and to assist in setting employment goals.[3] In DNR's 1987 AAP, all EEO categories, with the exception of administrative support (06), were underutilized as to three categories; "female", "total minority" and "black". Additionally, all EEO categories, with the exception of officials/administrators (01), were underutilized as to "hispanic". Therefore, in category 01, DNR was underutilized as to "female", "total minority" and "black". In DNR's 1988 AAP, the question of underutilization was

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[2]EEO categories were developed by the Equal Employment Opportunity Commission and are groupings of occupations. EEO-4 categories include: officials/administrators (01), professionals (02), technical (03), protective service (04), paraprofessionals (05), administrative support (06), skilled craft personnel (07), and service/maintenance personnel (08).

[3]581 Iowa Admin. Code 20.3(4). See 581 Iowa Admin. Code 20.1. Underutilization is the extent to which minorities, females and persons with disabilities are underrepresented within an agency's workforce as compared to their availability in the relevant labor force.

determined for only two categories; "female" and "total minority".[4] In DNR's 1988 AAP, the EEO category of officials/administrators (01), which includes the PSE 3 position of Associate Superintendent, was not underutilized as to "total minority".[5]

DNR's employment policy provides that protected class members will be preferred for hiring and promotion in job classifications in which protected class members are underutilized. Specifically, DNR's policy states:

> If the selection process involves a position in a job class that is underutilized, the following requirements will also apply: members of the protected classes shall be preferred for employment if their knowledges, abilities, qualities, skills and expected job performance taken as a whole, are not significantly less as compared to those of the other candidates. If the applicants for the position include a member or members of a protected class, and the person recommended for selection is not a member of a protected class, the selection memo shall explain why.[6]

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[4]Prior to development of the 1988 AAP, the decision was made by IDOP to combine minorities into one category titled "total minority". This resulted in a more meaningful statistic due to the small percentage of minorities that are available in Iowa's labor market.

[5]The EEO categories which were underutilized as to total minorities included: professionals (02), technical (03), protective services (04), paraprofessionals (05), and service/maintenance personnel (08). Conversely, the EEO categories which were not underutilized included: officials/administrators (01), administrative support (06) and skilled craft personnel (07). Females were underutilized in officials/administrators (01), professionals (02), technical (03), protective services (04), paraprofessional (05), and service/maintenance (08).

[6]See Joint Exhibit 10, Number 10 at p. 6.

Sometime in September or October, 1988, the PSE 3 position of Associate Superintendent became vacant. Upon receiving approval to fill the PSE 3 position, Rick McGeough, Chief of the Law Enforcement Bureau prepared a Request for Certification form which included the selective criteria and the type of register to be used.[7] The purpose of selective criterion is to help narrow the list of candidates, and its use must be approved by IDOP. In the instant case, the selective criteria used was number 107: criminal justice including enforcement, courts and corrections. DNR received the requisite approval to use this selective criteria. Based upon the Request for Certification, IDOP generated two lists; a promotional list which certified 31 names and a non-promotional list which certified three names.[8]

After receiving the lists, McGeough wrote to all candidates advising them that the position of Associate Superintendent was vacant, and if the candidate was interested, and felt qualified, a resume should be sent to the Bureau. Of the 34 persons on the two lists, 14 persons were invited for interviews and 13 interviewed for the position.[9] Those interviewed who were not DNR employees

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[7]There are 2 types of registers: the promotional list and the nonpromotional list. The promotional list is a list of eligible State employees. The non-promotional list is a list of individuals outside of State government who applied for the specific position of Associate Superintendent.

[8]Upon review of the certified list generated by IDOP, I find 31 names; the names of 24 white males, 2 females, 4 minorities and a disabled person. The non-promotional list contains the names of three white males.

[9]One candidate requested not to be interviewed.

included two black male candidates: Wilbur Devine, Jr., Civil Rights Specialist II for the Iowa Civil Rights Department, and Lorenzo Creighton, Personnel Management Specialist for IDOP; and included six white males: Arlen Crechanowski, Law Enforcement Instructor for the Iowa Law Enforcement Academy; Eugene Gardner, Chief, Bureau of Support Services, in the Division of Community Services; Roger Halleck, Attorney; Jon Jackson, Regional Collections Administrator, in the Bureau of Collections, Iowa Department of Human Services; Paul A. Muller, Correctional Representative, in the Department of Corrections; and Rodney Van Wyk, Law Enforcement Instructor for the Iowa Law Enforcement Academy. DNR employees interviewing for the position were: Randy Edwards, a Recreational Officer employed by DNR since October, 1976; Lowell Joslin, a District Enforcement Officer, employed by DNR or its predecessor since 1978; Bill G. Medland, a PSE 2 Park Supervisor (Parks Conservation Peace Officer) employed by DNR or its predecessor since 1969; and Michael Runyon, Conservation Officer, employed by DNR or its predecessor for 26 years.[10] All DNR employees who interviewed for the position of Associate Superintendent were white males.

The job duties of Associate Superintendent include: supervising the subordinate professional staff; directing

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[10]State's Exhibit #7 contained the resumes of the candidates. However, the Exhibit contained twelve not thirteen resumes. In its brief, the State cites the experience of Gary Owen, a DNR employee possessing seven years of experience in a DNR enforcement position. However, I do not have this resume and, therefore, I cannot take official notice of Owen's work experience.

conservation programs; reviewing, evaluating and making recommendations about facility needs, land acquisitions and land development; assisting in the preparation of the budget, policies and objectives; coordinating and overseeing federal programs; coordinating research activities; coordinating and overseeing public and staff training and, education and informational programs.[11]

The interviews were conducted on November 28 and 29, 1988. The interview panel was made up of three white males, all DNR employees. It included Rick McGeough, Bureau Chief; Allen Farris, Division Administrator of DNR's Fish & Wildlife Division; and Mike Carrier, Division Administrator of DNR's Parks, Recreation and Preserves Division. Bob Fagerland, DNR's Deputy Director, and a white male, also sat in on some of the interviews.

Prior to the interview process, the panel determined that there were five important criteria for the position of Associate Superintendent. These criteria included: (1) Iowa Law Enforcement Academy certification (hereinafter ILEA certification), (2) a law enforcement background, (3) a natural resource background, (4) supervisory skills, and (5) an educational background in conservation, natural resources, or fish and/or wildlife management. Based upon these criteria, all candidates were asked a battery of questions. These questions included: background strengths, types of original programs that the candidate had implemented, supervisory experience, types of training the

[11]Joint Exhibit 2.

candidate had provided to employees, perceptions of the Associate Superintendent's position, interview preparation, background strengths, differences between a conservation law enforcement officer and other law enforcement officers, the philosophy of public service, long range goals, personal use of alcohol and tobacco, attributes necessary for new conservation officers, and whether the candidate trapped, fished and/or hunted.

Devine interviewed for the PSE 3 position on November 28, 1988. The interview panel identified his strengths as: a masters degree, participation in a physical fitness program, he was articulate and had well thought out answers to the interview questions and Devine had researched the Associate Superintendent position, State employment experience, and ILEA certification. The interview panel also identified Devine's weaknesses as: limited supervisory experience and no experience supervising conservation officers; no natural resource or conservation experience; limited experience or exposure to hunting, fishing or trapping; no exposure to DNR or its programs prior to the interview; no long range employment goals of working at DNR in either a natural resource environment, or a part of the law enforcement bureau; and no educational background in conservation, natural resources or fish and/or wildlife management.

After completion of the interviews, the panel determined that Lowell Joslin, DNR's District Enforcement Officer, was their top candidate. The interview panel saw his strengths as: supervisory experience which included supervising conservation officers;

conservation experience which included working for a County Conservation Board, working for the State as a fish and game law enforcement officer, and presently working as DNR's District Supervisor for the South Central District; satisfactorily carried out the broad responsibilities of a District Supervisor; familiarity with the bureau; had knowledge about the central office and its operations; got along with the people in the Bureau and within the Department; ILEA certification; and Joslin had a bachelor's degree from Iowa State University in fish and wildlife management. The interview panel identified, as a weakness, that Joslin was not a disciplinarian, and, therefore, the panel felt that Joslin may have problems in the areas of employee grievances and discipline matters. Based upon the panels' overall evaluation of each candidate, the position was offered to Joslin and he accepted.

On December 7, 1988, the Appellant was notified that he had not been selected for the position of Associate Superintendent of the Law Enforcement Bureau, and at that time Devine was advised that Lowell Joslin had been selected and had accepted the position. On December 15, the Appellant asked McGeough why he had not been selected. On December 22, 1988, the Appellant filed a non-contract grievance with the State. On December 23, McGeough delineated the specific reasons why Joslin was the selected candidate. These reasons were:

> he had formal education related specifically to natural resource management, he had several years experience with the county conservation board system, he had a number of years of

> experience as a state conservation officer, he had experience administering a district level conservation law enforcement program and he had experience supervising conservation officers at the district level. He had a great deal of knowledge about the central office operation because of the location of his district office. I feel he brings to the position more specific experience, knowledge and ability than any of the other applicants we interviewed.[12]

Pursuant to §19A.14(2) of the Iowa Code, Devine filed this merit appeal with PERB on February 6, 1989.

IV. CONCLUSIONS OF LAW

Iowa Code, Section 19A.14(2) (1987) provides that PERB hearings on merit appeals shall be conducted in accordance with PERB rules and Chapter 17A of the Iowa Administrative Procedure Act. Section 19A.14(2) also provides that decisions issued by PERB "shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel."

Therefore, it must be determined in this case whether the actions by DNR and IDOP were based upon substantial compliance with Chapters 19A and 19B, and IDOP rules. Each issue raised by the Appellant shall be discussed separately.

A. Discrimination Issue.

The first issue is whether the Department of Natural Resources discriminated against Devine on the basis of race by denying the Appellant a promotion to the PSE 3 position of Associate Superintendent in DNR's Bureau of Law Enforcement.

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[12]See Joint Exhibit 8.

Section 19B.2 provides in part that:

> It is the policy of the state to provide equal employment opportunity in state employment to all persons. An individual shall not be denied equal access to state employment opportunities because of race, creed, color, religion, natural origin, sex, age or physical or mental disability. It is also the policy of this state to apply affirmative action measures to correct deficiencies in the state employment system where those remedies are appropriate. This policy shall be construed broadly to effectuate its purpose.[13]

The Appellant alleges that Chapters 19A and 19B were promulgated in order to address and eliminate an existing problem in state government; underutilization of African-Americans. The Appellant further alleges that DNR violated Iowa Code, Section 19B.2 when it did not promote a qualified African American into the Associate Superintendent's position at a time when the DNR was severely underutilized as to African Americans, and instead, a white male was promoted. In his testimony and brief, the Appellant alleges that DNR's promotion criteria and process, which favors promoting candidates from within, adversely impacts African Americans.

The State contends that the Appellant has not met his burden of proof in a discrimination case. DNR also argues that its practice of promoting from within DNR is a business necessity, and that the candidate selected to fill the Associate Superintendent position was the most qualified.

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[13]Iowa Code §19B.2 (1989).

There are two types of discrimination theories; disparate impact and disparate treatment.[14] In a disparate impact case, the employer utilizes employment practices that are facially neutral in their treatment of different groups, but in fact the employment practices fall more harshly on one group.[15]

In order to establish a prima facie case under the disparate impact theory of discrimination, the Appellant must first identify the specific employment practices that are being challenged.[16]

In the instant case, the Appellant did not establish the specific employment practices that were responsible for the disparities and, therefore, were being challenged. The Appellant argues that it was the "selection process utilized to hire employees in the DNR Law Enforcement Bureau which is the work unit

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[14]In his testimony, the Appellant alleges that disparate impact and disparate treatment are the same. This is not the case. Although the ultimate legal issues are the same in both theories, the focus is different. In a disparate impact case, the focus is on the statistical impact of a particular hiring practice on employment opportunities for minorities; there must be a causal link between an observed statistical disparity and a specific employment practice. See Watson v. Fort Worth Bank & Trust Co., 108 S.Ct. 2777, 2785 (1988). In a disparate treatment case, the focus is on a specific incident in which an employer has treated a particular person less favorably because of that person's race; there must be discriminatory intent or motive. Id. at 2785. Although the Appellant appears to be alleging a disparate impact case based upon the Appellant's answers to Interrogatories, he cites disparate treatment cases in his brief. As a result, I will examine both theories to determine if a violation of Chapter 19B took place.

[15]International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843, 1854, n.15 (1977).

[16]See Watson, 108 S.Ct. at 2788, See also, Wards Cove Packing Co., Inc., v. Antonio, 109 S.Ct. at 2125, (1989).

at issue."[17] Therefore, it must be inferred that the Appellant meant to attack the promotion process in toto; the promotion and non-promotion lists, the use of selective criteria, the interview questions asked and criteria used for the selection process.[18]

Second, the Appellant must offer statistical evidence to show that DNR's promotion process disproportionately excludes members of a protected class.[19]

In the instant case, Devine did not offer any statistical evidence to show that DNR's promotion process denied members of a protected group access to employment opportunities. The Appellant did not demonstrate that DNR's promotion process had a significant disparate impact on employment opportunities for African Americans. Devine contends that:

> a statistical analysis in the instant case is not necessary because zero African Americans in the law enforcement bureau (relevant work unit) speaks for itself. There is little likelihood that these discrepancies could have occurred by chance and such obvious evidence tends to prove that race was and continues to be a factor in the hiring process.[20]

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[17]See Amended Answers to Interrogatories, Number 2 submitted by Appellant on June 16, 1989.

[18]In Wards Cove and Watson, the Supreme Court does not definitely state whether the analysis of an overall selection process is allowed, however, for purposes of analysis in this case I will review DNR's overall selection process. Based upon my readings of Watson and Wards Cove, it is my opinion that the Supreme Court may not allow the Appellant to analyze the overall selection process but instead must analyze each component separately.

[19]See Antonio, 109 S.Ct. at 2125.

[20]See Appellant's brief at p. 4.

However, statistics do play a critical role in a disparate impact case, and without the statistical data, the Appellant cannot prevail on a disparate impact theory of discrimination. In addition, upon examination of DNR's selection process, the process itself resulted in a promotion list which contained an applicant with a disability, two female applicants, and four minority applicants. Of these seven applicants, two minority applicants were interviewed for the position. Consequently, there is no evidence from which I can conclude that DNR's promotion process adversely impacts upon African Americans. As a result, the Appellant has failed to prove causation and thus unable to establish a prima facie case of the disparate impact theory of discrimination.[21]

Although the Appellant appears to allege a disparate impact theory of discrimination, he cites and analyzes Texas Department of Community Affairs v. Burdine,[22] which is a landmark disparate treatment discrimination case.[23]

The United States Supreme Court in McDonnell Douglas Corp. v. Green[24] sets forth the basic allocation of burdens of proof and

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[21]If the Appellant would have met his burden of proof, the burden of production then shifts to the State to produce evidence that its employment practices are based upon legitimate business interests. If this is done, the Appellant must then demonstrate that other selection devices do not have the similar undesirable adverse impact as do the present methods, and that these other selection devices would also serve DNR's legitimate interests.

[22]101 S.Ct. 1089 (1981).

[23]See Appellant's Brief at p. 8.

[24]93 S.Ct. 1817 (1973).

order of presentation in a case alleging a disparate treatment theory of discrimination. First, the Appellant has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. The Appellant must show that: (1) he belongs to a racial minority; (2) he applied and was qualified for a job which the employer was seeking applicants; (3) despite his qualifications he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of the (Appellant's) qualifications.[25]

In the instant case, Devine establishes that: he is an African American which is a protected group, and he applied for a position for which the State was seeking applicants. Devine appears to be qualified for the position. The minimum qualifications for the Associate Superintendent position are established in the Education, Experience and Special Requirements section of the PSE 3 job description. The qualifications in part included:

> Graduation from an accredited four year college or university and five years professional level experience such as program administration, development, management or operations;
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> * * *
>
> OR
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> substitution of twenty four hours of graduate level course in a special program curriculum as Social Work, Law, Education, Engineering, or Public or Business Administration for each

[25] Id. at 1824.

> year of the required experience to a maximum substitution of two years; ...[26]

Upon examining Devine's resume, he has 4 years of college, a Master's Degree in Sociological Practices, and he has been employed as a Civil Right's Specialist for approximately 6 years. Consequently, Devine meets the minimum qualifications as established in the PSE 3 job description. Additionally, he was listed on the promotional list, thereby further illustrating that he met the minimum qualifications. The record shows that, despite his qualifications, he was rejected for the position. The record also reveals that the position was filled from the original applicant pool which was based on the promotional and nonpromotional lists generated by IDOP. Additionally, all of these candidates met the minimum qualifications as established in the PSE 3 job description. Consequently, the Appellant met his burden of proving by a preponderance of the evidence a prima facie case of discrimination based upon disparate treatment.

The burden now shifts to the State to "rebut the presumption of discrimination by producing evidence that (Devine) was rejected or (Joslin) was preferred for a legitimate, nondiscriminatory reason."[27]

The Appellant, in his brief, argues that the State failed to meet its burden of proof and "must prove by objective evidence that

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[26]See Joint Exhibit 1.

[27]Burdine, 101 S.Ct. at 1094.

the selected candidate was better qualified than the Appellant".[28]

The State argues that the Appellant met fierce competition for the PSE 3 position, and that applicant Joslin was clearly the more qualified candidate. Both Bureau Chief McGeough and Division Administrator Farris testified as to the five criteria important for the job, and based upon these criteria the interview panel concluded that Joslin was more qualified. These criteria included: ILEA certification, a law enforcement background, a natural resources background, supervisory skills and education.

Using these criteria, and examining the Devine and Joslin resumes, it is clearly apparent that Joslin was a qualified candidate. Both have an ILEA certificate. Devine has approximately 2 years of law enforcement experience (approximately 1 1/2 years experience with the Iowa Department of Public Safety and 5 months experience with AAA security). Joslin has 10 years of law enforcement experience (5 years experience as a State Conservation Officer and 5 years as a District Enforcement Supervisor). Devine does not have a natural resources background, nor does he fish, hunt or trap, and Devine is not involved in any conservation/natural resources programs. Joslin has a natural resources background since he had been employed by either the State or County in conservation/natural resources since 1974. Devine's

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[28]See Appellant's Brief at p. 8. However, the Appellant has misstated the employer's burden. Instead, the State must "simply explain what he has done or produce evidence of legitimate nondiscriminatory reasons. The employer's burden is not to show that those he hired were somehow better qualified." Burdine, 101 S.Ct. at 1095.

supervisory experience includes supervising intake officers at Iowa Civil Rights Commission, a supervisor of investigations at AAA Security and Investigations for 5 months and supervisory experience while in the U.S. Air Force. Joslin has supervised natural resource personnel since 1978. Devine's degrees are not related to conservation, natural resources or science; Joslin has a bachelor's degree from Iowa State University in Fisheries and Wildlife Biology. Based upon this evidence it is clear that the State has produced sufficient evidence to conclude that the selection of Joslin was based upon legitimate nondiscriminatory reasons.

Finally, Devine must demonstrate that the State's proffered reasons were not the true reasons for Joslin's selection and that other selection devices could have been used without the undesirable racial effect.[29]

In the instant case, the Appellant is unable to meet this final burden. Devine contends that the only candidates that could meet the five enumerated criteria established by DNR would be those from within DNR which is exclusively made up of whites, and that consequently, members of a protected class are excluded from being seriously considered for the position of Associate Superintendent. Although this argument may have some merit, Devine did not show that any other selection devices could have also served the employer's legitimate interest.

Additionally, the State demonstrated that DNR has the right to determine minimum job qualifications, and that DNR's decision to

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[29]See McDonnell Douglas, 93 S.Ct. at 1825.

choose a qualified candidate was not based upon unlawful criteria.[30]

Based upon the foregoing, the Appellant has failed to prove that DNR did not substantially comply with Section 19B when it failed to promote Devine to the PSE 3 position of Associate Superintendent in the Law Enforcement Bureau.

B. Affirmative Action Plan

The second issue, in this case, is whether DNR violated Chapter 19B and IDOP rules when it developed and implemented its 1988 Affirmative Action Plan.

The Appellant contends that Iowa Code, Chapter 19B and IDOP rules (Chapter 20) pertains to affirmative action plans which must be implemented in order to overcome the barriers to equal employment opportunity. Devine alleges that DNR violated IDOP rules when it determined, for the 1988 AAP, that EEO category 01 (officials/administrators) was not underutilized.

The State contends that DNR did not violate either Chapter 19B or IDOP rules because DNR did not err in its determination of the underutilization relating to EEO category 01. The State further argues that as a result of EEO category 01 not being underutilized there was no obligation by DNR to promote a minority applicant.

Chapter 19B.4 provides in part that: "Each state agency, ... shall annually prepare an affirmative action plan." Chapter 20 of IDOP's rules pertains to equal employment opportunity and

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[30]See Burdine, 101 S.Ct. at 1096-97.

affirmative action plans.[31] IDOP rules provide the items an agency's affirmative action plan shall contain,[32] Among these items each agency is required to perform a quantitative utilization analysis. This analysis determines the numerical and percentile underrepresentation of females and minorities in an agency's work force.[33]

Devine alleges that since EEO category 01 was underutilized in 1987 as to African Americans, and DNR did not hire any African Americans in 1988, then the 1988 AAP should show underutilization for African Americans.

However, IDOP rule 20.3(7)(6) provides that an agency may consolidate racial, ethnic or minority groups into one single group.[34] In its 1988 AAP, DNR followed this rule and consolidated all racial minorities into one group. There was uncontroverted testimony that for EEO category 01, African Americans comprised .9% of the area labor market and that minorities comprised 1.9%. It was also uncontroverted that there is one minority employee in EEO category 01, which results in minority employees comprising 1.3% of all employees in EEO category 01. Subtracting the percentage of minorities in EEO category 01 from the percentage of minorities in

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[31]The Appellant does not allege violation of a specific rule in Chapter 20 of IDOP rules.

[32]See 581 Iowa Admin. Code 20.3. The plan shall contain an affirmative action statement, an administrative statement, a work force analysis, an availability analysis, a qualitative utilization analysis, goals and timetables.

[33]See 581 Iowa Admin. Code 20.3(4).

[34]See 581 Iowa Admin. Code 20.3(7)(b).

the area labor force, it was uncontroverted that minorities are underrepresented in EEO category 01 by .6% or .47 people. Using IDOP's rounding rule,[35] the number of minorities underutilized in EEO category 01 is zero. Thus, minorities were not underutilized for DNR's 1988 AAP. Consequently, it must be found that the DNR has substantially complied with IDOP's administrative rules.

The Appellant also alleges that because there are no African Americans in this EEO category, DNR has an affirmative duty to hire an African American. However, the United States Supreme Court has held that a minority cannot be hired based solely upon race.[36]

Based upon the foregoing, the Appellant has failed to prove that DNR violated Chapter 19B and IDOP rules when DNR developed and implemented its 1988 Affirmative Action Plan. Furthermore, it is apparent that DNR has substantially complied with IDOP rules regarding DNR's 1988 AAP.

C. Other Alleged Employment Violations

The third issue raised in this case is whether IDOP and DNR violated Chapter 19B and IDOP rules when IDOP failed to: (1) require DNR to conduct pre- and post-employment studies; and (2) require DNR to collect and maintain data on applicants considered for promotion.

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[35]See 581 Iowa Admin. Code 20.3(4)(a). IDOP's rounding rule provides that .5 or more shall be rounded upward and .49 or less shall be rounded downward.

[36]See Steelworkers v. Weber, 99 S.Ct. 2721, 2728-29 (1979); Johnson v. Transportation Agency, 107 S.Ct. 1442, 1454 (1987); LIAO v. Tennessee Valley Authority, 867 F.2d 1366 (11th Cir. 1989).

Devine alleges that by not conducting employment studies or collecting and maintaining applicant flow data IDOP and DNR have violated IDOP rules.

The State contends that Chapter 19B pre- and post-employment studies are conducted by IDOP, and that employment studies such as collecting and maintaining applicant flow data, are also completed by IDOP. IDOP's rationale is that it would be inefficient to require each state agency to collect data which is readily available at IDOP.

Section 19B.3(1) provides in part that:

> The department of personnel is responsible for the administration and promotion of equal employment opportunity and affirmative action .... In carrying out this responsibility the department shall do all of the following with respect to state agencies other than the state board of regents and its institutions: ... (e) Conduct studies of pre employment and post-employment processes in order to evaluate employment practices and develop improved methods of dealing with all employment issues related to equal employment opportunity and affirmative action.

Based upon this Section, it is IDOP, and not DNR, which is statutorily responsible for conducting pre- and post-employment studies. Consequently, the Appellant's argument that DNR and IDOP violated Chapter 19B when DNR failed to conduct pre- and post-employment studies is without merit.

Reading IDOP rule 10.1(3), it is clear that state agencies are required to collect applicant flow data for Equal Opportunity/Affirmative Action purposes. There was uncontroverted evidence that IDOP keeps these records instead of each agency.

Consequently, based upon the foregoing, the Appellant has shown that IDOP and DNR violated IDOP's rules when IDOP failed to require DNR to maintain data on applicants considered for promotion.

However, this violation of IDOP's rules is not sufficient to conclude that Devine was discriminated against since the Appellant has not been able to demonstrate discrimination based on IDOP compiling the employment data instead of DNR. The purpose of Rule 10.1 is to make the agency aware of the racial characteristics of its applicants in order to obtain a racially balanced workforce. It is clear in the instant case that DNR was aware of the number of minorities in both the Bureau of Law Enforcement and DNR, as well as the race and gender of those individuals applying for the Associate Superintendent position. Therefore, I conclude that the State substantially complied with IDOP rules.

VII. AWARD

Based upon the foregoing, the Appellant's appeal is denied.

DATED at Des Moines, Iowa this 14th day of May, 1990.

Susan M. Bolte

SUSAN M. BOLTE
ADMINISTRATIVE LAW JUDGE

Copies to:

Robert A. Wright, Sr.
Wilbur Devine, Jr.
Linda Hanson
Fae Brown-Brewton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the 14th day of May, 1990.

Sheri L. Brown