

increased problems with the aforementioned hand and had surgery performed on it on April 25, 1978.

5. Following the complainant's return home from surgery on April 26, 1978, he received written notice from respondent that the two examinations for the positions for which he had applied would be administered on April 29, 1978.

6. Following the operation and at all times up to May 5, 1978, the complainant's right hand was in a cast.

7. The aforesaid cast prevented the complainant from bending the fingers on his right hand sufficiently enough to grasp a pen or pencil, and made it essentially impossible for him to write with his right hand, amounting to a temporary disability of his right hand until at least May 5, 1978. Relatively normal use of the hand, including writing, was restored following removal of the cast.

8. After reading the examination notices on April 26th the complainant called an agent of respondent who was the proctor for Milwaukee area exams.

9. He explained to her that he wished to take the exams but that his writing hand was temporarily disabled because of the cast.

10. The proctor informed complainant that the exams would be multiple-choice which required that the appropriate circle on the answer sheet be darkened and inquired if he would have a problem doing those.

11. The complainant responded that he thought it would be possible to complete such examinations with his left hand.

12. On April 29, 1978, at the exam center, there was a different proctor, who also was an agent of the respondent.

13. Prior to the first exam, (Social Worker 1), this proctor announced that

it would be a three hour essay exam.

14. The complainant then told the proctor that he had been under the impression that the exam would be fill-in-the-blank.

15. The proctor asked the complainant if the cast was on his writing hand and after the complainant said it was, the proctor asked if he would have trouble taking the exam.

16. The complainant responded that he could try doing it left-handed to which the proctor said words to the effect of "Okay, see how you do."

17. The complainant proceeded to write this examination using only his left hand.

18. The complainant was able to do this only with great difficulty as a result of his problems with his right hand, which made achievement unusually difficult.

19. After the completion of the exam the proctor asked the complainant how he had done and the complainant said that he had had a lot of trouble with the exam, to which the proctor responded with words to the effect of "Wait and see how you did on it and if there's a problem we'll let you take it over."

20. The complainant then took the Administrative Assistant 1 exam which was one and one half hour multiple choice and which required him to darken the circles on the answer sheet with his pencil.

21. While taking this exam the complainant was suffering some pain from his left hand which was tired from the previous exam, but this did not make achievement unusually difficult.

22. At some point in early June, 1978, the appellant received the notice of his results of the Social Worker 1 exam (Appellant's Exhibit 5), which were a final grade of 74.83 and a rank of 481.

23. When the appellant saw these results his immediate reaction was that he had no chance of getting a Social Worker 1 job.

24. During the end of June or the beginning of July, 1978, the appellant received a letter from Catherine Bohrman, an employe of DHSS and an agent of the respondent, stating that he had not scored high enough on the Social Worker I exam to be considered further for those positions.

25. Sometime thereafter, by a letter to Ms. Bohrman dated July 24, 1978, (Appellant's Exhibit 6), but not received by DHSS until August 16, 1978, the complainant explained the problems that he had had with the examinations and indicated that if the matter were not resolved to his satisfaction he would file a discrimination charge against the state.

26. Shortly after this letter was received by DHSS it was forwarded to the Division of Personnel.

27. The Division of Personnel was unable to ascertain to which administrative assistant exam the complainant's letter referred but did retrieve and review the complainant's Social Worker 1 examination.

28. The division then attempted to contact the complainant by telephone but was unable to do so because he had an unlisted telephone number, and the division then on August 30, 1978, sent the complainant by express mail a letter dated August 30, 1978, (Respondent's Exhibit 4A), which stated, in part, as follows:

"Your letter to the Department of Health and Social Services regarding the Social Worker 1-Probation and Parole examination was forwarded to the Division of Personnel.

After a careful review of the situation, a decision was made to allow you to retake this examination. Please contact me at 608-266-5307 to make the necessary arrangements.

/s/
SUSAN K. THRASH
EMPLOYEE SELECTION SPECIALIST"

29. As of August 30, 1978, the Social Worker 1 positions in question had not been filled and they were not the subject of any hiring freeze.

30. The appellant received this letter and, after having unsuccessfully attempted to reach Ms. Thrash by telephone, responded by letter dated September 1, 1978, (Appellant's Exhibit 7), which was mailed on or about September 12, 1978, and which stated, in part, as follows:

"First of all, both exams...are involved in my complaint. Secondly, my re-taking the exams at this point would only serve to put me on the present eligibility lists. I have already lost the opportunity to be considered for the positions that have been filled by the two exams. Thirdly, there is a freeze on state hiring which in effect wipes out my chances of employment for quite some time. Fourthly, I have already signed up for and have been accepted to go to school starting Sept. 5th.

* * *

I will not jeopardize my training for a job at this point on the merits of retaking the exam.

* * *

If the state would like to make an out of court settlement or a consent decree I would be willing to forget filing a formal action. I would consider \$2500 a reasonable settlement..."

31. The Division of Personnel responded by letter dated September 14, 1978, (Respondent's Exhibit 6), setting forth its rationale for its handling of the matter to that point and indicating that it was not interested in a cash settlement of any amount.

32. The complainant's civil service score on the written examination for Administrative Assistant 1-Consumer Affairs Assistant was 74.00, which was insufficient to qualify for the second, oral, part of the examination.

33. The respondent caused a notice of these results which also informed complainant he was ineligible for further examination, to be mailed to the complainant at his then current address.

34. The complainant never received the aforesaid notice.

CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of Subchapter II of Chapter III, Stats.
2. The complainant has the burden of proving by the greater weight or preponderance of the evidence that, with respect to the examinations in question, he was handicapped at the time he took the examinations on April 29, 1978, and that the respondent discriminated against him with respect to his handicap.
3. The complainant has satisfied his burden of establishing that he was handicapped with respect to the Social Worker 1 examination.
4. The complainant was handicapped within the meaning of s.111.32 (5) (f), Stats., on April 29, 1978, with respect to the Social Worker 1 examination.
5. The complainant has not satisfied his burden of establishing that he was handicapped with respect to the Administrative Assistant 1 examination.
6. The complainant was not handicapped within the meaning of s.111.32(5) (f), Stats., on April 29, 1978, with respect to the Administrative Assistant 1 examination.
7. The complainant has not established his burden of proving that the respondent discriminated against him because of his handicap.
8. The respondent did not discriminate against the complainant because of his handicap.

OPINION

Section 111.32(5) (f), Stats., provides, in part, that it is discrimination because of handicap:

"1. For an employer, labor organization, licensing agency or other person to refuse to hire, employ, admit or license,

or to bar or to terminate from employment, membership or licensure any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment unless such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment, membership or licensure."

The term "handicap" is not statutorily defined. The Wisconsin Supreme Court has provided a broad definition of handicap: "...a disadvantage that makes achievement unusually difficult; esp.: a physical disability that limits the capacity to work." Chicago M. St. P. & P. RR Co. v. DILHR, 62 Wis. 2d 392, 398, 215 N.W. 2d 443 (1974), Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 328 (1980).

The "Declaration of policy" for Subchapter II of Chapter III includes, in part the following language:

111.31(1) The practice of denying employment and other opportunities to, and discriminating against, properly qualified persons by reason of their...handicap...is likely to foment domestic strife and unrest, and substantially and adversely affect the general welfare of a state by depriving it of the fullest utilization of its capacities for production. The denial by some employers, licensing agencies and labor unions of employment opportunities to such persons solely because of their...handicap...and discrimination against them in employment, tends to deprive the victims of the earnings which are necessary to maintain a just and decent standard of living, thereby committing grave injury to them.

* * *

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their ...handicap...this subchapter shall be liberally construed for the accomplishment of this purpose."

Furthermore, while it is by no means dispositive of the issue, the Commission notes that the respondent has not on this record contested that a temporary disability with respect to writing an examination would be a "handicap" within the purview of s.111.32(5)(f), Stats.

There appears to be little direct precedent on the question of whether a temporary disability constitutes a handicap. In Providence Journal Co. v. Mason, 13 FEP Cases 385 (1976), the Rhode Island Supreme Court held that a temporary "whiplash" injury was not a "physical handicap" within the meaning of the Rhode Island Fair Employment Practices Act. That decision turned on an interpretation of the following statutory language:

"'Physical handicap' means any physical disability [infirmity], malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a seeing eye dog, wheelchair, or other remedial appliance or device." 13 FEP at 387, n.2 (Brackets in original)

The Court reasoned as follows:

"A literal reading of s.28-5-6(H) does appear to declare that any physical disability, caused by injury, no matter how slight, is a 'physical handicap.'

* * *

However, this language is immediately limited by an enumeration of specific injuries, infirmities, or malformations which are intended to be 'physical handicaps.' This language may not be extended to include other injuries or infirmities which are different in kind from those enumerated unless it appears from the provisions of the Fair Employment Practices Act itself that the general language of the initial portion of s.28-5-6(H) be immune from limitation by the subsequent reenumeration of a generic class of disabilities.

* * *

...before a reenumerated infirmity may be construed as a 'physical handicap', that infirmity must be similar in kind to those enumerated. A close scrutiny of the enumerated infirmities indicates to us that they have a common characteristic, namely, they are all serious injuries or impairments of more than a temporary nature."

* * *

We reiterate that in this case the Legislature has spoken on what constitutes a 'physical handicap.' If they had intended that the general term 'any physical disability,' be interpreted in its unrestricted sense, they would have made no mention of the enumerated class or physical disabilities which constitute physical handicaps." 13 FEP Cases at 388-389.

The Wisconsin Fair Employment Law contains no such restrictive enumeration. In light of this and the broad language of the law and of the Supreme Court's interpretation of "handicap," the Commission concludes that a temporary disability may constitute a handicap within the meaning of s.111.32(5)(f), Stats. In the context of an examination, a temporary disability that makes achievement unusually difficult constitutes a handicap. If the respondent does not provide a handicapped applicant a reasonable opportunity to be examined,¹ this constitutes discrimination on the basis of handicap.

The Commission further is of the opinion on the basis of these findings, that the respondent did not discriminate against the complainant.

When the complainant first inquired about the nature of the examinations when he was released from the hospital, he did not receive correct information about their nature. However, the complainant had subsequent opportunities to have avoided the problems he encountered with the examination process, and he failed to do so.

Prior to complainant beginning the Social Worker 1 exam, the proctor announced that it would be a three hour essay, and the following dialogue ensued, (Tr., pp 24, 28):

"Q What did you say to the proctor?

A I raised my hand and I mentioned to him that I was under the impression that it was a fill-in-the-blank.

Q Yes, what did he say to you?

A He said, 'I can see' - well first he asked if that was my writing hand and I said 'Yes,' because he noticed the cast, and he said, 'Well, how are you going to take the exam,' or he said, 'Are you going to have trouble taking the exam?'

¹This obviously may vary from case to case depending on the nature and duration of the temporary disability, as well as other factors.

A (continued from previous page)
Well, I said I could try doing it left-handed, and he said
'Well okay; see how you do;' and he passed out the exam and
we took the exam.

Q Did he suggest perhaps delaying the exam?

A No. He said to take the exam, see how I do on it, if there
was a problem they would make further arrangements.

* * *

Q Did you talk to the proctor after the exam?

A Yes, I did.

Q What did you say to him?

A I went to him with the exam and he said, 'Well, how did you do?'
'Well, I had a lot of trouble with the exam;' and he says "Well,
wait and see how you did on it and if there's a problem we'll
let you take it over.'"

When the complainant received his score on the Social Worker 1 examination
in early June, 1978, his immediate reaction was "I didn't have a hell's chance
of getting that job." (Tr., p. 31). The complainant took no action at this
time to request the opportunity to retake the exam. After receiving another
letter approximately a month later informing him that he would not be considered
further for the position, he waited approximately another month to send a letter
to DHSS concerning his problems with the examination. The respondent then offered
the complainant an opportunity to retake the examination.

The respondent did not cause the complainant to be denied employment, either
directly or by denying him a reasonable opportunity to be examined.

With respect to the Administrative Assistant position, the Commission found
that the complainant's disability did not make achievement on the examination
unusually difficult.

In retrospect, there were a number of communications problems or mis-
understandings attributable to both sides to this dispute. For example, the

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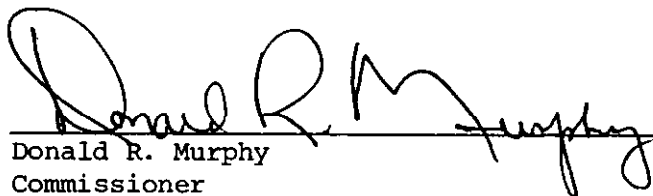
proctor at the exam under the circumstances might well have given the complainant specific information about how to proceed when he received his grade. It is unfortunate that the complainant later assumed that there were no vacancies and that he never got the correct information in this regard. However, it can not be concluded on this record that there was any discrimination because of handicap.

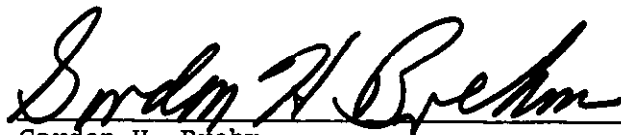
ORDER

This complaint is dismissed.

Dated October 17, 1980

STATE PERSONNEL COMMISSION


Donald R. Murphy
Commissioner


Gordon H. Brehm
Commissioner

AJT:mgd

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