

STATE OF WISCONSIN

PERSONNEL COMMISSION

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 CHARLES WOOD,
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.
 Case No. 86-0037-PC-ER
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FINAL
 DECISION
 AND
 ORDER

The proposed decision and order in the above matter was issued on April 1, 1988 and the parties were granted until May 2, 1988 to file objections thereto.

On May 2, 1988, the Commission received a letter from counsel representing the complainants in three other proceedings pending before the Commission, Knellwolf v. DNR, 86-0145-PC-ER and Nigbor v. DNR, 87-0009-PC-ER and 88-0029-PC-ER, requesting a delay in the issuance of a final decision in the above matter "until such time as the hearings have been completed for the Knellwolf and Nigbor cases."

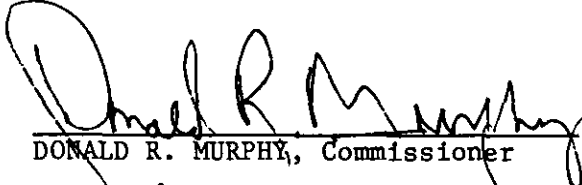
The Commission declines to grant the requested delay and adopts the attached proposed decision and order as the final decision and order in the matter with the modification of the first sentence in the finding of fact 27


to read: "As a general rule, between the ages of 20 and 50, there is not significant change in a person's vision; it remains relatively stable."

Dated: May 5, 1988 STATE PERSONNEL COMMISSION


DENNIS P. MCGILLIGAN, Chairperson

DRM:akw
VIC01/1


DONALD R. MURPHY, Commissioner


LAURIE R. McCALLUM, Commissioner

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 CHARLES WOOD,
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 v.
 Secretary, DEPARTMENT OF
 TRANSPORTATION,
 Respondent.
 Case No. 86-0037-PC-ER
 * * * * *

PROPOSED
 DECISION
 AND
 ORDER

This matter is before the Commission on an appeal of a charge of discrimination on the basis of a handicap filed by Charles G. Wood, Complainant, against the Department of Transportation (DOT), relating to DOT's failure to hire complainant for a state trooper position. A hearing was held on complainant's allegations, testimony was given, exhibits were received as evidence and post hearing briefs were filed by the parties. The following findings, conclusions, decision and order are based upon the record made at the hearing.

FINDINGS OF FACT

1. Complainant Charles G. Wood is a resident of West Allis, Wisconsin, and is employed by the Waukesha County Sheriff's Department.
2. Respondent, Department of Transportation (DOT), is a state agency responsible for transportation administration.
3. Mr. Wood applied for employment with DOT as an enforcement cadet for a State Patrol Trooper 1 position. On December 15, 1984, he took the required examination for that position.

4. Mr. Wood ranked 1105 among those who took the examination and was not listed in the group of persons certified by the Department of Employment Relations (DER) to DOT as the top 250 candidates, i.e., the 250 who scored highest on the examination.

5. At the time Mr. Wood applied for the state patrol position, he also submitted to DER a form to establish that he was handicapped and eligible under the Handicap Expanded Certification program (HEC) to be placed on a certification list of handicapped applicants.

6. Mr. Wood was given HEC status based upon his written request for handicapped status. DER did not seek verification of Wood's HEC eligibility. If the employer decided to hire Wood, he would then be required to verify his handicap at the request of his employer.

7. DOT invited Wood for an interview and to take several physical aptitude tests.

8. Mr. Wood took and passed a physical agility test and a hearing test. He also passed peripheral vision and color vision tests, but instead of taking the visual acuity test, provided respondent with a visual acuity report from his doctor. Mr. Wood's visual acuity report showed his eyesight to be 20/20 corrected and 20/400 uncorrected.

9. Respondent's vision standards for enforcement cadet are 20/20 corrected and 20/100 uncorrected.

10. In a letter dated May 29, 1985, respondent informed Mr. Wood that he did not meet its vision standards and no longer would be considered as a candidate for the cadet position.

11. On March 4, 1986, Wood filed a charge of discrimination with this commission, claiming respondent failed to hire him for an enforcement cadet position because of his eyesight keenness level.

12. The State Patrol Trooper 1 position is an entry-level trooper position. The primary duties of this position are enforcing state traffic and criminal laws, rules and regulations, while patrolling state highways. These duties include issuing warnings or citations, making arrests and taking suspects into physical custody and transporting prisoners to unit headquarters or jail.

13. Troopers carry out their duties usually working alone and in all kinds of weather conditions.

14. While performing duties, troopers are confronted with a great variety of potentially dangerous circumstances. Some are of a life-threatening quality.

15. Good vision is vital to troopers in performing their duties. In some instances, good vision, without any reliance upon vision correction devices, is critical, due to the risk that corrective lenses could be rendered inoperative during physical altercations, extreme weather conditions, chemical exposure, etc.

16. Respondent's current visual acuity standard has been the same since 1978, except in 1983 the binocular vision was changed to include 20/20 corrected vision. Respondent's prior visual standards extend back to 1953.

17. Twenty/twenty (20/20) vision is optimal vision. It is what most physically normal people can see at twenty feet.

18. Complainant's uncorrected vision of 20/400 is twenty times worse than 20/20 vision.

19. A person with 20/400 vision can focus out to 15 inches. Beyond 15 inches, his sight becomes progressively blurred. Such a person can only

be 20 feet away to see the same object a person with optimal vision can see 400 feet away.

20. A person with 20/400 vision is unable to recognize a person 20 feet away or determine the sex of that person.

21. Respondent stipulated that complainant's uncorrected vision of 20/400 is a handicap.

22. Persons with contact lens cannot wear them every day, over an extended period of time.

23. Hard contact lens can be worn twelve to sixteen consecutive hours. Soft contact lens can be worn longer, but must be hydrated in the eye for maximum vision.

24. Wind, high temperatures and low humidity dry out soft lens, causing eye irritation and loss of visual acuity.

25. Dust, foreign bodies and toxics are hazardous to contact lens. Often, these hazards require the contact lens wearer to remove the lens.

26. Respondent has neither a visual acuity standard for permanent state troopers who have passed beyond the enforcement cadet stage, nor periodic visual acuity testing for such employes.

27. Between the ages of 20 and 50, there is no significant change in a person's vision; it remains relatively stable. After age 50, a person's vision may begin to gradually deteriorate as the person progresses in age.

28. Most Wisconsin state troopers are between the ages of 20 and 40. Retirement is at age 55.

29. Good visual acuity is reasonably related to a state trooper's ability to adequately perform his/her duties and is reasonably necessary to the safe operation of that work.

30. Uncorrected visual acuity standards are a legitimate method of establishing job qualifications of good visual acuity.

31. Complainant's uncorrected vision of 20/400 is not adequate to perform the duties of a state trooper and respondent's rejection of him for such a position was based solely on this consideration.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over complainant's claim of discrimination under §230.45(1)(b) and and 111.375(2), Stats.

2. Complainant has satisfied his burden of showing by a preponderance of credible evidence that he is handicapped and respondent rejected him for employment because of his handicap.

3. Respondent has satisfied its burden of showing by a preponderance of the evidence that the employment in question involves a special duty of care for the safety of the general public, and that the refusal to hire complainant was reasonably related to complainant's ability to adequately undertake the job-related responsibilities of said employment, including the special duty of care for the general public.

4. Respondent has satisfied its burden of showing by a preponderance of the evidence that it did not refuse to reasonably accommodate complainant's handicap.

OPINION

The respondent, Department of Transportation (DOT), acknowledges that Mr. Wood, the complainant, is a visually handicapped person, but claims its failure to continue considering Mr. Wood as a state trooper candidate was not employment discrimination as defined in §§111.321, 111.322 and 111.325, Wis. Stats., but an exception as expressed in §111.34(2), Wis. Stats. §111.34(2)(a), Stats., provides:

..., it is not employment discrimination...to refuse to hire...any individual,...if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that...employment,....

Under (b) of the same section, evaluation of a handicapped individual is to be done on an individual case by case basis and the safety of the individual and general public may be considered. Section (c) requires the same case by case evaluation of the handicapped individual in instances involving a special duty of care for the safety of the general public.

The state patrol is a law enforcement organization. Troopers have full arrest powers and are trained in the use of lawful physical force, which includes the use of deadly force. A trooper's work is usually carried on while observing highway traffic and while he or she is alone. Good vision is essential to this work.

Respondent presented several state troopers, who testified to occasions when their glasses or contact lenses were rendered inoperative. It was their collective testimony that weather conditions, such as rain, snow, cold weather and fog, adversely affected glasses.

Sergeant Peter Schrieber, a state trooper 19 years, testified to the need of good vision, the dangers inherent in routine work and of emergencies which span a few seconds, but are life threatening. He also testified to being on the road in all types of weather, on call 24 hours per day and facing the hazards of chemicals, smoke, fire and physical confrontations.

Captain William Harvey, a district commander with 32 years service, testified that state trooper work differed from other law enforcement work. Troopers have more traffic enforcement work, they must be generalists, and they must, as a rule, operate independently without backup. He testified that because of the basic requirements generic to most positions little

could be done to accommodate any visual limitations of troopers. All hands must be able to be called in instances of emergencies and hazardous assignments.

Lieutenant Alvin Bishop, a veteran of 15 years, whose uncorrected vision is 20/30 in the left eye and 20/40 in the right eye, testified that he removes his glasses whenever possible during situations of potential physical confrontation. During training he had his glasses shattered while wearing a riot helmet and face shield.

State trooper Roger Jones testified to several one-on-one physical confrontations, numerous injuries, including eye abrasions during a struggle of controlling the suspect. On one such occasion he was wearing sunglasses and they were broken.

Respondent's witnesses, Dr. Rodney J. Sturm, Davis and Duhr Eye Clinic, and Dr. William Meisekothem, retired practitioner and teacher, both ophthalmologists, testified to the limitations of contact lenses. According to their testimony, contacts cannot be worn in all circumstances and there is no assurance that a person will be able to wear them for any given length of time, i.e., every working day of his career. Contact wearers are susceptible to windy weather, dust particles, chemicals, smoke and gases. In addition, eye irritation or infection, respiratory infection and allergies will prevent wear of contact lenses. It was the belief of both of these expert witnesses that state troopers would, at times, have to perform without the use of corrective lenses.

Both doctors agree with two articles, "Police Vision Standards" and "Recommended Vision Standards for Police Officers" by James E. Sheedy, Assistant Professor, Ohio State University, which are reports on visual

acuity studies. Sheedy concludes and recommends that 20/40 uncorrected vision be established as the visual acuity standard for police officers.

Dr. Peter Schlipmann, a psychologist at the University of Wisconsin-Milwaukee, who specializes in police psychology, child psychology and works with psychiatric patients who are homicidal and suicidal, called by respondent as a witness, testified about his work over the last eight years with various law enforcement agencies dealing with officers who acquired post-traumatic stress -- anxiety caused by a traumatic episode. He testified that because most people are vision bound, impairment of vision during a traumatic event impairs other senses and causes a person to be less likely to cope.

In response to respondent's evidentiary presentation, complainant called three witnesses who served or had served in law enforcement organizations. The focus of their testimony was upon their work experience as individuals who wore contact lenses or eye glasses.

Norman B. Wood, complainant's father, whose uncorrected vision is 20/200, testified that he served as a conservation warden, the law enforcement unit for the state Department of Natural Resources, for thirty-one years. During that period, he was involved in physical confrontations, sometime suffering injuries, but always able to perform his duties. He testified that he had never lost his glasses during any confrontations, but on at least one occasion, removed them prior to the encounter. He also testified that as supervisor, he supervised many wardens who wore glasses and observed them successfully carrying out their duties.

John W. Glennon, a DNR warden who was supervised by Mr. Wood, has approximately 20/200 uncorrected vision and wears glasses and contacts. He corroborated Mr. Wood's testimony and testified he has had no vision

problems wearing glasses or contacts. Glennon agreed with the testimony of the state troopers about problems with eye glasses in certain weather conditions and testified that his doctor advised him not to wear contacts in the presence of chemicals.

Norman B. Wood, III, police officer for the city of Berlin, special conservation warden and complainant's brother, testified that his uncorrected vision is 20/500 and that he currently wears gas permeable lenses, but previously for ten years wore hard lenses and glasses. He testified that during his seven years as a law enforcement officer, he has been involved in fifty fights, rescued a person from a river and rescued two people from a smoke-filled, burning house. He testified that on the occasion of the river rescue, after bringing the person to shore, the person started fighting and drew a knife. During the fight, he knocked Wood's glasses into the river, but Wood testified he was able to subdue the person and effect an arrest.

The complainant, Charles G. Wood, a correctional officer for the Waukesha County sheriff's department, processes criminal suspects into jail. He testified that he usually wears glasses on the job and has never experienced visual difficulties in adverse weather conditions or on the occasion in 1985 when he helped suppress a forest fire, although he said, regarding the forest fire suppression, he had to remove his contacts earlier than usual that evening and clean them off.

Respondent having acknowledged complainant's uncorrected vision as a handicap as defined in §111.32(8), Wis. Stats., reduces the issues in this matter to the general question of whether or not respondent's actions are in accord with the exception to handicap discrimination expressed in §111.34(2), Wis. Stats. The exception to handicap discrimination as

applied here, allows respondent to discriminate against Wood if Wood's uncorrected vision acuity is "reasonably related" to his ability to adequately perform the duties of a state trooper, including the special duty of care to the public, §111.34(1)(c), Stats. This Commission believes respondent has justified its reasons for refusing complainant as a candidate for the state trooper position.

Charles G. Wood has an uncorrected visual acuity of 20/400. Without some type of visual aid, he cannot focus out beyond approximately 15 inches before his vision becomes blurred, increasing to the point of being unable to recognize a person twenty feet away or distinguish a gun in someone's hand. State troopers must have good vision to perform their duties. All too frequently their work places them in life-threatening situations. On occasion these confrontations, often in reduced-light conditions, include the use of firearms. In such instances, the attribute of good vision without optical correction may become a factor in saving a life.

The undisputed facts support the view that there is a likelihood that Wood, if hired, would be required to function at some time, in life-threatening instances, without his corrective lenses. The testimony of two ophthalmologists establishes that in such instances Wood's uncorrected eyesight is so poor as to constitute a hazard. Because of the responsibilities of the position, this hazard would extend to co-workers and the public.

Respondent's case is weakened by the fact that there is neither a visual acuity standard nor a periodic vision testing program for permanent troopers. However, this must be weighed against the expert testimony that, as a general rule, there is no significant change in a person's vision between the ages of 20 and 50. Furthermore, the validity of a distinction

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between vision standards for current and new employes has been recognized in similar contexts. See Padilla v. City of Topeka, 708 P. 2d 543, 548 (Kan. 1985).

The facts support the view that respondent satisfied the provisions of §111.34(2)(c), which requires individual evaluation of job applicants and prohibits general rules excluding all handicapped people or a particular class of handicapped people. Respondent gave Wood a series of tests, including a variety of eye tests. Instead of taking the visual acuity test, Wood elected to provide respondent with a visual acuity report from his doctor. Two ophthalmologists testified that Wood's uncorrected vision of 20/400 was too poor of a risk for a state trooper.¹ However, it is clear from the testimony of the ophthalmologists that vision, unlike many disabilities or impairments, can be accurately measured. Consequently, the capacity to see, of a person with 20/100 uncorrected vision, can be easily determined and profiled without individual testing once such visual acuity information is provided.

Finally, the question about accommodation has been discussed generally in other portions of this opinion, but, briefly stated, based on testimony and documentary exhibits, trooper emergencies may not allow employment of a spare pair of glasses. Equipment such as eyeglass straps can be hazardous to the wearer. Furthermore, any form of corrective lenses, including

¹ Regardless of the validity per se of respondent's vision standard of 20/100 uncorrected, this record amply supports respondent's determination that complainant's eyesight (20/400 uncorrected) was inadequate for employment as a State Trooper 1.

contact lenses, can be rendered inoperative under certain circumstances, including sharp blows, exposure to extreme weather conditions, chemicals, dust, etc.

Respondent's argument that it is unlikely Wood could verify Handicapped Expanded Certification (HEC) eligibility need not be considered to decide this matter. The action causing this claim occurred before the need arose for Wood to verify his HEC status.

In conclusion, the Commission recognizes that complainant is a highly dedicated individual who is committed to a career in law enforcement. It is indeed unfortunate that his vision limitations have prevented him from pursuing this career path with the State Patrol. However, the Wisconsin legislature and courts have recognized that the rights of a handicapped individual must be balanced against the public safety in cases such as this. State troopers must be prepared to use .357 magnum pistols and 12 gauge shotguns under many kinds of adverse, life-threatening conditions. The record is clear that while these emergency situations occur rarely, they will happen, and each trooper must be prepared to react to such situations. It is obvious that if a trooper with 20/400 vision loses the use of his or her corrective lenses due to assault, adverse weather conditions, exposure to chemicals, or other vagaries of this job, his or her vision will be severely restricted (copies of photographs representing 20/20 and 20/300 vision (which is better than complainant's)) are attached to this decision), and the public safety will be imperiled as a result. Respondent has adequately demonstrated a reasonable relationship between its decision rejecting complainant and the responsibilities of this position, including its special duty of care to the public.

ORDER

For the foregoing reasons and based on the record, complainant's claim of discrimination against him by respondent is dismissed.

Dated: _____, 1988 STATE PERSONNEL COMMISSION

DENNIS P. MCGILLIGAN, Chairperson

DRM:rcr
RCR01/4

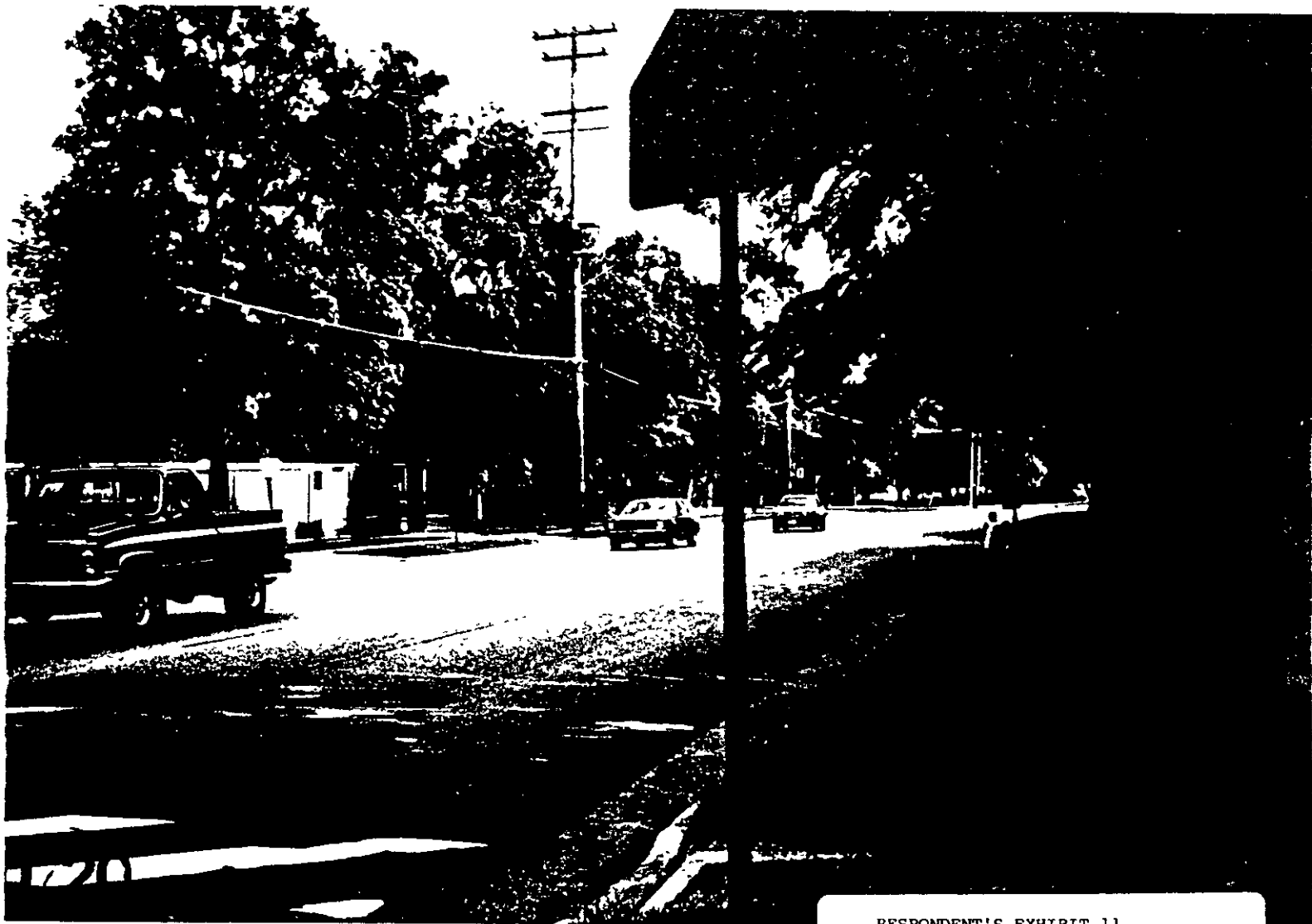
DONALD R. MURPHY, Commissioner

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RESPONDENT'S EXHIBIT 11

PHOTOGRAPH #1



RESPONDENT'S EXHIBIT 11

PHOTOGRAPH #2