

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*  
JAMES SCHAUB, JR.,  
Appellant,  
v.  
Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,  
Respondent.  
Case No. 90-0095-PC  
\* \* \* \* \*

FINAL  
INTERIM  
DECISION  
AND  
ORDER

The Commission, having reviewed the proposed decision and order and the objections thereto and having consulted with the hearing examiner, adopts the proposed decision with the following additions for purposes of clarification and correction:

I. The following underlined language should be added to Finding of Fact 2 so that it reads as follows:

2. In 1981, appellant applied for an entry-level state civil service position classified as an Officer 1 and was certified for this position as a result of Handicapped Expanded Certification. Appellant qualified for Handicapped Expanded Certification based at least in part on the fact that he was a client of the Department of Vocational Rehabilitation at the time.

II. Finding of Fact 8.g. should be modified so that it reads as follows:

g. Officer 1 position: applicant has a condition characterized as post status lumbar laminectomy X2 and is unable to do any heavy labor; applicant's employment history indicates that he was unable to find employment due to past history of surgeries for this condition; Mr. Bell originally determined that applicant was not eligible for HEC certification based on the opinion of physician Gary Anderson that the applicant did not have a specific physical or mental impairment which substantially limited one or more life activities; Mr. Bell later rescinded this determination and granted HEC eligibility based upon a conflicting opinion from a different physician and verified this opinion by speaking to this second physician's nurse.

III. Conclusion of Law 3. should be modified to read as follows:

3. The appellant has established that the decision was invalid in that it was based upon an improperly promulgated administrative rule.

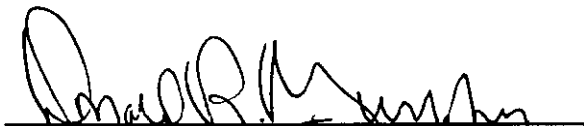
IV. At the end of the third sentence in the first full paragraph on page 8, the following language should be added:


Respondent argues that it is inappropriate for the Commission to give any weight to the documents offered by appellant relating to HEC eligibility determinations made in regard to applicants other than appellant. (See Finding of Fact 8, above). These documents, however, are very relevant to the practice followed and the criteria applied by respondent in making HEC eligibility determinations. Respondent had ample opportunity to respond to or to attempt to rebut or explain this evidence at hearing. In addition, simply because some of these determinations were made by staff members other than Mr. Bell, they are nonetheless attributed to respondent in its capacity as the employing agency.

Dated: October 17, 1991 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

Parties:

James Schaub Jr  
15 Winnebago St  
North Fond du Lac WI 54935

Robert Lavigna  
Administrator DMRS  
137 E Wilson St  
P O Box 7855  
Madison WI 53707

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JAMES SCHAUB, JR.,

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v.

Administrator, DIVISION OF MERIT  
RECRUITMENT AND SELECTION,

Respondent.

Case No. 90-0095-PC

\* \* \* \* \*

PROPOSED  
DECISION  
AND  
ORDER

Nature of the Case

This is an appeal of a determination by respondent DMRS that appellant was not eligible for certification under the Handicapped Expanded Certification program for appointment to an Officer 5 position for which he was considered in 1990.

Findings of Fact

1. Some time in 1980, appellant sustained a knee injury in a car accident. This knee injury prevented appellant from returning to his job as a construction worker.
2. In 1981, appellant applied for a state civil service position classified as an Officer 1 and was certified for this position as a result of Handicapped Expanded Certification. Appellant was appointed to this position.
3. Since 1981, appellant has been continuously employed as an Officer in a correctional facility and, as of May, 1988, his position was classified as an Officer 3. His performance as an Officer has been rated as satisfactory or above. The duties and responsibilities of an Officer involve steady walking, climbing stairs, and subduing inmates involved in physical altercations. Subduing an inmate may involve quick movements, lateral movements, quick changes in direction, lifting, squatting, or bending.
4. In May, 1988, appellant applied for and took the civil service examination for a promotion to Officer 5. As a part of this application process, appellant also applied for certification under the Handicapped Expanded

Certification program. In 1990, appellant's name appeared on a certification list, as the result of Handicapped Expanded Certification, for an Officer 5 position at Columbia Correctional Institution. The appointing authority for this position ranked appellant as the top candidate.

5. Respondent was then responsible for verifying appellant's eligibility for Handicapped Expanded Certification for this Officer 5 position. Appellant provided to respondent information from his physicians which indicated that appellant has torn ligaments in his left knee which has resulted in constant pain; a 10% loss of flexion; a decreased range of motion; and difficulty with steady walking, quick movements, changes in direction, climbing stairs, lifting, crawling, or squatting or bending. The information provided by the physicians also indicated that this was a permanent disability and that it was degenerative over time. Appellant had not visited a physician for treatment of this condition since 1984.

6. In February of 1990, respondent determined that appellant was not eligible for Handicapped Expanded Certification for this Officer 5 position. Respondent based this determination primarily on appellant's successful employment as an Officer in a correctional institution since 1981 and on the fact that appellant had not visited a physician for treatment of his knee condition since 1984. Appellant filed a timely appeal of this determination.

7. In performing the day-to-day duties and responsibilities of an Officer in a correctional institution, appellant experiences constant pain in his injured knee, often wears a neoprene wrap on his injured knee, and takes frequent short breaks to rub his injured knee. In addition, appellant is often unable to perform some of the physical activities associated with his position and has tried to accomplish the same objectives by substituting other activities or motions, by trying to perform the same physical activity but more slowly, and by requesting assignment to a unit on a lower floor.

8. The following relevant examples of respondent's determinations in regard to other applications for Handicapped Expanded Certification are a part of this record:

a. Institution Aide 1 position: the applicant suffered a neck fracture 10 years earlier and currently has recurrent neck pain, especially with heavy lifting, but a normal range of motion; respondent verified as HEC certified.

b. Management Information Technician 2 position: the applicant suffers from chronic back pain and is unable to sit for prolonged periods, to engage in repetitive reaching, or to lift more than 10 pounds; respondent verified as HEC certified.

c. Housekeeping Services Supervisor 1 position: the applicant suffers from a degenerative joint disease and is unable to engage in heavy lifting, carrying, kneeling, or climbing ladders; respondent did not verify as HEC certified.

d. Institution Aide 3 position: the applicant is a recovering alcoholic who had been sober for more than 2 years and who also suffers from a cancer phobia; the applicant's alcoholism had interfered with her job when she had been drinking; the phobia results from applicant having breast cancer and a resulting mastectomy and her fear of a recurrence; verified by respondent as HEC certified.

e. Social Worker 1 position with the Division (now Department) of Corrections: the applicant is a recovering alcoholic who had been sober for more than 5 years; the vocation/occupational limitation cited by her physician was that "if she starts to drink she will be unable to function in any area of her social or vocational life;" when she had been drinking, applicant had taken a leave of absence from her job for treatment purposes; verified by respondent as HEC certified.

f. Social Worker 1 position with the Division (now Department) of Corrections: applicant has chronic left elbow tendinitis and is unable to make repetitive motions with her left arm and suffers a 30% loss in strength in her left arm; verified by respondent as HEC certified.

g. Officer 1 position: applicant has a condition characterized as post status lumbar laminectomy X2 and is unable to do any heavy labor; applicant's employment history indicates that he was unable to find employment due to past history of surgeries for this condition; not verified by respondent as HEC certified.

h. Institution Security Director 2 position: applicant has carpal tunnel syndrome and wrist ganglias resulting in pain and loss of range of motion; the job limitations include inability to restrain inmates or qualify with handguns; not verified by respondent as HEC certified because currently employed in the same occupation as that applied for.

i. Clerical Assistant position: applicant, as the result of a car accident, suffers constant pain in the back of her neck and between her shoulder blades and a slight loss of motion in her left shoulder; the occupational/vocational limitation cited by her physician was that, if an employer knew that she had been treated by a physician over this period of time, he/she may be reluctant to hire her; verified by respondent as HEC certified.

9. Respondent believes that the purpose of the HEC program is to help get people started in employment and, as a result, gears the program to applicants for entry level jobs or to employees seeking changes in the type of job they hold. Respondent does not consistently verify that under-employment or unemployment or problems in employment are the direct result of an applicant's handicap.

#### Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.44(1)(a), Stats.

2. The appellant has the burden to prove that respondent's determination that appellant was not eligible for certification under the HEC program for the subject position was incorrect.

3. Appellant has sustained his burden of proof.

#### Opinion

The parties agreed to the following issue in this case:

Whether respondent's determination that appellant was not eligible for Handicapped Expanded Certification on the Officer 5 register for the position at Columbia Correctional Institution was correct.

The statutory authority for the Handicapped Expanded Certification program is found in §230.25(1n), Stats.:

(1n)(a) After certifying names under subs. (1) and (1m), the administrator may engage in expanded certification by doing one or more of the following:

1. Certifying up to 3 names of persons belonging to at least one of one or more specified racial or ethnic groups.

2. Certifying up to 3 names of persons of a specified gender.

3. Certifying up to 3 names of persons with a handicap.

(b) The administrator may certify names under par. (a) 1 or 2 only if an agency requests expanded certification in order to comply with an approved affirmative action plan or program. The administrator may certify names under par. (a) 3 only if an agency requests expanded certification in order to hire persons with a handicap.

Effective March 1, 1981, respondent promulgated §Pers 12.05, Wis. Adm. Code, which stated as follows:

The administrator may, when necessary to achieve a balanced workforce or to hire persons with disabilities, provide for certifications as a supplement to certifications made under the provisions of s. 230.24(1), or 230.25(1) and (1m), Stats., as follows:

\* \* \* \* \*

(2) Expanded certification of up to 3 additional names to hire the occupationally handicapped may be authorized by the administrator at the request of an agency. Such certification shall be limited to persons who have been certified by a physician, psychiatrist, psychologist or other appropriate specialist as having a disability, which has been determined to substantially limit employment opportunities and which does not require the person to successfully complete a training program to overcome the vocational handicapping effects of the disability prior to becoming employable.

The language of §230.25(1n), Stats., was added to the Wisconsin Statutes during 1985. The language of §Pers 12.05, Wis. Adm. Code, relating to handicapped expanded certification did not change until 1988 when §ER-Pers 12.06, Wis. Adm. Code, was created as the sole administrative rule provision relating to respondent's administration of the handicapped expanded certification program. Section ER-Pers 12.06, Wis. Adm. Code, was effective June 1, 1988, and provided as follows:

**ER-Pers 12.06 Handicapped Expanded Certification.** Upon request of an agency, the administrator may provide for certifications under the provisions of s. 230.25(1n), Stats., as a supplement to certifications made under the provisions of s.230.24(1) or 230.25(1) and (1m), Stats.

On May 20, 1988, respondent issued DER Bulletin No. MRS-82 which stated as follows:

Persons with disabilities which substantially limit their employment opportunities (i.e., their ability to obtain and/or retain employment) are eligible for HEC. Note that it is not just the presence of a disability which makes you eligible. You must also have reason to believe that the disability will cause you to have employment difficulties.

The first question the Commission must address is whether the criteria or standards contained in this bulletin should have been promulgated as an administrative rule, or whether they fit within one of the exceptions to the rule making requirement found in §227.01(13), Stats.

The criteria for participation in the HEC program stated in this handout (DER Bulletin No. MRS-82) is the only codification of a standard of general application. They obviously were intended as general policy directives, not as orders directed to a specifically named person, and not as merely informational materials within the meaning of §227.01(13), Stats. Furthermore, these criteria cannot appropriately be characterized as "personnel standards," which are exempted from rulemaking by §227.01(13)(L), Stats. The definition of "personnel standards" respondent advances is so broad that it would exempt large parts of respondent's explicit statutory responsibility from the rulemaking process:

The procedures for how to apply for a civil service position, how to take an exam, how exams are rated and scored, and how individual names are placed on the registers which are certified to the hiring agencies, are all parts of the certification process and are personnel standards which are not required to be promulgated as administrative rules. The HEC program is one of several expanded certification programs which are parts of the overall certification process. The standards for eligibility for any of these expanded certification programs constitute "personnel standards" under sub. (13)(L), which are not required to be promulgated as administrative rules.

This argument is inconsistent with §230.05(5), Stats.: "[t]he administrator shall promulgate rules for the effective operation of the provisions of this subchapter for which responsibility is specifically charged to the administrator," and the statutes which charge the administrator with, for example, the responsi-



bility for examination, §230.16, and certification and registers, §230.25. Furthermore, respondent's position is inconsistent with the fact that many of the existing rules governing examinations and registers fall into categories which presumably could be exempted as "personnel standards" under respondent's theory see, e.g., Ch.ER-Pers 6, 11 and 12, Wis. Adm. Code, regarding recruitment and examination, employment registers, and certification and appointment, respectively. As a consequence, these criteria were required to have been promulgated as administrative rules. The failure of respondent to have done so renders such criteria invalid.

Even if the Commission were to agree that it was appropriate for respondent to determine and apply these criteria, the record reflects that these criteria were not applied in a rational manner in the instant case and that respondent did not apply these criteria in a consistent manner in determining eligibility for the HEC program.

Respondent argues (post-hearing brief, p. 5) that, "the purpose of HEC is to help people with truly serious disabilities, not just minor disabilities" and that the severity of the disability is one of the criteria it applied in making HEC eligibility determinations. If, however, respondent actually keyed HEC eligibility to the severity of the applicant's disability, how then could the fact that appellant was verified as eligible for HEC in 1981 be reconciled with the fact that appellant was not verified as eligible for HEC in 1990 even though it is acknowledged by both of his treating physicians that his condition is degenerating. It does not appear from the record that this criterion was correctly applied to appellant's application for HEC eligibility.

Respondent has indicated that the primary criterion it has applied, as set forth in DER Bulletin No. MRS-82, is that an applicant show that he or she has had difficulty obtaining or retaining employment. However, if this criterion actually played a meaningful role in respondent's determination, why then did respondent not ask appellant what difficulties he had encountered in his employment as a result of his handicap. In addition, if this is actually a criterion upon which respondent relies in determining HEC eligibility, why then does respondent not consistently verify that an applicant's employment problems, including problems with under-employment or unemployment, are the direct result of an applicant's handicap. It appears from the record that respondent, in certain cases, has assumed that a handicapped ap-

plicant's recent history of under-employment or unemployment or problems in employment are directly related to his or her handicap. This approach presents a serious policy problem: it punishes handicapped individuals who have worked successfully to overcome their handicap in their employment and rewards handicapped individuals who have been unsuccessful in employment, regardless of the reason.

The record sets forth other problems relating to respondent's position in this regard. Appellant introduced into the record evidence relating to other HEC eligibility determinations rendered by respondent. An obvious limitation on the value of this evidence in this case is the failure of the record to specify the duties and responsibilities of the positions for which these HEC applicants were being considered and the nature of the information respondent may have obtained regarding these applicants' employment histories. However, in general, it is puzzling that respondent seems to be lenient in granting HEC eligibility to alcoholics who have been sober for a substantial length of time, and whose specified limitations are speculative, but much less lenient in granting HEC eligibility to applicants with certain orthopedic handicaps even though they were shown to interfere with the applicant's ability to carry out certain duties and responsibilities of the position for which they were being considered (See Finding of Fact 8h) or were shown to have clearly interfered with the applicant's ability to find employment, which was the primary criterion cited by respondent for its HEC eligibility determinations (See Finding of Fact 8g). The Commission concludes on this basis that respondent did not actually apply in a coherent manner the criterion stated in its May 1988 handout in making HEC eligibility determinations, including the one in the instant case.

While it is clear that respondent's determination that appellant was not entitled to HEC was incorrect and must be rejected, the question of what action should be required on remand presents some difficulty. The statutory authority for HEC, §230.25(1n), Stats., vests the administrator with some discretion in deciding whether to certify names upon a request for HEC, and provides little specific guidance as to the basis for that exercise of discretion:

(1n)(a) After certifying names under subs (1) and (1n), the administrator may engage in expanded certification by doing one or more of the following:

\* \* \*

3. Certifying up to 3 names of persons with handicap.

- (b) The administrator may certify names under par. (a) 3 only if an agency requests expanded certification in order to hire persons with a handicap. (emphasis added)

While the Commission must conclude that respondent acted incorrectly by improperly relying on criteria that were required to have been, but were not, promulgated as administrative rules, it cannot say, given the lack of specific guidance provided by §230.25(1n), Stats., and the discretion vested in the administrator by that subsection, that a correct result under §230.25(1n) would have been to have certified appellant as HEC eligible. That is, even if it were concluded that the term "persons with a handicap" in §230.25(1n) means persons with a handicap as defined in the FEA at §111.32(8), Stats., under which appellant clearly qualifies, the decision whether to certify anyone or someone under HEC still is discretionary: "[t]he administrator may engage in expanded certification," §230.25(1n)(a), Stats. Under these circumstances, the only appropriate remedy is to remand this matter to respondent for the exercise of its discretion under §230.25(1n), without reliance on the invalid criteria set forth in DER Bulletin No. MRS-82. See Wisconsin Telephone Co. v. DILHR, 68 Wis. 2d 345, 228 N.W. 2d 649 (1975); State ex cel Clifton v. Young, 133 Wis. 2d 193, 394 N.W. 2d 769 (Ct. App. 1986).

ORDER

Respondent's action of refusing to certify appellant under the handicapped expanded certification program pursuant to §230.25(1n), Stats, is rejected, and this matter is remanded for action in accordance with this decision.

Dated: \_\_\_\_\_, 1991      STATE PERSONNEL COMMISSION

\_\_\_\_\_  
LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt/2

\_\_\_\_\_  
DONALD R. MURPHY, Commissioner

\_\_\_\_\_  
GERALD F. HODDINOTT, Commissioner

Parties:

James Schaub Jr  
15 Winnebago St  
North Fond du Lac WI 54935

Robert Lavigna  
Administrator DMRS  
137 E Wilson St  
P O Box 7855  
Madison WI 53707