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PAUL J. PELLITTERI,
 Complainant,

v.

Secretary, DEPARTMENT OF
REVENUE,
 Respondent.

Case No. 90-0112-PC-ER

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FINAL
DECISION
AND
ORDER

Oral arguments were heard by the Commission in the above-noted case on October 12, 1994, pursuant to complainant's request. Most arguments raised already were addressed in the Proposed Decision and Order and, therefore, will not be repeated here. Some arguments warrant further comment as discussed in the following paragraphs.

Credibility of Agnes Cammer: Ms. Cammer's credibility is discussed in the Proposed Decision and Order (Discussion section, pages 10-11), in terms of testimony given at hearing. Complainant contended in oral arguments that the credibility determination also should consider Ms. Cammer's deposition testimony (Exh. J-2). The Commission considered this argument and consulted with the hearing examiner.

The following question and answer were given at Ms. Cammer's deposition (Exh. J-2, p. 14-15).

- Q Did you tell Paul about this permissive transfer from one agency to another?
- A: I don't think that I did. I was xeroxing [sic, probably should say "zeroing"] him in on -- talking with him on some training to get into the Clerical Assistant 1 and 2 Register, and I have that in here [reference apparently is to her file brought to deposition]. He will work with my assistant, Barb White. I urged him to get on the Clerical Assistant 1 and 2 Register. . . .

One reason why the examiner felt the above-cited exchange did not discredit Ms. Cammer's hearing testimony was due to what the examiner

perceived as complainant's own admission to discussing transfers to other agencies with Ms. Cammer. The admission occurred at hearing as shown by the transcript portions cited in the Proposed Decision and Order. (See transcript portions shown on pages 11-12 of the Proposed Decision and Order.) Due to complainant's admission, the examiner determined it was most likely that Ms. Cammer's recollection was incomplete at her deposition.

The examiner also had the opportunity to observe witness demeanor at hearing, an opportunity which did not exist with depositions. The examiner's observations of Ms. Cammer and complainant at hearing supported the conclusion that Ms. Cammer's recollection was incomplete at her deposition.

Lifting Restriction: Complainant, at oral argument, characterized the 20-25 pound lifting restriction noted in the proposed decision as speculative and, therefore, erroneous. (See paragraphs 28-30 of the Findings of Fact.) The Commission disagrees.

The medical records introduced by complainant support the finding that a 20 pound lifting restriction existed (Exh. C1, p. 8, entry for 3/28/88), as does complainant's prior information to the Commission (Exh. C2 where complainant asserts his physician imposed a 20 pound lifting/pushing restriction on 11/6/89), and his hearing testimony (T 16 of a 25 pound restriction). Further, complainant's doctor advised him on 7/7/89, that his residual problems were "most likely" permanent. (Exh. C1, p. 13) Similarly, on 10/20/89, his doctor advised him that improvement was "highly unlikely". (Exh. C1, p. 13)

Statutes to be liberally construed: Complainant's counsel noted at oral argument that s. 111.31(3), Stats., specifically provides that the Fair Employment Act is to be liberally construed to accomplish the purposes of the Act. The Commission is aware of the statutory provisions of the Fair Employment Act. However, the Commission believes that a liberal interpretation of current statutes does not support complainant's case.

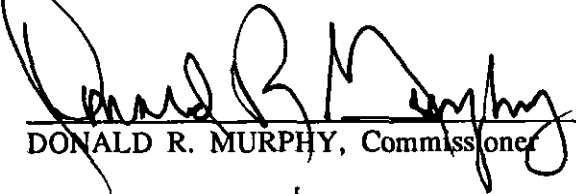
ORDER

That the Proposed Decision and Order be adopted as the Commission's Final Decision and Order as supplemented herein and, accordingly, complainant's case is dismissed.

Dated October 24, 1994.

STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Paul J. Pellitteri
14 North Rosa Road
Madison, WI 53705

Mark D. Bugher
Secretary, Department of Revenue
GEF III, 125 South Webster Street
P.O. Box 8933
Madison, WI 53708-8933

NOTICE

OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to

§227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

STATE OF WISCONSIN

PERSONNEL COMMISSION

* * * * *

PAUL J. PELLITTERI,
 Complainant,

v.

Secretary, DEPARTMENT OF
 REVENUE,
 Respondent.

Case No. 90-0112-PC-ER

* * * * *

PROPOSED
 DECISION
 AND
 ORDER

Mr. Paul J. Pellitteri filed a charge of discrimination with the Personnel Commission on July 11, 1990, alleging that the Department of Revenue (DOR) harassed him, treated him differently in the terms and/or conditions of his employment and discharged him because of his handicap; and further alleging that DOR failed to accommodate his handicap, all in violation of the Fair Employment Act (FEA), Subch. II, Ch. 111, Wis. Stats.

An Initial Determination (ID) was issued on November 3, 1992, which found Probable Cause to believe Mr. Pellitteri was treated differently in terms and conditions of employment because of his handicap when he was reprimanded during slow work periods. The ID further found No Probable Cause to believe respondent failed to accommodate his handicap; a finding appealed by Mr. Pellitteri.

Mr. Pellitteri filed a motion to add the State of Wisconsin as a party to his case. Such request was denied by the Commission in an interim ruling dated September 8, 1993.¹

¹ It appears the parties may have conflicting understandings about the import of the Commission's interim ruling. The ruling on page 5, states as follows:

Summary. The Commission in this interim order merely holds as follows: a) DOR lacks authority under Ch. 230, Stats., to appoint complainant to vacancies in other state agencies as potential employment to accommodate complainant's handicap; and b) the Commission lacks authority under s. 111.375(2), Stats., to add the [State of Wisconsin] as a party. The Commission does not resolve the question of whether a non-DOR appointing authority might

A hearing was held in the above-noted case on December 20, 1993, to provide testimony to supplement depositions accepted as part of the record. All exhibits were admitted by stipulation of the parties. The parties requested and were provided an opportunity to arrange for a hearing transcript and to submit briefs. The final brief was received by the examiner on May 13, 1994.

The parties agreed there was no dispute that complainant was handicapped at the times relevant to the case. Nor did Mr. Pellitteri dispute that he was unable to perform the duties of his regular position at DOR at the time of his discharge. The parties also agreed that the hearing decision would be issued on the merits of Mr. Pellitteri's claims, rather than a repeat of the probable cause review standard.

The hearing issues were defined at a status conference held on November 9, 1993, as follows:

1. Complainant's allegations regarding harassment are withdrawn and, therefore, will not be addressed at hearing.
2. Complainant's claim of handicapped accommodation in regard to respondent taking action via transfer to place him in a position with a different employing agency, will not be part of this hearing, pursuant to the Commission's Interim Decision and Order dated September 8, 1993.
3. Complainant's claim of handicapped accommodation will encompass a new allegation which complainant's counsel became aware of during discovery. The new claim will relate to respondent's alleged failure to aid or advise complainant as to permissive transfer opportunities.

have a duty to accommodate complainant's handicap if he had applied for a vacancy with a non-DOT (sic) appointing authority.

The above-noted language does not mean the Commission has reserved in this case the issue of appointment by non-DOR agencies for resolution sometime in the future. Rather, if complainant had applied at a non-DOR agency, and if the non-DOR agency rejected him, and if he had filed a timely charge of discrimination regarding the non-DOR agency rejection; then the Commission would have addressed the issue in a separate case. No such separate case exists.

FINDINGS OF FACT

Background Information

1. Mr. Pellitteri was employed by the Department of Revenue (DOR) as a Shipping and Mailing Clerk from 1972, until he was terminated on May 4, 1990.² The reason given by DOR for termination was DOR's inability to further accommodate his handicap. (T 11-12, 17-18)
2. Mr. Pellitteri's handicap resulted from injuries suffered in an automobile accident which occurred in September of 1987. Specifically, he suffered a broken leg (and/or a fractured hip), a badly twisted right ankle, cracked ribs and a broken nose. (Exh. C1-p. 3, T 12-13)
3. A rod was inserted in his femur to address the fractured hip problem (Exh. C1-p. 3) On December 8, 1987, he was released to work without restrictions. (Exh. C1-p. 5)
4. He developed Achilles tendonitis in connection with his right ankle injury, which was noted in medical records for the first time on February 15, 1988. (Exh. C1-p. 7) On March 28, 1988, his doctor allowed him to continue work but with a lifting restriction of 20 pounds, as well as a directive to "minimize ambulation". (Exh. C1-p. 8) On September 19, 1988, Mr. Pellitteri reported to his doctor that he was able to function at "both jobs" with minimal discomfort. (Exh. C1-p. 10)
5. The Achilles tendonitis problems continued to the point where surgery was performed on or about April 12, 1989, at which time his femur rod was removed. At his post-surgery visit on April 21, 1989, his doctor said he could return to a desk job starting April 24, 1989. (C1-p. 12) This date apparently was revised. Physician notes dated May 25, 1989, indicated he could return to work starting May 30, 1989, starting half-days for 2 weeks. (Exh. C1-p. 13)
6. On July 7, 1989, the physician authorized Mr. Pellitteri to work at his regular Shipping and Mailing Clerk job for one-half days, and at a desk job for the other half days. (Exh. C1-p. 13) His physician told him on October 20, 1989, that his residual problems probably would be

² Mr. Pellitteri was initially hired as a Shipping and Mailing Clerk 1. He was later promoted to a Shipping and Mailing Clerk 2 position.

permanent. (Exh. C1-p. 13) The restrictions of July 7th, were extended by his physician for 6 months, per medical notes of October 31, 1989. (Exh. C1-p. 39)

7. The record is unclear whether accommodations were requested and/or provided prior to November 3, 1989. However, there is no dispute about DOR's compliance with (accommodation of) all requested medical restrictions prior to Mr. Pellitteri's termination date.
8. Sometime after November 1989, DOR was informed that Mr. Pellitteri's medical restrictions were permanent.
9. Mr. Pellitteri's position with DOR required standing to operate mailing machines. The position also involved (to a limited degree) sit-down tasks such as bookwork, report writing, opening mail, etc. (T 13-14) There is no dispute that the physical abilities required for performance of his regular job duties exceeded his permanent medical restrictions.

Temporary Accommodations Made by DOR

10. DOR accommodated Mr. Pellitteri during a period of time (of at least 7 months starting November 3, 1989, and until termination, per Exh. C14) when DOR was working with him to prepare him for advancement opportunities. (Exh. R1, Attachment H, p. 7-8) Specifically, his job duties were changed on a temporary basis to meet his medical restrictions. He was given some sit-down clerical duties (T 131) for 4 hours each day and regular light duty for the remaining 4 hours (Exh. C2). This restructuring of his position could not be made on a permanent basis under the civil service code due to the higher pay range involved with clerical versus mail-room duties, as discussed in the following paragraph. (Exh. C14) (T 17, 96-97 & 131-132)
11. The position held by Mr. Pellitteri in the mail room was a Pay Range 5 (PR 5), which is the lowest permanent classification at DOR (T 97-98 & 101) and, perhaps, the lowest full-time permanent classification in state civil service. (T 88) He was ineligible for a permanent intra-department transfer (meaning a transfer within DOR) to clerical positions because the lowest-classified clerical position was Clerical Assistant 1 which was a Pay Range 6 (PR 6). Civil service rules do not allow a transfer to a higher classification. Rather, Mr. Pellitteri would

be required to qualify through competition. [T 97-98 (reading from Exh. J2), 116-117 & 128-129]

12. The mail room utilized limited term employee (LTE) clerical helpers to perform clerical duties for the mail room. Clerical helpers were at a pay range lower than Mr. Pellitteri and were employed to help during peak tax periods (January through May of each year). (T 120 & 130)
Complainant was not interested in exploring the potential of employment in one of the LTE clerical helper jobs. (T 136-137)

Mr. Pellitteri's Case-Theory Regarding Permissive Transfers

13. DOR has a written policy entitled "Disability Accommodation Policy and Procedures". (Exh. C7) (T 55) The policy states (on p. 6) that employees "will be counseled regarding their rights to other positions in state employment". DOR interprets this to mean that DOR has staff available to answer employee inquiries about applying for state jobs. (T 62)
14. The crux of Mr. Pellitteri's case is based on the language from DOR's policy, as cited in the prior paragraph. He believed such language created a duty for DOR to have a DOR staff person either: a) Review job bulletins for "permissive transfer" vacancies in other agencies to determine if he could perform the work and, if so, bring the vacancy to his attention; b) Explain how he could get such bulletins himself; and c) Aid him in obtaining "permissive transfer" jobs in which he expressed an interest by, for example, calling the hiring authority and encouraging them to hire him. DOR disagrees. (C's Initial Brief, p. 14) (T 67-69 & 71-73)
15. A "permissive transfer" is a non-statutory term used to refer to inter-department transfers which are unregulated by union contracts.³ Use of "permissive" as an adjective to describe the transfer reflects the fact that the decision to hire an employee from a different agency is within the discretion of the hiring agency. A more detailed summary of the process is provided in the following exhibits: Exh. J3-p. 14 and Exh. J4-p. 7 & 30-33.

³ An inter-departmental transfer covered by union contract is referred to as a "contractual transfer". (Exh. J3-p. 16)

Agnes Cammer's Efforts to Aide Mr. Pellitteri to Find Suitable Employment

16. Agnes Cammer works for DOR as the Employee Development and Training Officer and the Affirmative Action Officer. (T 93) She first met with Mr. Pellitteri on July 12, 1989, in her role as coordinator of DOR's Employee Assistance Program and the Employee Development and Training Program. (Exh. C12; Exh. J2-p. 4 and Exh. R1-p. 3-4 of attachment H) (T 93) She helped him complete a Disability Accommodation Request Form for filing with DER. (Exh. C14) (T 94) A completed form includes the following three descriptions: a) of the claimed disability, b) of how the disability impacts on his ability to perform his present job and c) of requested accommodations. (T 94-95)
17. In November 1989, after Mr. Pellitteri's doctor extended restrictions for another six months (see par. 6 above), DOR developed the following accommodation plan which was signed by Ms. Cammer on November 6, 1989 (Exh. C14):

Employee's job duties have been re-structured by assigning him on a part time schedule as Shipping & Mailing Clerk with other clerical duties effective 11/3/89. Employee is expected to return to full time Shipping & Mailing Clerk duties as of April 30, 1990, per Diane Hardt, Bureau Director, Tax Processing. I concur with this action.

18. Ms. Cammer counseled Mr. Pellitteri regarding his rights to other positions in DOR (T 95 & 101).
19. Although Mr. Pellitteri never specifically inquired about transfers in other agencies (T 45)⁴, Ms. Cammer provided information about it. She referred him to the explanation in the employee handbook (Attachment B & C to Exh. R1). The handbook indicates how to apply for non-DOR positions.⁵ Ms. Cammer also told him that once he went to DER, he could

⁴ Mr. Pellitteri appears to dispute this contention in his initial brief. On page 13 of his brief he alleges he asked "time and time again" for a transfer to a job which would accommodate his handicap, even outside of DOR. Mr. Pellitteri provided no supporting citation to the record, and the examiner found none.

⁵ Page 3-5 of DOR's employe handbook provides as follows:
Interdepartmental Transfer

- go to each personnel officer of the respective agency he was interested in to submit his application. (T 95-96, 99-100, 102 & 103)
20. Ms. Cammer (through her assistant) provided Mr. Pellitteri with a list of classifications counterpart to his own to which he would be eligible for transfer if vacancies existed in other state agencies, along with a list of the respective testing dates. (Exh. C4) (T 100 & 107-110)
21. Ms. Cammer informed Mr. Pellitteri about services from the Department of Vocational Rehabilitation (DVR). (Exh. C4 and Exh. R1-p. 11-15 of Attachment H) (T 31-32 & 109-110) He contacted DVR and, as a result, DVR agreed to provide him computer training which could have enhanced his employability within and without DOR. DOR subsidized the training by providing some paid time off work. (Exh. C4) He attended the training. (Exh. C2)
22. Ms. Cammer assisted Mr. Pellitteri in obtaining opportunities to upgrade his skill level to enable him to apply for more advanced positions. (Exh. J2-p. 12-15) (T 18 & 101-102) He took and passed one or two tests for promotional clerical positions, but these did not lead to permanent employment in state service.
23. DOR has 1,200 employees. (T 100) At the time Ms. Cammer was assisting Mr. Pellitteri, she also was providing similar counselling to about a dozen other handicapped DOR employees. (T 105-106.)

Resources Known to Mr. Pellitteri

24. Mr. Pellitteri's position was located in DOT's mail room, one floor below street level. A jobs bulletin board existed just outside the mail room which contained postings of all civil service job openings, including

The Department of Employment Relations maintains a listing of employees by their present classification who have filed a "Request for Transfer/Reinstatement" form. This listing is available to all agency personnel managers upon request. The request to transfer/reinstate is maintained for up to six months.

Employees may also contact personnel managers of agencies where they would like to work, so that they will know of your interests and qualifications. Should they have a vacancy you would be interested in, ask them to consider you as a transfer. An agency may also consider you along with applicants certified to them from a civil service register.

transfer opportunities. (Exh. J4, p. 5-6) (T 118) A second and third jobs bulletin board existed in the same building in a glassed-in case. One glassed-in-case was located just outside the men's rest room on first floor. The other was located on second floor by the coffee shop. (T p. 118-119).

25. Mr. Pellitteri knew where the jobs-boards were and that civil service job opportunities were posted on them. (T 32-35, 40) He further knew (or should have known) he could obtain his own free copy of any job announcement in which he was interested, by requesting the same of DOR's personnel office. He also knew that DER was the state-agency clearinghouse for civil service job opportunities. (T 135) He never went to DER to make inquiries (T 48-50, 135-136, 139)⁶ or to have DER mail job bulletins to his own home⁷ (T 40-41, 46-47), at a cost of \$9 for 6-months and \$18 for 12-months. (See cover pages to C8-C11).
26. Mr. Pellitteri also knew there were transfer provisions contained in the union contract (Attachments D & E to Exh. R1) which covered his Shipping and Mailing Clerk job. He went to a union steward for information about transfers, but that person did not know the answers to his questions. The steward suggested that he contact a different person in the union, but he never followed-up on the suggestion. (T 138-139, 141)
27. Mr. Pellitteri knew (or should have known) from his long-standing employment with the State (T 28-29, 40-41, 49 & 135-136), from his *knowledge of the union contract, and from information provided by Agnes Cammer and contained in DOR's employee handbook; which agencies and organizations to go to pursue lateral transfers in other agencies (transfers to another PR5 position) (Exh. J1-p. 10-11 and Exh. J4-p. 33) and to pursue retraining to improve his skills and thereby improve his chances of employment.* Despite this knowledge, he took

⁶ One possible exception exists, as noted at T 43.

⁷ The job bulletins posted at DOR, contain information about home mailings. Such information is located on the first page of the bulletins. (See Exhs. C8-C10, for example.)

very limited steps to develop (or even to learn more about) these options. (See, for e.g., T 49)

Alleged "Missed" Transfer Opportunities

28. Mr. Pellitteri, as part of his discovery in this case, asked DER to provide copies of all state-job bulletins issued from July 1, 1989 through April 1, 1990. (J3-p. 20) DER complied with the request at a continued deposition. (J4)
29. Mr. Pellitteri faults DOR for failing to bring the following non-DOR employment opportunities to his attention:
 - a. Stock clerk 2 for the Madison area, as announced on September 1, 1989 (Exh. C8). However, a vacancy did not exist. Rather, a new recruitment list was being established through the announcement. (Exh. J4-p. 9-10 & 14)
 - b. Stock clerk 2 for the Waupun and Winnebago areas, as announced on September 17, 1989 (Exh. C9).
 - c. Parking attendant for the Madison area, as announced on December 17, 1989 (Exh. C10).
 - d. Stock clerk 2 for the Tomah area, as announced on December 17, 1989 (Exh. C10).
 - e. Stock clerk 1, part-time for the Fox Lake area, as announced on March 17, 1990 (Exh. C11).

Mr. Pellitteri would have been eligible to seek transfer (without competition) to the PR5 positions listed in "a." through "d." above. The position in "e." above involved a demotion.

30. Mr. Pellitteri felt all positions noted in the prior paragraph would have met his medical restrictions, but failed to prove his opinion. He offered no expert medical evidence to support his opinion. Further, his opinion is contrary to the job descriptions provided in Exhibits C8 through C10. The stock clerk positions were required to receive and stock supplies, which suggests a required ability to lift weights. In fact, the positions noted in Exhs. C10 and C11, expressly include a lifting requirement of 25 pounds or more. Similarly, the parking attendant position required lifting of about 50 pounds. The last-noted lifting restriction for Mr. Pellitteri in this record 20 or 25 pounds (Exh. C14) (T 16) (Also, see par. 4 above).

CONCLUSIONS OF LAW

1. This matter is properly before the Commission, pursuant to s.230.45(1)(b), Stats.
2. Complainant is handicapped, within the meaning of s. 111.32(8), Stats., and therefore eligible for the protections of the accommodation provisions of s. 111.34(1)(b), Stats.
3. Respondent did not fail to accommodate Complainant's handicap.

DISCUSSION

Credibility Issues

Regarding Ms. Cammer:

Mr. Pellitteri, in his initial brief, contests the credibility of Ms. Cammer's testimony that she provided inter-departmental transfer information to him. The examiner considered his arguments, but disagreed with his conclusions.

The examiner acknowledges that DOR witnesses (Kaphingst and Cammer, in particular) appeared confused regarding whose duty it was to "counsel" Mr. Pellitteri regarding his "rights to other positions in state employment", as called-for under DOR's written accommodation policy. (See par. 13 of the FINDINGS OF FACT.) The examiner, however, felt such confusion was due to differing definitions of the term "counsel".

The definition confusion noted by the examiner is most clearly shown by Ms. Cammer's testimony at hearing. On page 95-96 of the hearing transcript, the following exchange occurs:

Q Did you counsel Paul relative regarding his rights to other positions in state government?

A In Revenue. I did not in state government. I just showed him -- referred him to the employee handbook on how to transfer and explained that at that time if he wants an interdepartmental (sic) that's within Revenue, that I will be the one to handle it.
If it's not, then he will have to go to the Department of Employment Relations here they have people who can help him find what are available within the state, and I also told Paul that once it goes to the DER, I said DER that's the Department of Employment Relations, then he could go to each personnel officer of the respective agency that he's

interested in and submit the resume or make an application or whatever that the specific department's rules are, to follow them and indicate his interest of transfer.

The above-noted excerpt shows that Ms. Cammer's answer assumed a difference existed in the word "counsel", as opposed to the guidance she provided. Her confusion about the meaning of words did not raise a credibility issue in the examiner's opinion.

Regarding Mr. Pellitteri:

Mr. Pellitteri initially testified that Ms. Cammer did not refer him to DER. He also denied that she even discussed transfers to other agencies with him. (T 133-134) However, he later provides contrary testimony.

The hearing transcript (T 137-138), contains the following exchange:

Q Prior to your discharge what was your understanding about transfer opportunities that may have been available to you or any state employee?

A I wasn't real sure on, you know, the procedures.

Q What did you do to try to find out the procedures, if anything?

A Ask somebody.

Q Who did you ask?

A Probably Agnes. I mean, I wanted to know what could be done to save me from being fired, whether it was transfer me up to Eau Claire or anything. I mean, I was willing to relocate or anything it took. They just says, "Well, you'll have to go check everything out, I guess."

Q They told you that you'd have to go to other agencies to check things out?

A Well, it's not their responsibility. And I says, "Well, who do I contact," and they said -- just, they weren't real helpful.

Q Who did they advise you to contact?

A Nobody, really, except other -- I mean, they really didn't know who, you know, because like if there was somebody in Eau Claire, I guess they didn't know what to do.

An additional exchange occurred, as noted on pages 139 of the hearing transcript. Relevant portions are shown below:

Q I have an impression from the record today that I want to clarify with you whether it's a correct impression. It seems that you did go to the personnel office at DOR, but otherwise you had no efforts really of your own to search for jobs during this period?

A Well, when I asked for information on who to go to nobody was telling me.

Q I thought before you said they advised you to go to the specific agencies?

A They said try someplace else, but I wanted to know -- you know, I would ask them, you know -- I figured the information was available to them, that the state would know who to contact, what departments, what agencies even, to have the information that I didn't have.

The examiner concluded from the foregoing exchange that the topic of inter-departmental transfers was discussed by Mr. Pellitteri and Ms. Cammer. His statements to the contrary were not credible.

Accommodation Statute

Wisconsin statutes require accommodation of an employee's handicap within certain limits. Section 111.34 (1) of the Statutes provides in relevant part as follows:

(1) Employment discrimination because of handicap includes, but is not limited to:

* * *

(b) Refusing to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business. (Emphasis added.)

The determination of what constitutes a reasonable accommodation, within the meaning of s. 111.34(1)(b), Stats., is the focus of inquiry here. Some interpretive guidance has been developed in case law.

The Wisconsin Court of Appeals has held that the duty of reasonable accommodation must be viewed on a case-by-case basis, and may include transfer to another position at least where the employee requests transfer to a specific vacant position. McMullen v. LIRC, 148 Wis. 2d 270, 271-2, 434 NW2d 830, ___ (1988) Some factors to consider in determining whether transfer to

another position would be a reasonable accommodation include: 1) the relationship between the two positions, 2) their nature and physical location and 3) the employe's ability to perform the duties required in the transfer position. Id., 148 Wis. 2d at 276. The concurring opinion offered one interpretation of these factors which would require transfer only if the transfer job were "job-related" to the initial job. Id., 148 Wis. 2d at 277-9 As illustrative of the "job-related" test of the concurring opinion, it was noted that an initial position as wood cutter would not be "job-related" to the transfer position of accountant.

The McMullen case did not address the question of whether an employer has a duty as a reasonable accommodation to advise (and/or advocate on behalf of) handicapped employes regarding transfer opportunities which exist within (and/or outside of) the employing agency's hiring authority. Nor does McMullen indicate whether the answer to these questions should differ depending on whether the handicapped employe inquired about transfer opportunities. These are the issues presented in Mr. Pellitteri's case.

Transfers Within DOR

DOR's responsibility relative to in-house (within-DOR) transfers is codified section 230.37(2), Stats., as part of the civil service code. The provision is shown below in pertinent part.

When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his or her position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer the employe to a position which requires less arduous duties, if necessary demote the employe, place the employe on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss the employe from the service. . . . (s. 230.37(2), Stats.) (Emphasis added.)

Respondent contends the Commission's inquiry should end in Mr. Pellitteri's case because DOR established compliance with s. 230.37(2), Stats. The record establishes DOR's compliance with the civil service code. The civil service code does not require DOR to consider transfers outside of DOR. Simply stated, DOR lacks authority to dictate the hiring decisions made by non-DOR agencies. (See Commission's interim decision dated September 8, 1993).

Nevertheless, DOR's accommodation duty under the FEA arguably might include actions not required under the civil service code. For example, the FEA arguably might require DOR to provide information on non-DOR transfer opportunities; as well as to advocate for a handicapped employee's hire by a non-DOR agency.

Transfers Outside of DOR

Regarding Duty to Inform: DOR provided information to Mr. Pellitteri regarding transfer opportunities outside DOR, as noted in par. 19 and 20 of the FINDINGS OF FACT. Based on the findings, it is irrelevant to the disposition of this case whether DOR's efforts were performed on a voluntary basis or under statutory requirements. Therefore, it is unnecessary for the Commission to resolve whether DOR's accommodation duty under the FEA includes a duty to provide information to Mr. Pellitteri about transfer opportunities outside of DOR; and the Commission respectfully declines to do so.

Regarding Duty to Advocate: Mr. Pellitteri argued that the reasonable accommodation provision in the FEA, required DOR to do more than inform him about transfer opportunities outside DOR. Mr. Pellitteri felt DOR also should have reviewed state job bulletins for positions in non-DOR agencies and determined whether the duties of those jobs fit within his medical restrictions. He further argued that if DOR felt he was able to perform jobs in non-DOR agencies, then DOR was required to give him a copy of the job announcement and to aid him in obtaining the transfer by, for example, encouraging the non-DOR agency to hire him.

DOR counters that its duties under the FEA are limited to those enumerated in s. 230.37(2), Stats., of the civil service code. For the reasons discussed below, the Commission concludes that DOR met all duties under the FEA. Therefore, it is unnecessary for the Commission to resolve whether DOR's accommodation duties under the FEA are limited to the duties required under the civil service code.

The Commission disagrees under the circumstances presented in Mr. Pellitteri's case that DOR's duty of reasonable accommodation under the FEA required DOR to search for non-DOR positions and to advocate for his hire in such suitable positions. Mr. Pellitteri did not request DOR to provide

information and/or advocacy in relation to transfer opportunities in non-DOR agencies. Even so, DOR provided information to Mr. Pellitteri which would have enabled him to pursue transfers to non-DOR agencies. Mr. Pellitteri was a long-term employe in state service. He knew (or should have known) where to inquire further about transfers to other agencies and he was capable of undertaking such task if he was interested in obtaining such employment.

Cases cited by Complainant: Mr. Pellitteri cited cases from other jurisdictions to support his argument that DOR's reasonable accommodation duty included advocacy in relation to transfer opportunities. The Wisconsin Supreme Court has expressly rejected looking to other laws as interpretive guidance to the reasonable accommodation provisions of the FEA. McMullen v. LIRC, 148 Wis. 2d at 275-276. Mr. Pellitteri's arguments, however, are addressed below because the issues were briefed by both parties for Commission response.

Mr. Pellitteri cited the following two cases: Dean v. Metropolitan Seattle, 104 Wash2d 627, 708 P2d 393, 51 FEP 793 (1985) and Clarke v. Shoreline School District, 106 Wash2d 102, 720 P2d 793, 57 FEP 442 (Wash. Sup. Ct. 52139-5, 6/12/86).⁸ Each case presented a question of transfer as a reasonable accommodation under Washington's state handicapped statute. In Clarke, the employer rejected the handicapped employe's requested transfer and took no affirmative steps to help him find another position. Id., 57 FEP at 444. In Dean, the handicapped employe argued that the employer violated its duty to reasonably accommodate him due to the employer's refusal to notify or even consider him of vacant positions he could perform. The Dean court concluded as follows:

Metro failed to make reasonable accommodations to Dean's handicap when he informed it of his illness in that Metro treated him as any other job applicant, did not determine the extent of his disability, did not call him into the office to assist him in applying for other positions but left the initiative to him. He received no special attention from the personnel office when he tried to find another position with Metro. In addition, Metro acknowledged having job openings that Dean could not have

⁸ Complainant actually cited the lower court's decision in Clark, which he cited as 106 Wash2d 102, 720 P2d 792.

discovered on his own. Metro personnel made themselves available to Dean but took no affirmative steps to help him find another position. This was required of them as "reasonable accommodation". 51 FEP at 798.

The Clarke court considered the rationale of Dean, and concluded as follows:

Reduced to its essence, Dean stands for the following propositions: First, the employer has no duty to create a job for a handicapped employee or to hire him in preference to a more qualified employee. (cite omitted) Second, there is no discrimination in denying a job to a handicapped person who is unqualified to perform it. Third, if a handicapped employee is qualified for a job within an employer's business, and an opening exists, the employer must take affirmative steps to help the handicapped employee fill the position. Failure to satisfy the requirements of this third principle constitute handicap discrimination in violation of [state statute]. 57 FEP at 449 (Emphasis contained in original.

The rulings of the Dean and Clarke cases have no application in the context of Mr. Pellitteri's case for at least three reasons. First, the cases provide interpretation of state statutes other than Wisconsin's FEA. Second, the Dean and Clarke cases limit their ruling to vacancies "within the employer's business". DOR met this requirement because position alternatives within DOR (over which DOR had appointment authority) were considered. The rationale of Dean and Clarke does not extend to position alternatives outside of DOR. Third, DOR took "affirmative steps" to help Mr. Pellitteri find alternative employment not only within DOR, but also outside DOR. He was not left hanging by DOR in regard to transfer opportunities. He could have discovered the existence of transfer opportunities within and outside of DOR on his own. Information was provided on how he could pursue transfers to non-DOR agencies and he knew such opportunities were listed in state employment bulletins which were very accessible to him. Furthermore, DOR worked with Mr. Pellitteri and his physician to determine the extent of his disability and to suggest appropriate employment and training alternatives.

Additional Arguments Raised by Complainant: Mr. Pellitteri argues on p. 13 of his initial brief that DOR's efforts to encourage him to

upgrade his skills to get a better job were commendable, but in his case were not practical, possible or individualized. Clarification of this argument was provided on the first page of his reply brief where he contended that it should have been obvious to DOR that he was not capable or interested in an upgrade for promotion. He further contended it should have been obvious to Ms. Cammer that the only viable option was permissive transfer. The Commission disagrees.

Mr. Pellitteri expressed an interest in training to upgrade his skills and, in fact, attended such training. He also took exams for promotional opportunities. (FINDINGS OF FACT, pars. 21 & 22) It would have been unreasonable for DOR to conclude from this that Mr. Pellitteri was not capable of or interested in advancement.

Mr. Pellitteri never even requested DOR to provide information about non-DOR transfers (FINDINGS OF FACT, par. 19) Nor did he request DOR to advocate on his behalf for non-DOR positions. Under these circumstances, it would not have been obvious to Ms. Cammer that permissive transfer was the only viable option.

The remaining major argument advanced by Mr. Pellitteri was that Ms. Cammer breached the duty DOR owed him under its accommodation policy to "counsel" him regarding non-DOR transfer opportunities. This argument already has been addressed in connection with duties under the FEA.

Perhaps complainant is arguing that respondent's accommodation policy created a contractual obligation beyond duties owed under the FEA. The Commission, however, lacks jurisdiction to consider such an argument. The Commission's jurisdiction in this case pertains to requirements under the FEA, which were met by DOR in Mr. Pellitteri's situation.

ORDER

That this case be dismissed.

Dated _____, 1994.

STATE PERSONNEL COMMISSION

cc: Attorney Archie E. Simonson
Attorney Kevin B. Cronin