



STATE OF WISCONSIN

PERSONNEL COMMISSION

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MICHAEL CHADWICK,

Appellant,

v.

Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION, and
Secretary, DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

Respondents.

Case No. 91-0177-PC

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is an appeal of a decision by respondents to remove appellant's name from a certification and related employment register. A hearing was held on December 2, 1991, before Gerald F. Hoddinott, Commissioner. At this hearing, respondent DHSS renewed its motion to dismiss DHSS as a party to this appeal which had been denied without prejudice by the Commission in an Interim Decision and Order issued October 21, 1991.

Findings of Fact

1. Some time in 1991, appellant applied for and took an examination for the Resident Care Technician 1 (RCT 1) classification. As the result of his score on the examination, appellant's name was placed on a certification list which was forwarded to the Central Wisconsin Center (CWC), an institution for the developmentally disabled administered by respondent DHSS.

2. CWC has several steps in its procedure for screening candidates for hire for RCT 1 positions. One of these steps involves a physical examination. This physical examination includes the completion by the candidate of a physical examination questionnaire; a back screening which involves an assessment of the condition of the back, wrists, and knees, among other things; and a review of the completed questionnaire and the results of the back screening by a staff physician at CWC. The back screening involves an

assessment of the candidate's posture and movements by a physical therapist; an assessment of the candidate's flexibility and strength by a physical therapist; and the assessment of muscular endurance and of a simulation exercise involving the movement of a dummy by a physical therapy assistant.

3. Appellant's completed physical examination questionnaire indicated that he had undergone lumbar back fusion surgery in 1980, surgery on his left knee in 1977, and bilateral (both wrists) carpal tunnel surgery. The back screening of appellant indicated generally normal posture and movement with the exception of some limitations in back and wrist movements and knees which were mildly hyperextended; good flexibility and strength on each of the exercises except unilateral hamstring raises, double leg raises, and back extensor flexibility; and good performance on the muscular endurance and dummy simulation exercises. The physical therapy assistant who completed the muscular endurance and dummy simulation exercises stated in her assessment that: "Good candidate--appeared to have no problems--good body mechanics."

4. Pearl Sanders, M.D., the employee health physician at CWC, reviewed appellant's completed physical examination questionnaire and the results of his back screening and concluded as follows:

In view of the (left) knee surgery, bilateral carpal tunnel surgeries, & lumbar back fusion surgery, I do not feel I can recommend Mike for this position. General health good otherwise.

Dr. Sanders signed this recommendation on August 12, 1991.

5. Nathan Page, M.D., the Medical Director at CWC, reviewed Dr. Sanders' recommendation and concurred with it. This recommendation was then forwarded to CWC's personnel unit. In a memo dated August 14, 1991, to Al Bell of the Department of Employment Relations, Brian Fancher, the Personnel Director at CWC, stated as follows, in pertinent part:

Mr. Gerald Dymond, Appointing Authority, Director of Central Wisconsin Center, requests the removal of the following applicants from the 07/31/91 50% RCT-register and the 07/31/91 100%-RCT registers.

Dr. Nathan Page, Medical Director at CWC reviewed these 3 applicants and has determined that they would never be able to perform this type of work. Passing a physical examination and a back screening, both performed here at the Center, are required

qualifications for this position. We are therefore requesting immediate removal from the RCT registers.

This request is being made per subsection ER-pers 6.10(1) Wis. Adm. Code. This provides for the removal of an applicant from certification "who is found to lack any of the predetermined qualifications for the position."

94.29	387-60-0340	Daniel Hill 165 Tower Dr. Sun Prairie, WI 53590	100%
93.57	393-82-4174	Brian Peck 1121 Knapp St. Oshkosh, WI 54901	100%
87.86V	394-58-8886	Michael Chadwick 4109 Barby Lane Madison, WI 53704	100% & 50%

Please contact Elly Slaney-Bartels at 249-2151 x206 as soon as possible as to whether or not these applicants can be removed. It is extremely critical that we have a prompt response to this request.

6. In a letter dated August 15, 1991, Mr. Bell advised appellant that his name had been removed from the RCT 1 certification and register pursuant to §6.10(1), Wis. Adm. Code, for failure to meet the required medical or physical standards for the position. Appellant filed a timely appeal of this removal with the Commission.

7. Order 5.18 of the Personnel Section of CWC's internal administrative orders provides that:

All persons selected for employment at CWC are required to have a complete physical examination and medical evaluation by CWC medical staff prior to employment. Medical approval by the Medical Director or delegate is required prior to offer of employment

8. The duties and responsibilities of RCT 1 positions at CWC require the ability to lift and carry a maximum of 55 pounds numerous times on a daily basis from either a standing, kneeling, sitting or stooping position. RCTs are assigned to units based on the transfer provisions of the applicable collective bargaining agreement. Typically, the most desirable positions, i.e., those which do not require night work and those assigned to the units which house the less volatile and more ambulatory residents, are filled through transfer requests from the more senior RCTs and the less desirable positions are then

available for new hires and less senior RCTs. 75% of CWC's residents are not ambulatory at all and, of the remaining, most are only partially ambulatory. On each unit, RCTs are required to move and reposition each resident every 2 hours. On some units, RCTs perform as many as 100 lifts per day. RCTs, even though they may be assigned to particular units, are often required to work on other units which may be short-staffed on a particular day. There are no RCT positions which do not involve lifting and frequent and repetitive movements requiring strength and flexibility.

9. At the time that he applied for the subject RCT 1 position, appellant had been working in the construction industry for 6 years and had experienced no problems in routinely lifting 50-pound boxes. Appellant did not provide to CWC any of his medical records or any other medical information relating to his surgeries or physical condition.

10. CWC is required to have a safe environment for its residents. The primary reason that CWC requires a physical screening for candidates for RCT positions is to assure that no persons are hired for those positions unless they are physically capable of safely lifting and repositioning residents. A secondary reason that CWC requires such a physical screening is to reduce the costs for the institution created by employees who are injured on the job, including the costs of wages and medical care for the injured employee as well as the overtime costs for the employees required to fill in for them during their absence from work. CWC spent \$1 million of its budget during 1991 on costs associated with injured employees. During the 6 years that Dr. Page has been the Medical Director at CWC, he has not recommended the hire of any candidates with multiple physical problems such as those of appellant. CWC's experience is that these persons have a significantly greater likelihood of injury than those persons without these physical problems.

11. Due to his removal from the certification and register, appellant did not participate in the remaining steps in CWC's hiring process for RCT 1 positions.

Conclusions of Law

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

2. Appellant has the burden to prove that the decision to remove him from the subject employment register was contrary to §230.17(1), Stats., or §ER-Pers 6.10(1), Wis. Adm. Code.

3. Appellant has failed to sustain this burden.

Opinion

The issue agreed to by the parties in this case is:

Whether respondents violated §230.17(1), Stats., and/or §ER-Pers 6.10(1), Wis. Adm. Code, by removing the appellant's name from the register of eligible candidates for the classification of Resident Care Technician 1.

Section 230.17(1), Stats., states as follows:

The administrator shall provide by rule, the conditions, not otherwise provided by law, under which an applicant may be refused examination or reexamination, or an eligible refused certification. These conditions shall be based on sufficient reason and shall reflect sound technical personnel management practices and those standards of conduct, deportment and character necessary and demanded to the orderly, efficient and just operation of the state service

Section ER-Pers 6.10, Wis. Adm. Code, states as follows, in pertinent part:

In addition to provisions stated elsewhere in the law or rules, the administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:

(1) Who is found to lack any of the preliminary requirements established for the position;

The record shows that passing the physical examination is one of the preliminary requirements established by respondent DHSS for a candidate for an RCT 1 position at CWC. The record also shows that appellant did not pass this physical examination, i.e., the two physicians at CWC assigned the responsibility for overseeing the physical examination process decided that appellant had not passed this physical examination.

Appellant argues by implication that, if his own physician or a physician who specialized in neurology or orthopedic surgery had administered this physical examination, the result may have been different. However, appellant

did not request of CWC that he be permitted to submit to them the results of any other physical examination nor did he provide to CWC any medical records or other information resulting from any other physical examination. As a result, this argument is based on conjecture and on information not available to CWC at the time that they assessed appellant's physical fitness for the RCT 1 position. Such conjecture and absence of information cannot serve as the basis for a finding in appellant's favor in regard to the issue under consideration here.

Appellant argues by implication that the physical standards set for the position are not required for the successful performance of the duties and responsibilities of the RCT 1 position. However, the record shows that the safe lifting and repositioning of residents is one of the primary responsibilities of this position and that, in the opinion of Dr. Sanders and Dr. Page, the impact appellant's four surgeries have had on his strength and flexibility provided a significant limitation to appellant's ability to lift and reposition residents in a safe manner. Appellant has failed to successfully rebut this showing.

Appellant has also failed to show that the preliminary requirement under consideration here has been unevenly imposed by CWC either in general or specifically in regard to appellant's candidacy. The record shows that the physical examination is required of every RCT 1 candidate at CWC and that candidates with physical limitations similar to appellant's have not passed such examination.

The Commission concludes that appellant has failed to show that respondents' conclusion that appellant failed to satisfy one of the preliminary requirements of an RCT 1 position at CWC violated either §230.17(1), Stats., or §6.10(1), Wis. Adm. Code.

In regard to respondent DHSS's renewal of its motion to dismiss DHSS as a party to this appeal, the Interim Decision and Order retained DHSS as a party because some question remained as to whether DHSS was a necessary party for purposes of awarding relief. The Interim Decision and Order stated as follows, in pertinent part:

. . . the materials in the file do not indicate precisely when in the selection process the appellant's name was removed from the certification. If the removal was accomplished after the candidates had been interviewed and appellant rated as the top candidate on the certification, if the position in question remains vacant and if the appellant were to prevail after a hearing before

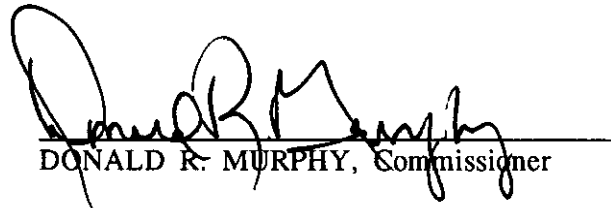
the Commission, the Commission could presumably direct DHSS to appoint appellant to the vacancy in question.

The facts established in the hearing record indicate that appellant's name was removed from the certification list and the register prior to his completion of CWC's hiring process. For example, the record shows that candidates who pass the physical examination are required to be interviewed and appellant did not get to the interview stage of the process. As a result, appellant has failed to show that, absent the removal from the certification list and the register, he would have been the successful candidate for the RCT 1 position. In the absence of such a showing under the facts of this case, the Commission concludes that DHSS is not a necessary party for the purposes of awarding relief and respondent DHSS is dismissed as a party respondent in this appeal.

Order

Respondent DHSS is dismissed as a party respondent in this appeal. The action of respondent DMRS is affirmed and this appeal is dismissed.

Dated: August 26, 1992 STATE PERSONNEL COMMISSION
GFH/lrm/gdt2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

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**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.