



Whether respondent discriminated against complainant on the basis of handicap in its decision not to select him for one of the three vacant Examiner 4 positions. (92-0025-PC-ER)

### FINDINGS OF FACT

1. Complainant has been employed by respondent OCI (Office of Commissioner of Insurance) since 1985 in a position in the classified civil service in the Bureau of Financial Analysis and Examinations. Complainant began as an Insurance Examiner 1, which is an entry level classification. His position was reclassified to Insurance Examiner 2 in 1986 and Insurance Examiner 3 in 1988.

2. Insurance Examiner 1, 2 and 3 constitute a progression series — i.e., reclassification is based on the "attainment of specified education or experience by the incumbent," §ER 3.01(3), Wis. Adm. Code. Insurance Examiner 4 is not part of this progression series and this classification usually is attained by promotion.

3. Complainant is an insulin-dependent diabetic with secondary eye problems. According to his ophthalmologist (and the Commission so finds):

Mr. Orr has quite a complex eye history that involves both cataract removals as well as diabetic retinopathy. We have the vision in his best eye (which is his right eye) to an adequate level at this point in time. He does, however, require

more than the normal amount of light as well as some magnification to see the fine print. Additionally, there may be times that his driving is quite hampered.

Letter dated February 5, 1992, from Dr. Michael B. Shapiro, Complainant's Exhibit 15.

4. Complainant applied for Insurance Examiner 4 vacancies within respondent agency that had been posted on an open competitive basis, and took the exam on November 16, 1991.

5. The examination was administered by DMRS (Division of Merit Recruitment and Selection, Department of Employment Relations). It consisted of multiple choice questions.

6. The previous examination for an Insurance Examiner 4 vacancy at respondent agency, in which complainant had participated, required written answers.

7. Complainant was not advised before the exam in question that it would be a multiple choice exam.

8. Complainant experienced difficulty in taking the exam due to his visual restrictions, the exam format, and the lighting at the exam center. His score on the exam was relatively low, and he was certified on the basis of handicapped expanded certification pursuant to §ER-Pers 12.06, Wis. Adm. Code. Complainant did not request any accommodation with respect to taking the exam.

9. A three member oral interview panel was effectively responsible for deciding whom to promote from among those certified. The panel members were the three Insurance Examiner Supervisors in the Bureau of Financial Analysis and Examinations — Steve Caughill, Brian Hogan and Peter Medley.

10. The three panel members were not given before, and were not aware of at the time of the interviews, the candidates' exam scores or ranks, with the exception of one candidate, Jerry DeArmond, who mentioned his score as part of his written exercise.

11. The interview panel phase of the selection process consisted of eight questions, one of which was answered in writing (this was characterized on the question sheet as: "will be used primarily to evaluate effectiveness of written communication skills with secondary consideration give to content.")

12. As a result of the interview process, complainant was ranked seventh of nine candidates interviewed. The decision was made to appoint the three candidates ranked highest — Roger Peterson,<sup>1</sup> Jerry DeArmond, and Theresa Wedekind.

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<sup>1</sup> Because complainant does not contest respondent's decision to hire Mr. Peterson, he will not be discussed further.

13. As previously noted, complainant has been employed by respondent since 1985 and was an Insurance Examiner 3 following a 1988 reclassification to that level. He has a Bachelor of Business Administration degree in finance from UW-Madison, and the equivalent of a Masters of Business Administration degree in Banking and Investments from the same institution. He has had more experience as an EIC (examiner in charge) than either Ms. Wedekind or Mr. DeArmond.

14. Ms. Wedekind has been employed by respondent since 1989 and was an Insurance Examiner 3 following a reclassification to that level in 1991. She had been employed by the Department of Revenue as a Tax Return Examiner I for approximately a year before that. She has an Associate Degree in Accounting from Madison Area Technical College and has completed several courses in the Data Processing Computer Programming program at the same institution. She has completed the LOMA (Life Office Management Assn.) examination series and part of the CPCU (Chartered Property and Casualty Underwriter) examination series.

15. Mr. DeArmond has been employed by respondent since 1988 and was an Insurance Examiner 3 following a reclassification to that level in 1990. He has a Bachelor of

Business Administration in finance from UW-Milwaukee and has completed the LOMA examination series.

16. During his employment with respondent, complainant's annual performance evaluations have been at least satisfactory. The 1987 evaluation reflects concerns about timeliness, and writing and interpersonal skills. The 1989 evaluation noted, with respect to his EIC assignments, that three reports required extensive rewriting and that "Rod would benefit from increased efficiency in getting timely reports issued and by improved writing skills." It also noted a well-written team leader report. The 1992 evaluation stated that with respect to his EIC (Examiner-in-Chief) assignments, "[t]he exam reports needed considerable editing to get to final form, so improvement in that area is needed."

17. During her employment with respondent, Ms. Wedekind's performance has been at least satisfactory. The 1992 performance evaluation has several positive comments reflecting above-average performance — e.g., "prepared very good workpapers," "[e]xamination reports were well-written, requiring minimal editing." The 1991 evaluation states that she "performed well" as EIC, noting that "[e]xam reports were well prepared on a timely basis and required minimal editing." With respect to in-office projects, the report states that she "has met or exceeded

performance expectations in the completion of each of these assignments and has been extremely productive in carrying an above average workload." It further notes that she "received an exceptional performance award on July 12 in recognition of her significant progress in developing job skills while also being productive, as well as above average effort in the area of independent study."

18. During his period of employment with respondent, Mr. DeArmond's performance has been at least satisfactory. His 1992 performance evaluation has positive comments consistent with above-average work, including the following regarding his EIC work:

The reports were well written, without needing extensive editing. Jerry moved reports along through the review process without delays. The AAL assignment was an obvious challenge to an examiner of Jerry's rank which was successfully met.

The 1991 evaluation reflects that one report was submitted slightly late but noted extenuating circumstances and that his reports "were well written, without extensive editing." The 1990 evaluation reflects an "excellent" job as EIC for the State Life Fund. A "Financial Examinations Supervisor Review Sheet" for the Network Health Plan for which he was

EIC in 1991 has the supervisor's general comment: "Great job. I was impressed."

19. With respect to the 18 examinations for which complainant served as EIC during his employment with respondent, complainant introduced into the hearing record 7 "Examination Report Review Sheets." All of these sheets have positive summary comments by the reviewers — e.g., "good report" — as well as some specific notations of errors, items that needed correction, etc.

20. Prior to the selection process here in question, complainant had unsuccessfully competed twice for Insurance Examiner 4 promotions. After the second attempt, he sent a memo to his supervisor, Steve Caughill, dated June 21, 1990. The memo inquired as to how he could improve his performance and obtain the specific experience and training necessary to enhance his opportunity for advancement.

21. By memo dated July 19, 1990, Mr. Caughill replied that while there was no specific list of things he could enumerate, complainant should "do whatever is necessary to assure that your exam reports are in final form and do not need extensive revisions by the supervisors." He also suggested that complainant work on his "verbal communications/interviewing skills," and that he "should make each examination assignment a challenge to exhibit your auditing



skills, knowledge and ability." Mr. Caughill further stated that complainant was performing satisfactorily at the Insurance Examiner 3 level. He also pointed out that advancement to the Insurance Examiner 4 level was accomplished by promotion on a highly competitive basis, and that "[t]he PPD process does not necessarily gauge your work performance against higher classifications."

22. Due to complainant's eye problems he requested that his examination assignments be structured to avoid out of town or protracted examinations. Respondent complied with this requested accommodation. Complainant believes this has resulted in him not receiving as significant assignments as otherwise might have been the case, which has hurt his chances for promotion.

23. Complainant has complained to management on a number of occasions that the lighting in the stairways in the building housing the agency is inadequate. Management has not effected any improvement in this lighting, but has told him to use the elevators, notwithstanding complainant's protestations that the lighting in the elevators is even worse.

24. Complainant spoke to Bureau Director Matthew Mandt in about May 1992 regarding his concerns that his relationship with his immediate supervisor was not good and was impeding his opportunity for advancement.

Complainant requested a change in supervision and Mr. Mandt granted this request.

25. Respondent's decision to promote Mr. DeArmond and Ms. Wedekind to the Insurance Examiner 4 level positions rather than complainant was based on management's good faith, rationally-based evaluation of their qualifications, and was not based in whole or in part on complainant's handicapped status.

#### CONCLUSIONS OF LAW

##### 92-0018-PC

1. This case is appropriately before the Commission pursuant to §230.44(1)(d), Stats.
2. Complainant has the burden of proof to establish by a preponderance of the evidence that respondent's decision not to select him for one of the Insurance Examiner 4 positions was illegal or an abuse of discretion.
3. Complainant has failed to sustain his burden of proof.
4. Respondent's decision not to select complainant for one of the Insurance Examiner 4 positions was not illegal or an abuse of discretion.

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5. This case is appropriately before the Commission pursuant to §§111.375(2), 230.45(1)(b), Stats.

6. Complainant has the burden of establishing by a preponderance of the evidence that respondent's decision not to select him for one of the Insurance Examiner 4 positions involved discrimination against him on the basis of handicap in violation of the FEA (Wisconsin Fair Employment Act, Subchapter II, Chapter 111, Stats.).

7. Complainant has failed to sustain his burden.

8. Respondent did not discriminate against complainant on the basis of handicap in violation of the FEA when it decided not to promote him to one of the Insurance Examiner 4 positions.

OPINION

92-0018-PC

This is an appeal of an appointment decision pursuant to §230.44(1)(d), Stats., which provides:

A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the Commission.

In order to prevail on this appeal, appellant must establish that the decision to hire Mr. DeArmond and Ms. Wedekind instead of him was illegal or an abuse of discretion. The complainant has the burden of proof (sometimes called the burden of persuasion), and the evidentiary standard is the "preponderance of the evidence." See Lawry v. DP, 79-26-PC(7/31/79); 2 AM JUR 2d ADMINISTRATIVE LAW §§391, 392; §PC 5.03(4), Wis. Adm. Code. With the exception of the charge of handicap discrimination, which will be discussed below under the heading of Case No. 92-0025-PC-ER, complainant has not alleged an illegal action in connection with his hiring, so the only issue in this case is whether there was an abuse of discretion.

The Commission discussed the meaning of "abuse of discretion" in Ebert v. DILHR, 81-64-PC (11/9/83), as follows:

The term "abuse of discretion" has been defined as "... a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." Lundeen v. DOA, No. 79-208-PC (6/3/81). The question before the Commission is not whether it agrees or disagrees with the appointing authority's decision, in the sense of whether the Commission would have made the same decision if it substituted its judgment for that of the appointing authority. Rather, it is a question of whether, on the basis of the facts and evidence presented, the decision of

the appointing authority may be said to have been "clearly against reason and evidence."  
Harbort v. DILHR, No. 81-74-PC (1982).

Before turning to a discussion of respondent's evaluation of the relative qualifications of the three candidates in question (the main issue with respect to abuse of discretion), the Commission will address an apparent misperception on complainant's part concerning the necessary training and experience for promotion to the Insurance Examiner 4 level. Complainant introduced into evidence a document (Complainant's Exhibit 3) which is labeled "Reclassification [sic] Criteria for Financial Examiners."<sup>2</sup> Complainant contends that the successful candidates did not satisfy the criteria for Examiner 4 (e.g., "Functions as EIC on examinations of medium to large companies ....") and should not have been selected. However, even assuming that complainant's Exhibit 3 accurately reflects the criteria for reclassification, it does not follow these are prerequisites for promotion.

The civil service code provides two bases for reclassification: "a logical and gradual change to the duties and responsibilities of a position or the attainment of specified

<sup>2</sup> This document does not appear to be a part of the official class specifications or position standard for this series maintained by DER, and those official documents were not introduced into the record by either party.

education or experience by the incumbent." Section ER 3.01(3), Wis. Adm. Code (emphasis added). The latter criterion applies to what frequently are called "progression series" in which the employe typically progresses from an entry level classification to the journey level and then to a more advanced level as he or she gains experience and completes training and/or educational requirements. There is no evidence that movement from Insurance Examiner 3 to Insurance Examiner 4 is part of the progression series that encompasses Insurance Examiner 1, 2 and 3, and the available evidence is to the contrary. Another document complainant placed in the record, a March 18, 1986, memo from Gregory Krohm on the subject of "Reclassification of Examiners" (Complainant's Exhibit 2) refers only to reclassification from Examiner 1 to 2 or from Examiner 2 to 3 as part of a "progression series." Also, Complainant's Exhibit 3, the enumeration of reclassification criteria, contains the notation ("promotion") after Examiner 4.

The other means of reclassification comes into play when the duties and responsibilities of a position change in a logical and gradual manner over a period of time. Assuming the validity of Appellant's Exhibit 3, the criteria listed for Examiner 4 presumably include the duties and responsibilities that would have had to have been performed as a prerequisite to reclassification on this basis. However, the

personnel transaction in this case did not involve reclassification on either basis, but rather involved promotion. There is no requirement under the civil service code that to be eligible for promotion to a position, the employe must satisfy all the criteria for reclassification to the classification level of the position. Indeed, such a requirement is inconsistent with the definition of promotion at §ER-Pers 1.02(27)(a), Wis. Adm. Code:

The permanent appointment of an employe to a different position in a higher class than the highest position currently held in which the employe has permanent status in class (emphasis added)

Pursuant to this definition, an employe can be promoted to a position in a completely different classification from the classification of his or her previous position. It is hard to envision a situation where such an employe would have been performing the duties and responsibilities required for reclassification to the classification of the new position.

The major thrust of complainant's case is related to the comparative qualifications of the candidates. It is clear from the record that complainant had more extensive experience than either Mr. DeArmond or Ms. Wedekind.

Complainant had been employed by OCI since 1985 and had been an Insurance Examiner 3 since 1988.

Mr. DeArmond began his employment at OCI in 1988 and was reclassified to Insurance Examiner 3 in 1990, while Ms. Wedekind started her employment with OCI in 1989 and was reclassified to Insurance Examiner 3 in 1991.

Furthermore, complainant had a bachelor's degree and advanced course work that amounted to the equivalent of a masters degree compared to Mr. DeArmond's bachelor's degree and Ms. Wedekind's associate degree, plus advanced professional study completed by the latter two candidates.

If respondent had based, or had been required by the civil service law to have based, its hiring decision on the candidates' formal education and amount of experience, complainant presumably would have made a convincing showing that the hiring decision constituted an abuse of discretion. However, the appointing authority has considerable discretion in the decision of whom to hire from among those who are certified following the competitive examination process, and there is nothing in the civil service code or elsewhere that restricts the appointing authority to consideration of the candidates' amount of experience and formal education. It is neither uncommon nor unreasonable for an agency to consider the applicants' performance in pre-hiring oral interviews and their performance while employed by the agency, as respondent did here. See, e.g., Jensen v. UWM, 86-0144-PC (11/4/87).



It is apparent from the record which included copies of complainant's performance evaluations over the years, specific reviews of some of his work projects, and the testimony of all three supervisors in the Financial Analysis and Examinations Bureau (who also were the oral interview panel members), that OCI management considered complainant to be an adequate performer at the Insurance Examiner 3 level, who had weaknesses in the areas of analysis and communications skills. All three supervisors had at least some degree of familiarity with complainant's work, and all testified to this effect. Complainant's performance evaluations for 1987, 1989, and 1992 all noted problems with writing skills, as did Mr. Caughill's 1990 memo (Respondent's Exhibit 11), which was written specifically to respond to complainant's concerns about his lack of advancement. On the other hand, the record reflects that management perceived Mr. DeArmond and Ms. Wedekind as well above average performers. These perceptions, as well as the fact that both successful candidates ranked substantially higher than complainant on the oral interview, provide a rational basis for the decision to have promoted Mr. DeArmond and Ms. Wedekind notwithstanding that complainant had more extensive experience as an Examiner 3 and EIC and more formal education.

Complainant produced some evidence in an effort to contest the factual basis for respondent's promotion decision. He pointed out that many of his "Examination Report Review Sheets" had positive summary comments such as "good report," which is inconsistent with the testimony by the bureau supervisors that his reports usually required substantial rewriting. However, respondent provided testimony from supervisors that they frequently would use a comment such as "good report" as a means of positive reinforcement, or an attempt to be tactful, even though a report might require some technical revision. Also, it must be kept in mind that in management's opinion complainant's work overall was satisfactory, albeit with some areas of relative weakness, when considered from an Insurance Examiner 3 standard. Therefore, it would not be completely inconsistent with respondent's position for a supervisor to state that a report was "good," when it is being viewed as an Insurance Examiner 3 work product, yet to have concerns about its adequacy when viewed from the standpoint of promotion potential to the Insurance Examiner 4 level. This is essentially reflected in Mr. Caughill's July 19, 1990, memo addressing complainant's concerns about his failure to have been promoted (Respondent's Exhibit 11). He states that complainant is "performing satisfactorily at your present classification, as demonstrated by your PPD reviews."

However he goes on to suggest that complainant improve his written and verbal communication skills to enhance his prospects for promotion.

Complainant also relied on the testimony of Joe Hilgendorf, an Insurance Examiner 5, who was supportive of complainant's performance level and offered the opinion that complainant should have been promoted along with the three successful candidates.<sup>3</sup> However, this testimony establishes at the most a difference of opinion regarding complainant's level of performance during the period when he had worked with complainant on various examinations (the last one was in 1989). That is, while his opinion of appellant's performance had some probative value, it was insufficient to establish that the three supervisors who testified did not have a reasonable basis for that part of their hiring decision that was based on their opinions about complainant's work performance. This conclusion is reinforced by the fact that management's criticisms of complainant's communications skills were supported by specific parts of the record.

For example, one of complainant's own exhibits (Complainant's Exhibit 9) contains a Field Examiner Review Sheet that complainant completed on May 2, 1989, as EIC for Mr. DeArmond. It contains the following notation for

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<sup>3</sup> There were only three vacancies to be filled.

question 8, "Did the examiner positively distinguish him/herself in the conduct of any tasks assigned, if so, give examples:"

I feel Jerry handles hisself [sic] in a very professional manner and see no problem with his manner of distinguishing hisself [sic]!!

Another document authored by complainant on May 28, 1992, (Complainant's Exhibit 1) contains the phrase: "Examinations for which I have directed as EIC since my employment with the Bureau." There also were examples of problematical technical work in complainant's reports.

Complainant also presented testimony by Chris O'Brien, another Insurance Examiner 3 who also had competed for promotion to Insurance Examiner 4, that he had alleged to management that while Mr. DeArmond had been acting as EIC on the AAL examination, he had been "goofing around" excessively and had made some comments to a female subordinate that amounted to sexual harassment. If management had promoted Mr. DeArmond without having looked into these matters, this would provide support to a conclusion that the promotion decision constituted an abuse of discretion. However, management did contact the female employe in question, and she stated she had no concerns about Mr. DeArmond's behavior. Management also met

several times with AAL officials at least in part to elicit their views on how the audit team was doing, and had been advised that OCI staff were conducting themselves professionally and there were no problems.

With respect to Mr. O'Brien's negative comments about Mr. DeArmond's performance as EIC for the AAL examination, on this record this again amounts to at the most a difference of opinion. Mr. DeArmond's direct supervisor was very positive in his performance evaluation of Mr. DeArmond for the period in question, including the specific comment that "[t]he AAL assignment was an obvious challenge for an examiner of Jerry's rank which was successfully met." Respondent also established that another examiner on the AAL project provided unsolicited praise of Mr. DeArmond's performance as EIC.

Complainant also attempted to undermine the validity of management's assessment of the candidates' performance in responding to the interview questions. One of the items on which complainant focuses is Ms. Wedekind's response to question two ("Provide specific examples (preferably in a work environment) of how you have effectively dealt with people in a leadership role.") Ms. Wedekind provided some general information regarding her approach to leadership, but noted that she had limited experience in this area and was unable to think of specific examples. In his

answer to this question, complainant included the fact that he had served as EIC on 18 exams. The Commission would agree with complainant that his response was more apt. However, it is undisputed that complainant had more extensive supervisory experience than Ms. Wedekind, but that respondent rated her more favorably in terms of her work performance and her overall performance in the oral interview, and in the context of management's specific reservations about certain areas of complainant's abilities. That Ms. Wedekind was unable to think of specific examples of how she effectively exercised her leadership is not inconsistent with respondent's rationale for its hiring decision.

Complainant also offered opinions that Ms. Wedekind's writing sample was inferior to his. However, the writing samples themselves do not support this contention.<sup>4</sup> For example, complainant's writing sample included the following:

My ongoing job training, which is everyday I may add, has greatly enhance [sic] my understanding of insurance principles. The above men-

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<sup>4</sup> The instructions for this question state: "(Will be used primarily to evaluate effectiveness of written communications with secondary consideration given to content.)"

tioned item has also attributed [sic] to my success as an interpreter of insurance topics.

In conclusion, complainant did not establish respondent abused its discretion either in deciding on the criteria to be considered with respect to its hiring decision or in evaluating the candidates against this criteria. Respondent chose to promote two individuals who, in management's opinion, had demonstrated greater potential for successful performance at the Insurance Examiner 4 level than complainant, even though complainant had had more extensive experience as an EIC. Based on the record before the Commission, there clearly was a rational basis for this decision.

#### 92-0025-PC-ER

The issue in this case is whether respondent discriminated against complainant on the basis of handicap with respect to its decision to promote Mr. DeArmond and Ms. Wedekind rather than complainant. In cases of this nature involving a nonselection where the employing agency denies that handicap entered into the hiring decision, the Commission uses the method of analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed. 2d 668, 5 FEP Cases 965 (1973). See Brummond v. UW-LaCrosse, 84-0178-PC-ER (10/10/85).

In order to establish a prima facie case, complainant must show that he belongs to a protected group, that he applied and was qualified for a vacant position that respondent was trying to fill, and that the complainant was rejected under circumstances which give rise to an inference of unlawful discrimination. In a failure to hire case this inference is usually supplied by a showing that the person or persons actually hired were not in the same protected category as the complainant.

In this case, complainant has established that he is handicapped. He applied for the positions in question and his qualifications are demonstrated by the fact that he was certified for consideration for appointment. While he did not demonstrate that the persons appointed instead of him were not handicapped, his evidence of pretext, which will be discussed below in that context, is at least sufficient to create an inference of discrimination if unrebutted.

At this point, the burden of proceeding shifts to respondent to articulate a legitimate, non-discriminatory rationale for its decision. Respondent accomplished this by its showing with respect to the criteria it established for its decision, and how it evaluated the candidates against this criteria, as was discussed above under the heading of abuse of discretion. Finally, the burden shifts back to complainant to attempt to establish that the rationale articulated by re-



spondent for its decision was really a pretext for a decision to reject complainant for promotion because of his handicap.<sup>5</sup>

Looking at this record from within this conceptual framework, much if not all of complainant's evidence discussed above under the heading of "abuse of discretion" also runs to the issue of pretext. That is, evidence tending to show that respondent's rationale for its decision lacked a valid factual basis and therefore amounted to an abuse of discretion also would tend to show that respondent's rationale did not have a valid basis but was merely a pretext for a discriminatorily-motivated decision. The Commission will not reiterate the discussion of that evidence here. Suffice it to say that for essentially the same reasons that the record does not support a determination that respondent's hiring decision was so lacking in a logical and factual basis that it constituted an abuse of discretion, the record also does not support a determination that the articulated reasons for the decision were so lacking in support that they constituted a pretext for unlawful discrimination.

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<sup>5</sup> To avoid possible confusion, it should be noted that in most cases, the evidence is not presented following the order outlined above. Rather, this framework of shifting burdens is a means of analyzing the evidence after the parties have put in their cases.

Complainant also produced evidence concerning his handicap which also is relevant to the issue of pretext. This evidence primarily concerns accommodation issues. While the complaint of discrimination runs to nonselection and does not charge failure of accommodation, evidence concerning management's response to requests for accommodation or similar matters can have probative value with respect to management's attitude towards complainant's handicap.

Complainant contended that the lighting in the examination facility where he took the multiple choice examination that preceded his certification and participation in the oral interview was inadequate and therefore he was unable to complete the exam and got a relatively low score. Initially, it should be noted that the low score itself had nothing to do with complainant's nonselection. He was certified for consideration for promotion, and the members of the oral panel were not provided with the scores or ranks of the candidates.<sup>6</sup> However, complainant contends that management should have taken steps to alert him to the fact that the exam was going to utilize a multiple choice format. The Commission cannot conclude on the record before it either that respondent had any such obligation, or that its

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<sup>6</sup> Mr. DeArmond mentioned his score in his answer to one of the oral interview questions.

failure to have done so was indicative of a bias against complainant because of his handicap. The exam was administered by an independent agency, DMRS, which is part of DER. DMRS is charged statutorily with the responsibility to provide handicapped applicants with necessary accommodations "to ensure equality of opportunity in the examination." §230.16(5), Stats. It certainly was not unreasonable for respondent to assume that DMRS would address any issues of accommodation that might arise.<sup>7</sup>

Complainant also testified that he has complained to management that the light was inadequate in the stairways in the building housing OCI and that management has never done anything about it, but told him he should use the elevators, notwithstanding his protestations that the lighting in the elevators is even worse. The Commission is not in a position on the limited record before it to reach a conclusion as to whether respondent's handling of this complaint fell outside of a range of reasonableness so as to make it probative of the proposition that respondent's hiring decision was a pretext for discrimination on the basis of handicap.

Another point that must be considered in the area of accommodations, is that complainant himself testified that

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<sup>7</sup> The record does not reflect that complainant requested any accommodation either prior to or during the exam.

management granted him his major request for accommodation — structuring his examination assignments to avoid out of town or protracted assignments. Also, when complainant recently asked the bureau director for a change in supervision, this was granted.<sup>8</sup>

As to some of his complaints about his treatment with respect to conditions of employment, complainant appears to be concerned about a lack of sensitivity to his condition, rather than denial of accommodation per se. For example, complainant testified that there has been no concerted effort to provide him with memos and other printed material in enlarged type, notwithstanding that this would make things easier for him, and that his supervisor never asked after his eye surgery if he needed anything. Even if the Commission were to conclude that these matters demonstrated a lack of sensitivity, complainant's case falls far short of establishing by a preponderance of the evidence that respondent's professed rationale for its decision was a pretext for discrimination, and that the decision was motivated in any way by complainant's handicap. The record clearly shows that all the members of management who participated in the hiring decision, not just his immediate supervisor, shared the good faith opinion, that was amply

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<sup>8</sup> While this was not a handicap accommodation request per se, it has at least some relevance to the issue of management's attitude toward complainant.

supported in the extensive personnel records respondent maintains, as well as other evidence, that Mr. DeArmond and Ms. Wedekind were better qualified and had demonstrated more potential than complainant, and based its decision on that opinion.

In conclusion, complainant did not sustain his burden of proof of establishing either an abuse of discretion or the presence of handicap discrimination with respect to these promotions. It appears that management had a reasonable, good faith belief that it promoted the employees with the greatest potential for successful performance at the Insurance Examiner 4 level. However, it also appears that complainant has a good faith belief that he is not being treated fairly, particularly in connection with his handicap, notwithstanding the steps respondent has taken with respect to accommodation. The Commission suggests that the parties consider taking a structured approach to the matter of accommodations, including the possibility of a professional evaluation of complainant's specific accommodation requirements at the worksite.

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ORDER

Respondent's decision to appoint Mr. Peterson, Mr. DeArmond, and Ms. Wedekind to the Insurance Examiner 4 level rather than complainant, is affirmed, and these cases are dismissed.

Dated: October 29, 1992 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner

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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.