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PATRICK D. BYRNE,

Appellant/
Complainant,

v.

Secretary, DEPARTMENT OF
TRANSPORTATION, and Admini-
strator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,

Respondents.

Case Nos. 92-0672-PC
92-0152-PC-ER

* * * * *

ORDER

After having reviewed the Proposed Decision and Order and the arguments of the parties, and after having consulted with the hearing examiner, the Commission adopts the Proposed Decision and Order except that it makes the following changes to reflect its understanding of the law in this area:

I. The second paragraph (beginning with "It is undisputed . . . ") and the third paragraph (beginning with "Complainant argues in this regard . . . ") on page 7 are deleted and the following is substituted:

In LaCrosse Police Comm. v. LIRC, 139 Wis. 2d 740, 407 N.W. 2d 510 (1987), the Supreme Court wrote as follows:

- This court, since 1979 has been called upon five times to interpret the definition of "handicapped individual" now found in sec. 111.32(8), Stats.
- 1) Bucyrus-Erie involved an individual with congenital back defects.
 - 2) Dairy Equipment involved an individual with only one kidney.
 - 3) American Motors involved an individual four feet, ten inches tall.
 - 4) Brown County involved an individual with 20/400 eyesight.

5) The instant case involves an individual with a perceived weak back projected to have further back problems.

In each of these cases, the burden was on the individual alleging the handicap to establish that a particular physical condition constituted a handicap within the meaning of the Fair Employment Act.

From these cases has emerged a two-step process of analysis in determining whether the individual has established a handicap within the meaning of the statute so as to place the burden on the employer to show a permissible discrimination.

First, is there a real or perceived impairment? Second, if so, is the impairment such that it either actually makes or is perceived as making achievement unusually difficult or limits the capacity to work.

The first step in the analytical process requires determining whether an impairment, real or perceived, exists. As stated above, an impairment for purposes of the statute is a real or perceived lessening or deterioration or damage to a normal bodily function or bodily condition, or the absence of such bodily function or such bodily condition.

If the individual satisfies the first step, then he or she must establish that the impairment either actually makes or is perceived as making "achievement unusually difficult or limits the capacity to work." Section 111.32(8)(a), Stats. The disjunctive "or" in the statute makes it clear that one of two conditions must be met to satisfy this second step. Either the claimant must show that the real or perceived impairment makes achievement unusually difficult, or the claimant must show that the real or perceived impairment limits the capacity to work. An employer's perception of either satisfies this element as well.

What is meant by "makes achievement unusually difficult?" The determination rests not with respect to a particular job, but rather to a substantial limitation on life's normal functions or a substantial limitation on a major life activity. See, School Bd. of Nassau County, Fla. v. Airline, 107 S. Ct 1123, 1129 (1987).

What is meant by "limits the capacity to work?" Obviously it must mean something other than "makes achievement unusually difficult." Brown County answers the question: "limits the capacity to work" refers to the particular job in question. In Brown County, this court said, "[T]he evidence is clear that Brown County perceived the impairment as one that limited Toonen's capacity to work at the specific job for which he applied . . . that perception . . . is sufficient to establish that Toonen was 'handicapped' . . ." 125 Wis. 2d at 572.

It is undisputed that complainant has dyslexia and that his dyslexia slows his reading speed and reading comprehension, and interferes with his ability to correctly spell words. However, in view of complainant's consistently satisfactory performance in a supervisory position requiring many of the same skills and abilities as the subject position over a period of

more than 10 years, and the satisfactory rating of his written communication skills by his supervisors over this period of time, the Commission concludes that complainant's dyslexia does not rise to the level of an impairment "which limits the capacity to work" within the meaning of the Fair Employment Act (FEA).

The next question then is whether complainant's dyslexia "makes achievement unusually difficult." Ms. McPeek's evaluation indicates in part that:

In summary, then Mr. Byrne shows patterns of symbol processing associated with dyslexia, although his overall verbal abilities are in the above average to superior range. The disparities are large enough to be handicapping since Mr. Byrne's ability, education, interest, and experience prepare him for responsibilities typically associated with leadership and management. Good written communication skills are usually expected at these levels. Mr. Byrne will need to continue to use the accommodation procedures which he has developed through the years. . . .

It was Ms. McPeek's observation and opinion that complainant had been required to make significant adjustments in the manner he processed and communicated information in order to carry out the responsibilities of his day-to-day life as well as his job; and that, in evaluation his overall verbal abilities, his weaker spelling/writing and processing was "statistically significant." The Commission concludes on this basis that complainant's dyslexia places a "substantial limitation on a particular life activity" and, as a result, that he is handicapped within the meaning of the Fair Employment Act.

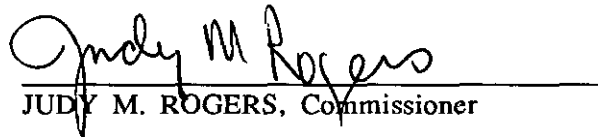
II. The language before the first comma of the first sentence of paragraph 4 on page 7, i.e., "If the complainant had shown that he was handicapped," is deleted.

Dated: September 8, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM:rcr


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, 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 peti-

tion 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.

STATE OF WISCONSIN

PERSONNEL COMMISSION

 PATRICK D. BYRNE,
 Appellant/
 Complainant,
 v.
 Secretary, DEPARTMENT OF
 TRANSPORTATION, and Admini-
 strator, DIVISION OF MERIT
 RECRUITMENT AND SELECTION,
 Respondents.
 Case Nos. 92-0672-PC
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PROPOSED
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This is a complaint of discrimination on the basis of race and handicap, and an appeal of a hiring decision and a decision that appellant was not eligible for handicapped expanded certification. A hearing was held on January 8, 1993, before Laurie R. McCallum, Chairperson. The parties were required to file briefs and the briefing schedule was completed on March 22, 1993.

FINDINGS OF FACT

1. Complainant/appellant is a white male. He has been employed by respondent DOT's Division of State Patrol since 1964. At all times relevant to this proceeding, he has been employed as a State Patrol Sergeant in District 1.

2. In early 1992, respondent DOT implemented a recruitment and selection process for a vacant State Patrol Captain position in District 1. The level of Captain is two levels above the Sergeant level and one level above the Lieutenant level.

3. A list of candidates certified to be eligible for this position was generated on or around February 21, 1992. Complainant/appellant's name appeared on this list as the result of handicap expanded certification (HEC).

4. The affirmative action plan which was in effect for respondent DOT at the time of the recruitment and selection for this Captain position indicated that the Captain classification was underutilized for ethnic/racial minorities. In fact, a member of a racial/ethnic minority had never held a State Patrol Captain position. At least some of the members of the interview panel for the subject Captain position were aware of this underutilization at the time of the interviews.

5. Each of the certified candidates was interviewed for this position. The interview panel consisted of Theodore Meekma, Administrator of the Division of State Patrol; William Singletary, Director of District Operations, Division of State Patrol; Nathaniel Robinson; and Beverly Larson. Complainant/appellant was interviewed on April 2, 1992. The interview panel ranked complainant/appellant as the top candidate based on the results of the interviews.

6. As the result of this ranking, respondent DOT's Bureau of Human Resource Services was asked by the Division of State Patrol to verify complainant/appellant's eligibility for HEC. This request was first referred to Loretta Dichraff, a Personnel Specialist in this Bureau. Ms. Dichraff contacted complainant/appellant and advised him that she had been assigned to verify his eligibility for HEC and that he should submit to her medical information verifying and describing his handicapping condition. In response to this, complainant/appellant submitted a 1983 psychological evaluation of his son which stated, in pertinent part:

Father, who has had 14 years of schooling and is a state patrol sergeant, has mild reading/spelling disability. In a session with Mr. Byrne, he evidenced significant problems with written expression and spelling despite having at least average (and probably above-average) intelligence.

Ms. Dichraff contacted complainant/appellant and advised him that this submission was inadequate and provided him a form to have a qualified health professional complete.

7. Complainant/appellant gave this form to Donna McPeek, a Psychotherapist and Learning and Behavior Specialist, and she completed it as follows (Ms. McPeek's responses are indicated in italics):

1. Does this person have a specific physical or mental impairment which substantially limits one or more life activities, QR, is he/she regarded as having such an impairment. (X) YES () NO

If yes, please indicate the condition: *Dyslexia*

2. If a condition is identified above, is it a disability which "substantially limits the person's employment opportunities including the ability to obtain or retain employment" (ER-Pers 12.06(2), Wis. Adm. Code)? () YES () NO

If yes, please explain the substantial limitations: *Slower reading; unreliable spelling and grammar although can state ideas well orally and has average to above average ability.*

Accompanying this completed form was an evaluation summary prepared by Ms. McPeek which stated as follows, in pertinent part:

. . . he became a State Patrol officer and has been promoted through the ranks during his many years with the State. In 1975, he attended Northwestern University, Traffic Institute, to complete 30 credits of Police Administration. He has regularly earned promotions and more responsibility. He reported enjoying his profession, and feeling that he has contributed substantively through his service.

He reported that "reading has always been slow" and that he feels that he doesn't always comprehend until he has read material several times. He has been able to write his ideas using "short, concise" sentences (and has been criticized from time to time for brevity). He has generally preferred to interact orally, both personally and professionally. Despite many years of exposure to print and effort, he reported that "he just can't remember how words look" (for spelling).

He reported through his long career he has used his talents to circumvent the difficulties. He has developed his speaking skills, sense of humor, leadership and organizational skills. With the cooperation of his supervisors and co-workers, he has modified some procedures for himself through the years in order to guarantee responsible documentation and complete professional paperwork requirements. He reported that his first choice is always oral. He can write, but "it isn't time effective" because he must use a dictionary to check each spelling and rewrite even short compositions several times for accuracy. . . .

. . . Mr. Byrne's skills and abilities range from high average to superior verbal abilities . . . to low average Spelling/Dictation (sixth grade level), calculations (seventh grade level). Verbal reasoning was in the "superior" range, . . . This emphasizes the statistical significance of his weaker spelling/writing and processing speed. . . This test also indicates that Mr. Byrnes' reading will be slower than average. His comprehension is above average, though, and reflects his overall strong verbal skills and abilities. More important than absolute scores, however, are the type of errors. These included deletion of letters, reversals of letters and symbols. These are the patterns associated with dyslexia.

In summary, then Mr. Byrne shows patterns of symbol processing associated with dyslexia, although his overall verbal abilities are in the above average to superior range. The disparities are large enough to be handicapping since Mr. Byrne's ability, education, interest, and experience prepare him for responsibilities typically associated with leadership and management. Good written communication skills are usually expected at these levels. Mr. Byrne will need to continue to use the accommodation procedures which he has developed through the years. . . .

8. Complainant/appellant provided Ms. McPeek's completed form and evaluation to Ms. Dichraff on or around April 30, 1992. Ms. Dichraff reviewed the form and the evaluation. Because she felt the information was incomplete, she reviewed some of complainant/appellant's performance evaluations which did not indicate any significant writing/spelling problems. The 1987 performance evaluation stated in part that, ". . . Pat has demonstrated the ability to compose complete, well-written reports which accurately reflect the intended message. . . . During the past year, Pat has brought his written report composition ability to a professional level which enhances his leadership qualifications." Ms. Dichraff concluded that complainant/appellant did not have a disability which substantially limited his ability to obtain or retain employment and recommended to her second-line supervisor, Cynthia Morehouse, the Director of the Bureau of Human Resource Services, that complainant/appellant not be verified as eligible for HEC. Neither Ms. Dichraff nor Ms. Morehouse contacted Ms. McPeek to seek additional information relating to complainant/appellant's disability. Ms. Morehouse accepted Ms. Dichraff's recommendation. No employee of the Division of State Patrol participated in this decision. Complainant/appellant was notified that

he was not eligible for HEC on May 5 or 6, 1992. The Division of State Patrol was so notified on May 1, 1992.

9. During the second or third week of April, 1992, Mr. Meekma and Ms. Singletary met with George Wenzel, Deputy Administrator of the Division of State Patrol; and Michael Moschkau, a Bureau Director within the Division of State Patrol. It was their unanimous decision that Alvin Bishop be recommended to the Secretary of DOT for selection for the Captain position in District 1. This decision was based on Mr. Bishop's Associate Arts degree in law enforcement and completion of the Northwestern University law enforcement course; Mr. Bishop's 6 years of experience as a District Operations Lieutenant; and DOT's affirmative action plan. Mr. Bishop is black.

10. After complainant/appellant's interview, Mr. Meekma advised Mr. Singletary to recommend to complainant/appellant that he get a haircut since Mr. Meekma was under the impression at the time that the new DOT Secretary may want to meet with all or some of the candidates for this Captain position. Mr. Singletary passed this recommendation on to complainant/appellant.

11. Mr. Bishop was offered and accepted the position of District 1 Captain.

12. Complainant/appellant has applied for and been examined for several other Lieutenant and Captain positions prior to 1992. Complainant/appellant has requested and received accommodations from respondent DOT in relation to these examinations. Respondent DOT was aware that these accommodations were requested by complainant/appellant due to his dyslexia. These accommodations have included additional time to complete the exam, use of a dictionary, and transcription of his dictated responses.

CONCLUSIONS OF LAW

1. Case No. 92-0672-PC was brought before the Commission pursuant to §230.44(1)(d), Stats.

2. The appellant has the burden under §230.44(1)(d), Stats., to prove that respondent's actions in not selecting appellant for the subject position or in not certifying appellant as eligible for HEC were illegal or an abuse of discretion.

3. The appellant has failed to sustain this burden.

4. The appellant failed to file Case No. 92-0672-PC in a timely manner.
5. Case No. 92-0152-PC-ER is appropriately before the Commission pursuant to §230.45(1)(b), Stats.
6. The complainant has the burden to prove that was discriminated against on the basis of his handicap or his race as alleged.
7. The complainant has failed to sustain this burden.

OPINION

The issues to which the parties agreed are as follows:

1. Whether respondent DOT's decision not to promote complainant to a Captain position in District 1 in May of 1992 constituted discrimination based on his handicap or his race.

Subissue: Whether respondents' decision that complainant was not eligible for Handicapped Expanded Certification constituted discrimination based on his handicap or his race.

2. Whether respondent DOT's decision not to promote appellant to a Captain position in District 1 in May of 1992 was illegal or an abuse of discretion.

Subissue: Whether respondents' decision that appellant was not eligible for Handicapped Expanded Certification was illegal or an abuse of discretion.

Issue 1. Whether respondent DOT's decision not to promote complainant to a Captain position in District 1 in May of 1992 constituted discrimination based on his handicap or his race.

As the Commission stated in Harris v. DHSS, Case Nos. 84-109-PC-ER, 85-0115-PC-ER (2/11/88), a typical handicap discrimination case will involve the following analysis:

- (1) Whether the complainant is a handicapped individual;
- (2) Whether the employer discriminated against complainant because of the handicap;
- (3) Whether the employer can avail itself of the exception to the prescription against handicap discrimination in employment set forth at §111.34(2)(a), Stats., -- i.e., whether the handicap is sufficiently related to the

complainant's ability to adequately undertake the job-related responsibilities of his or her employment (this determination must be made in accordance with §111.34(2)(b), Stats., which requires a case-by-case evaluation of whether the complainant "can adequately undertake the job-related responsibilities of a particular job");

(4) If the employer has succeeded in establishing its discrimination is covered by this exception, the final issue is whether the employer failed to reasonably accommodate the complainant's handicap.

The first question then is whether complainant is handicapped within the meaning of the Fair Employment Act. Section 111.32(8), Stats., defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such an impairment; or
- (c) Is perceived as having such an impairment.

It is undisputed that complainant has dyslexia and that his dyslexia slows his reading speed and reading comprehension, and interferes with his ability to correctly spell words. However, in view of complainant's consistently satisfactory performance in a supervisory position over a period of more than 10 years and the satisfactory rating of his written communication skills by his supervisors over this period of time, the Commission concludes that complainant's dyslexia does not rise to the level of an impairment "which makes achievement **unusually** difficult or limits the capacity to work" within the meaning of the Fair Employment Act (FEA). See Jacobus v. UW-Madison, 88-0159-PC-ER (2/92).

Complainant argues in this regard that respondent's determination, subsequent to the filing of the instant complaint and based on information not considered by the appointing authority at the time of the subject selection decision, that complainant was eligible for HEC, demonstrates that complainant is indeed handicapped within the meaning of the FEA. However, the definition of "handicap" for purposes of the HEC program is not identical to the definition of "handicap" within the meaning of the FEA; and a determination by a state agency that a candidate is eligible for HEC is certainly not binding on the Commission in its interpretation and application of the provisions of the FEA.

If the complainant had shown that he was handicapped, the next question to be resolved under the Harris analysis is whether the respondent

discriminated against the complainant because of his handicap. Complainant would first have to show that the individuals who made the decision to select Mr. Bishop for the subject Captain position were aware of complainant's handicap. Although this is not clear from the record, it appears that either Mr. Meekma or Mr. Singletary was aware that complainant had been certified for the position as the result of HEC and initiated the request to the Bureau of Human Resource Services that complainant's eligibility for HEC be verified.

The record does not show, however, that respondent's decision to hire Mr. Bishop instead of complainant for the subject Captain position was motivated by complainant's handicap. Respondent has articulated that Mr. Bishop was hired due to his completion of an Associate Arts degree in law enforcement and the Northwestern University law enforcement course; his 6 years of experience as a State Patrol Lieutenant, a higher rank than complainant's Sergeant rank; and the fact that respondent DOT's affirmative action plan showed that the State Patrol Captain's classification was underutilized for ethnic/racial minorities. These reasons are legitimate and non-discriminatory on their face.

Complainant argues that the fact that complainant was ranked as the top candidate by the interview panel demonstrates pretext. However, an appointing authority is not required to appoint the candidate recommended by the interview panel and it does not constitute discrimination per se if an appointing authority does not do so. In this case, the recommendation of the interview panel was one of several factors considered by the appointing authority. The other factors included level and type of education; level and type of experience with the State Patrol; and the goals of the applicable affirmative action plan. Complainant has failed to show that any of these factors was inappropriate given the duties and responsibilities of the subject Captain position or that respondent's assessment of the candidates' qualifications on the basis of these factors was inconsistent with the information made available to respondent during the course of the recruitment and selection process. Complainant has failed to demonstrate pretext in this regard.

Complainant also argues that, once respondent DOT requested HEC, it was required to hire a handicapped candidate and its failure to do so demonstrates pretext. This argument is absurd. Section 230.25(1n), States., states as follows, in pertinent part:

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

* * * * *

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

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

Complainant argues that the language "in order to hire persons with a handicap" requires an appointing authority to hire a handicapped candidate if the appointing authority requests HEC. The obvious intent of this statutory provision is to make available to an appointing authority the names of handicapped candidates to give these individuals an opportunity to be considered for appointment to an available position and to give the appointing authority the opportunity to consider them for appointment. To follow complainant's logic in this regard, if 3 candidates are certified to an appointing authority as the result of HEC, the appointing authority would be required to appoint all three of them even if only one position was available.

The complainant has failed to demonstrate pretext and has failed to show that he was discriminated against on the basis of handicap in regard to the subject selection decision.

Complainant also claims discrimination on the basis of his race. In view of complainant's race (white), the undisputed fact that he was qualified for the subject position and he did compete for it, and the undisputed fact that a person of another race (black) was the successful candidate, complainant has shown a prima facie case of race discrimination.

As discussed above, respondent has articulated legitimate, non-discriminatory reasons for the subject selection decision.

Also as discussed above, complainant's argument in regard to his ranking by the interview panel fails to demonstrate pretext.

Complainant finally argues in this regard that respondent DOT's reliance on its affirmative action plan shows pretext, if not direct evidence of discrimination. However, in differentiating among well-qualified candidates for a position, it is not evidence of discrimination to consider the goals of a

proper affirmative action plan as a selection criterion. The record clearly shows that the affirmative action plan in effect for respondent DOT during the relevant time period showed an underutilization for ethnic/racial minorities for the State Patrol Captain classification. Complainant has failed to offer any evidence that the contents or method of promulgation of this plan were deficient in any way. Complainant argues that the underutilization statistic for racial/ethnic minorities under consideration here was improperly calculated. Not only did complainant fail to offer any proof that incorrect labor pool data or an incorrect classification or classification grouping was used to generate the underutilization statistic, but complainant's argument necessarily fails when logic enters the picture. Complainant correctly cites the requirement that underutilization must be determined utilizing "classifications," not some more generic grouping of positions. The record clearly shows that there were no members of a racial/ethnic minority employed in the classification of State Patrol Captain at or prior to the time the subject selection decision was made. Obviously, unless complainant is arguing that there are no members of a racial/ethnic minority qualified for the classification of State Patrol Captain, there is an underutilization. Complainant has failed to show pretext or direct evidence of discrimination in this regard.

Complainant has failed to show that he was discriminated against on the basis of his race in regard to the subject selection decision.

Subissue: Whether respondents' decision that complainant was not eligible for Handicapped Expanded Certification constituted discrimination based on his handicap or his race.

Complainant does not offer specific arguments in regard to this subissue. The most that the Commission can glean from complainant's post-hearing briefs is that complainant contends there was collusion between the Division of State Patrol and the Bureau of Human Resource Services to remove complainant from consideration for the subject Captain position so that Mr. Bishop could be selected, and that the motivation for this collusion was handicap and race discrimination. However, this argument necessarily fails since, contrary to the dates cited in complainant's reply brief, the decision by the Division of State Patrol to recommend Mr. Bishop's selection to the DOT Secretary was made before the decision by the Bureau of Human Resource

Services that complainant was not eligible for HEC was communicated to the Division of State Patrol. As a result, the decision by the Bureau of Human Resource Services that complainant was not eligible for HEC had no effect on the subject selection decision. Complainant has failed to show discrimination in this regard.

The other arguments advanced by complainant in regard to the HEC eligibility determination relate more directly to whether respondent DOT abused its discretion in this regard and will be discussed below.

Issue 2. Whether respondent DOT's decision not to promote appellant to a Captain position in District 1 in May of 1992 was illegal or an abuse of discretion.

The only illegality alleged by appellant was respondent DOT's failure to appoint a HEC candidate to the position once respondent DOT requested HEC. This allegation is discussed above and decided in the respondents' favor.

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, 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, 81-74-PC (1982).

Here, appellant argues that he was better qualified than Mr. Bishop for the subject Captain position in view of his top ranking by the interview panel and in view of his greater experience with district patrol activities and his longer tenure with the State Patrol. As discussed above, an appointing authority is not required to accept an interview panel's recommendation. It is apparent from the record in this case that the interview panel was regarded as an advisory panel by the appointing authority and it was not "clearly against reason and evidence" for the appointing authority to consider the panel's recommendation as only one of several selection criteria.

In addition, it appears from appellant's argument that he felt that the appointing authority should have given greater weight to his years of service with the State Patrol and his experience with district patrol activities. However, as the Commission has consistently held, it is not the Commission's role to determine which of the universe of possible selection criteria the appointing authority should apply but instead to determine whether the selection criteria utilized by the appointing authority were reasonably related to the duties and responsibilities of the subject position and were uniformly applied to the candidates. As discussed above, respondent DOT's selection decision relied on their view that Mr. Bishop's training in law enforcement was superior to appellant's and the fact that he had been employed at a higher level with the State Patrol than appellant. These criteria are certainly reasonably related to the duties and responsibilities of a position supervising law enforcement activities in a district office of the State Patrol and the record shows that the conclusions drawn by respondent DOT as the result of applying these criteria to the qualifications of appellant and Mr. Bishop were accurate. Appellant has failed to show that respondent DOT abused its discretion as alleged.

Subissue: Whether respondents' decision that appellant was not eligible for Handicapped Expanded Certification was illegal or an abuse of discretion.

It is not apparent from a review of appellant's arguments that he has alleged any illegality in this regard.

Appellant does allege that respondent DOT abused its discretion by concluding that appellant was not eligible for HEC. Appellant first argues that, since Ms. McPeek's evaluation indicated that appellant's disability as the result of his dyslexia was substantial, it was clearly against reason and evidence for respondent DOT to conclude that he was not eligible for HEC. However, the standard respondent DOT was required to apply was whether or not appellant had a "physical or mental disability which substantially limits the person's employment opportunities, including the person's ability to obtain or retain employment." §ER-Pers. 12.06, Wis. Adm. Code. Although Ms. McPeek's evaluation related the information she had obtained from appellant as to how he had modified his approach to his job duties and responsibilities as the result

of his dyslexia, it failed to describe how or if appellant's dyslexia had substantially limited his ability to obtain or retain employment. To determine this, Ms. Dichraff consulted the most logical source of this information for a long-term employee, i.e., appellant's performance evaluations. This review revealed not only that appellant's performance in his supervisory positions had been consistently satisfactory, but also that his writing skills had been praised. It was certainly not against reason and evidence for Ms. Dichraff and Ms. Morehouse to conclude on this basis that appellant's dyslexia had not substantially limited his ability to obtain or retain employment and, as a consequence, that he was not eligible for HEC. Appellant has failed to show that respondent DOT abused its discretion in this regard.

Respondents also raise a timeliness objection to the appeal filed in Case No. 92-0672-PC. It is apparent from the record that appellant received notice no later than May 6, 1992, that it had been determined that he was not eligible for HEC and that, as a result, he would not be appointed to the subject Captain position. It is also apparent from the record that appellant filed his appeal of the HEC determination and the nonselection with the Commission on June 12, 1992. Section 230.44(3), Stats., requires that this appeal have been filed with the Commission within 30 days of May 6, 1992. Clearly, June 12 is not within 30 days of May 6. The Commission has consistently held that this 30-day filing requirement is jurisdictional in nature. Appellant argues that respondents waited too long to raise this objection and, as a consequence, waived their right to raise it. However, subject matter jurisdiction is not subject to waiver. In addition, §PC 1.08(3), Wis. Adm. Code, provides that "[a]ny party may move at any time to dismiss a case on the ground the commission does not have subject matter jurisdiction." The Commission concludes on this basis that Case No. 92-0672 was not timely filed.

ORDER

These cases are dismissed.

Dated: _____, 1993 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

LRM:rcr

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner

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