



employees, and are used to fill in for the PO 2 positions in the unit. In order to qualify for appointment to a PO 2 position, a PO 1 must complete recruit training school and be certified as a law enforcement officer. Complainant started recruit training school soon after his August 26, 1990, appointment. At no time did complainant request that he be permitted to attend full-time recruit training school.

4. Recruit training school is a law enforcement certification program offered by the state technical school system. UW-P PO 1s attended recruit training school on either a full-time or part-time basis. Those attending on a part-time basis are paid by UW-P for the hours they are in school; those attending on a full-time basis are not paid for the hours they are in school. The recruit training program consists of a set of training modules. Only some of these modules are offered at any one time, and all must be completed before a student is eligible for certification. A student in part-time training generally completes three (3) or four (4) modules each year. UW-P receives a grant of money each year from the Law Enforcement Standards Board to pay for law enforcement staff training. UW-P uses this money for recruit school and other training of staff. UW-P staff have not been asked or required to pay for recruit training school.

5. Originally, certification required completion of eight (8) modules or 320 hours. Some time in 1990 or 1991, the program was modified and this requirement changed to require completion of ten (10) modules or 400 hours. At the time this change was effected, students who had completed six (6) modules were permitted to complete their training under the 320 hour requirement.

6. Thomas Steiner was hired as a student PO 1 by UW-P some time prior to February of 1990 and began recruit training school in February of 1990. Mr. Steiner had completed five (5) training modules before complainant began recruit training school. Mr. Steiner originally was enrolled in part-time recruit training school. However, as the result of the modification of the training program and the certification requirements, the order of offering certain modules changed, and certain required elements were placed in different modules than before. As a result, Mr. Steiner requested that he be permitted to attend recruit training school on a full-time basis as a means of assuring that he would complete the required elements of the program before the expiration of the three-year deadline for completion. UW-P granted this

request. Complainant was not in this situation nor one similar and did not make such a request. Mr. Steiner was appointed to a PO 2 position at UW-P effective May 24, 1992.

7. Lloyd Hall was hired as a student PO 1 by UW-P prior to August 26, 1990. Mr. Hall had completed four (4) training modules before complainant began recruit training school. Mr. Hall found himself in the same situation as Mr. Steiner when the training program and the certification requirements were modified and, as a result, UW-P granted Mr. Hall's request to attend recruit training school on a full-time basis. Complainant was not in this situation nor one similar and did not make such a request. Mr. Hall was appointed to a PO 2 position at UW-P effective April 19, 1992.

8. David Brehm was hired as a PO 1 by UW-P effective November 25, 1991. He was hired as part of a special program in which Gateway Technical College law enforcement students received paid on-the-job training, i.e., a paid internship. Mr. Brehm originally attended recruit training school on a part-time basis and began at or shortly after complainant did. Some time during the spring or summer of 1991, Mr. Brehm requested that he be allowed to attend recruit training school on a full-time basis because he had only one class left to complete at Gateway and he felt that having completed recruit training school by the time he graduated from Gateway would make him more marketable. UW-P granted this request. Complainant was not in this situation nor one similar and did not make such a request. Mr. Brehm was appointed to a PO 2 position at UW-P effective November 29, 1992. Mr. Brehm resigned from UW-P effective February 1, 1993.

9. Linda Malnar and James Heller were hired as PO 1s by UW-P effective May 24, 1992.

10. Steiner, Hall, Brehm, Malnar, and Heller were under the age of 40 at all times relevant to this matter.

11. The shifts available to PO 1s are usually the second shift (3 p.m. to 11 p.m.) and the third shift (11 p.m. to 7 a.m.). During all times relevant to this matter, Sergeant Faye Schouten was assigned the responsibility of establishing the schedule for the PO 1s. Complainant made it known to her that he wished to work as many hours each week as possible in order to maximize his pay. Complainant considered the second shift more desirable to him than the third shift. The schedule for the period of September 27 through November 22, 1992, indicates that, on those days when complainant and another PO 1 were

assigned to work the second and third shifts, complainant was generally assigned the second shift; and that complainant generally worked more hours each week than any other PO 1. The schedules of student PO 1s were established to accommodate their class schedules; and of PO 1s in recruit training school to accommodate their training schedule. In his hearing testimony, complainant indicated that, during this period of time, the PO 1 schedule shows that his assigned hours were as desirable as those of the other PO 1s.

12. PO 1s are not eligible to carry a firearm and, as a result, are not approved for refresher firearm training. Certain PO 1s, including Mr. Steiner, requested use of the firing range in conjunction with the recruit training module relating to use of a 9 mm weapon, and Chief Ostrowski granted these requests. This did not constitute refresher firearm training. Complainant did not make such a request.

13. Some time prior to February 23, 1993, the new Assistant Chancellor, Chief Ostrowski's supervisor, directed Chief Ostrowski to notify him as soon as possible after 5:15 a.m. of snow or other adverse weather conditions so that he could make a decision about class closings. As a result, Sgt. Schouten wrote and issued a memo on February 23, 1993, to all dispatchers, including complainant, to the effect that the on-call supervisor should be called between 5:00 and 5:15 a.m. to report adverse weather or driving conditions.

14. On March 10, 1993, Sgt. Schouten was scheduled to work until 3:00 a.m. and complainant was scheduled to work the third shift, i.e., from 11 p.m. to 7:00 a.m. Just prior to the end of Sgt. Schouten's shift, she met with complainant and directed him to call Chief Ostrowski, i.e., the on-call supervisor, between 5:00 and 5:15 a.m. to report on weather and driving conditions so that Chief Ostrowski could report this to the Assistant Chancellor who would need to make a decision about class closings. Sgt. Schouten stressed to complainant that he was required to call Chief Ostrowski no later than 5:15 a.m., that this directive came from the Chief, and that the Chief considered it very important that the call be made no later than 5:15 a.m. The UW-P grounds supervisor had contacted Sgt. Schouten prior to 2:50 a.m. and they had discussed and made arrangements for snow removal.

15. Complainant finished his dispatch duties at 3:00 a.m. and began his patrol of the campus. By this time, about three (3) inches of snow had fallen on the campus. Complainant's patrol vehicle became stuck in the snow prior

to 5:00 a.m. at the Physical Education Building. While complainant was getting his vehicle out of the snow, he received a message on his beeper. Complainant then returned to the headquarters for the purpose of answering the beeper message and his vehicle got stuck in the headquarters parking lot. Complainant then entered the headquarters building and listened to his voice mail. The first message on the voice mail was from Chief Ostrowski who was very upset with complainant for not calling him prior to 5:15 a.m. Complainant proceeded to listen to the rest of the messages on his voice mail and to return another call before calling Chief Ostrowski.

16. Complainant, in a sworn interrogatory, stated as follows, in pertinent part:

. . . Sgt. Schouten directed me to call Chief Ostrowski between 5:00 a.m. and 5:15 a.m. to report weather conditions on campus. She emphasized to me that the call had to be made no later than 5:15 a.m. I called at about 5:30 a.m. and was told that I was 15-17 minutes late.

I had called late due to the difficulty in obtaining a parking place outside the office because of the snowy conditions. I was outside the office at 5:10 a.m. I would normally have been able to get inside and call the Chief by 5:15 a.m., but for the snow. Because of the snow, it was 5:20 a.m. when I got into the office. There was already a message on the answering machine from the Chief. The Chief's tone of voice caused me to panic and fear termination since I believed the Chief's prior conduct had been designed to set me up for a termination.

Because of my fear and anxiety, I mistakenly told the Chief that I had been instructed to call between 5:15 a.m. and 5:30 a.m.

17. Complainant testified at hearing that he received the beeper message as the result of Chief Ostrowski leaving a message on his voice mail while he was still stuck at the Physical Education Building some time prior to 5:00 a.m.; that he arrived at the headquarters building, got stuck in the snow again, and entered the building at 5:12 a.m.; that Chief Ostrowski's message was the first message on the voice mail but that he listened to two weeks' worth of voice mail messages just in case there was another one which would require discussion with the Chief; that he returned another message before finally calling Chief Ostrowski at 5:26 a.m.; and that he was very nervous because the plow dispatcher had called him earlier and had been upset with complainant

when he had been told that the complainant couldn't call Chief Ostrowski before 5:00 a.m. to determine whether the plows should be called out.

18. Chief Ostrowski called at approximately 5:22 a.m. to leave a message on the voice mail.

19. When he returned the call to Chief Ostrowski, complainant told the Chief that Sgt. Schouten had told him to call between 5:15 a.m. and 5:30 a.m.

20. When he discussed this incident with Sgt. Schouten later on March 10, complainant admitted that he had lied about her instructions to him because he was trying to come up with "something quickly to cover with;" stated that he had told Assistant Chief Knitter that Sgt Schouten told him to call the Chief at 5:15 a.m. but not any sooner; and indicated that he had had to listen to about five (5) minutes' worth of messages on the voice mail before he came to the Chief's message.

21. Chief Ostrowski met with complainant on March 12, 1993, to discuss the March 10 incident and, effective March 12, 1993, terminated complainant's employment for negligence in the performance of his duties, failure to follow instructions, and making false statements. The procedure followed by Chief Ostrowski in investigating the March 10 incident and in terminating complainant was consistent with the procedure he had followed in regard to other incidents involving LTEs.

22. When Chief Ostrowski discussed the incident of March 10 with Sgt. Schouten, she indicated that complainant seemed confused about the policy for snow removal and that for class cancellation.

23. Complainant testified at hearing that his visual impairment did not prevent him from carrying out his supervisor's directive on March 10, 1993.

#### Conclusions of Law

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.

2. Complainant has the burden to prove that he was discriminated against on the basis of his handicap or age as alleged.

3. Complainant has failed to sustain this burden.

#### Opinion

In an Order dated November 3, 1994, the Commission established the issue for hearing as follows:

1. Whether complainant was discriminated against on the basis of his age or handicap in regard to the following terms or conditions of employment:

a. the occasional requirement that complainant, while employed in a Facilities Repair Worker position, work 14-16 hours without a break;

b. permitting three other officers to complete recruit training school prior to complainant;

c. assigning more desirable work hours to other employees than to complainant during the time period 9/27/92-11/22/92;

d. paying other officers more than complainant during or after November of 1992;

e. the receipt by complainant of a verbal reprimand for submitting an inaccurate report in March of 1993;

f. the denial of refresher training in firearms for complainant on or after September 26, 1992; and the denial of dispatcher recertification exam training for complainant in February of 1993.

2. Whether complainant was discriminated against on the basis of his age or handicap when respondent terminated him effective March 12, 1993.

At the commencement of the hearing, complainant indicated that he wished to withdraw so much of his complaint as related to issues identified as 1.a., 1.d., 1.e., and 1.f. (after the semicolon). This decision will, as a result, only address issues 1.b., 1.c., 1.f., (before the semicolon), and 2.

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 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. Although respondent disputes that complainant's visual impairment constitutes a handicap, it will be assumed for purposes of this analysis that complainant is handicapped.

The second issue is whether the respondent discriminated against the complainant because of his handicap. There are two ways that discrimination on the basis of handicap under this element can occur. The first would occur if respondent's discharge of complainant had been motivated by complainant's handicap. The second would occur if respondent terminated complainant for performance reasons that were causally related to his handicap. See Conley v. DHSS, 84-0067-PC-ER (6/29/87).

In proving discrimination pursuant to the first model, complainant would first have to prove that respondent was aware or should have been aware of complainant's handicap. It appears to be undisputed that complainant's handicap is outwardly apparent, and that respondent was aware of it. Complainant would then have to prove that respondent treated him differently because of this handicap. In analyzing such a claim of disparate treatment, the Commission generally 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), and its progeny, to determine the merits of the complainant's charge. Under this method, the initial burden is on the complainant to establish the existence of a prima facie case of discrimination. The employer may rebut this prima facie case by articulating legitimate, non-discriminatory reasons for the actions taken which the complainant may, in turn, attempt to show were in fact pretexts for discrimination. This is the same type of analysis that would apply here to complainant's age discrimination charge.

The Commission will assume for purposes of analysis that complainant succeeded in establishing a prima facie case of handicap and age discrimination. The burden then shifts to respondent to articulate legitimate,

non-discriminatory reasons for its actions, and to complainant to show that these reasons are pretextual. The parties offer the following in this regard:

**1.b. permitting three other officers to complete recruit training school prior to complainant.**

Respondent states that the other three PO 1s (Steiner, Hall, Brehm) were not similarly situated to complainant as it relates to the completion of recruit training school, and that complainant never requested to attend recruit training school on a full-time basis. These reasons are legitimate and non-discriminatory on their face.

Although complainant testified that he requested of Chief Ostrowski, Assistant Chief Knitter, Sgt. Schouten, and Norma Rukavina (Chief Ostrowski's secretary) that he be permitted to attend recruit training school on a full-time basis, the testimony offered by these individuals (Ms. Rukavina did not testify) is consistent in its denial that such a request was made of any of them. In view of the lack of any corroborating evidence and the conclusions relating to complainant's lack of credibility in relation to other parts of the record here (see below), it is concluded that complainant did not make such a request.

Even if it were concluded that complainant had made such a request of respondent, complainant has failed to show that he was similarly situated to those PO 1s whose requests for full-time recruit training school were granted. Mr. Hall and Mr. Steiner were required to attend full-time in order to meet the three-year completion deadline, and Mr. Brehm was a Gateway Technical College student who wanted to finish technical college and earn his law enforcement certification through recruit training school around the same time to increase his opportunities for employment in the law enforcement field. Complainant has not shown that he had a reason for full-time attendance similar or comparable to these.

Complainant has failed here to show handicap or age discrimination.

**1.c. assigning more desirable work hours to other employees than to complainant during the time period 9/27/92-11/22/92.**

The schedules for this period of time indicate that, in accordance with complainant's wishes, he was assigned to work more hours each week than any of the other PO 1s; and, when he was scheduled on a day when there were two shifts to cover, he was assigned to cover the earlier shift, i.e., 3:00 p.m. to

11:00 p.m. Complainant also alleged that he was required to work the third shift on more weekends than Mr. Brehm during this period of time, and specifically alleged that he was required to work 26 weekend third shifts while Mr. Brehm was scheduled to work only 13. However, the record shows that, even if Friday third shifts are included as weekend third shifts, Mr. Hogle worked nine (9) of these and Mr. Brehm seven (7). This does not corroborate complainant's allegation nor demonstrate a significant disparity. Most importantly in this regard, complainant testified at hearing that, upon reviewing the schedules for this period of time, he concluded that his work schedule was no less desirable than that of any of the other PO 1s. Complainant has failed to show handicap or age discrimination here.

**1.f. the denial of refresher training in firearms for complainant on or after September 26, 1992.**

Complainant has failed to show that he was eligible for refresher training in firearms, i.e., the record shows that PO 1s are not qualified to carry a firearm; or that any other PO 1 was given such refresher training, i.e., the record shows that certain PO 1s were granted permission at their request to use the firing range to assist them in completing a training module relating to the use of a 9mm weapon but that complainant never made such a request. Although complainant alleges in his post-hearing brief that respondent took some action to prevent him from completing a recruit training module relating to firearms training, the record does not support this to any extent, i.e., the record does not show that work-site firearms training was a required part of any recruit training module or that complainant was denied any firearms training he requested or needed. Complainant has failed to show handicap or age discrimination in this regard.

**2. respondent's termination of complainant effective March 12, 1993.**

Respondent has stated that complainant was terminated for negligence in carrying out his duties, failure to follow instructions, and making false statements. These reasons are legitimate and non-discriminatory on their face.

Complainant appears to be arguing that the problems he had with his vehicle getting stuck in the snow prevented him from making the call to Chief

Ostrowski before 5:15 a.m. The evidence presented by complainant in this regard is not credible. Complainant gave several directly contradictory versions of what occurred during the third shift on March 10. At hearing, complainant testified that he got the beeper message resulting from Chief Ostrowski's call some time prior to 5:00 a.m.; that, as a result, he returned to the headquarters building; and that he entered the headquarters building at 5:12 a.m. Obviously, complainant could have called the chief immediately and satisfied the 5:15 a.m. deadline, and getting stuck in the snow would not have prevented him from doing that. At deposition, complainant testified that he received the beeper message and returned to the headquarters building; and that he was outside the headquarters building at 5:10 a.m. but didn't enter the building until 5:20 a.m. Once again, getting stuck in the snow did not prevent complainant from calling the Chief prior to 5:15 a.m. since, given this version of events, he was present outside the headquarters building at 5:10 a.m.

Complainant also attributes his failure to meet the 5:15 a.m. deadline to his nervousness after talking to the grounds superintendent about plowing and after listening to the angry message from Chief Ostrowski on his voice mail. Complainant is not credible in this regard either. If complainant had been that nervous about getting the plows out, he would have made a point of making the call to the Chief at or immediately after 5:00 a.m.; and would not have listened to two week's worth of voice mail messages and returned another call before calling the Chief (note that complainant stated in his deposition that the Chief's message was the last one on the voice mail but testified at hearing that it was the first, and that the record shows that most recent messages are the first on the tape). Moreover, the record shows that Chief Ostrowski did not place his call to complainant until 5:22 a.m. (and would have had no reason to do so prior to 5:15 a.m.) which, as a result, could not have had an impact on actions taken by complainant prior to 5:15 a.m. Even if Chief Ostrowski's call had been placed earlier, it would seem more plausible for complainant to have called Chief Ostrowski back immediately if he knew the Chief was upset and further delay would only compound the problem.

Complainant also points to his confusion regarding the calling policy for snow removal and that for class cancellation. He may well have been and Sgt. Schouten may not have clarified this sufficiently for him, but this confusion is not really relevant here, i.e., complainant was clearly instructed to call the Chief between 5:00 and 5:15 a.m., complainant understood this

instruction and that Sgt. Schouten and Chief Ostrowski considered it very important, and complainant failed to carry it out. The record does not show that complainant's confusion interfered to any extent with his understanding of the instruction or his failure to carry it out.

Even more important to respondent in its decision to terminate complainant were the false statements he made about the instructions he got from Sgt. Schouten. Complainant does not deny making the false statements but again attributes it to innocent mistake or confusion. This is inconsistent with statements he made subsequently to Sgt. Schouten, which she included in a memo to Chief Ostrowski within hours of the incident, to the effect that he had been trying to come up with "something quickly to cover with." Moreover, the Commission concludes, based on complainant's inconsistent testimony, that a pattern has been established here which makes it more plausible that complainant's false statements were not the result of inadvertence or confusion.

Complainant has failed to show pretext. However, complainant's primary failing in regard to this aspect of his handicap and age complaints is that he failed to show that he was treated differently than other younger, non-handicapped employees who engaged in similar actions.

In order to establish the second type of handicap discrimination, it would be necessary for complainant to show a causal link between his handicap and his poor work performance in order to prove that he was discriminated against as alleged. Complainant admitted at hearing that his handicap did not prevent him from carrying out the directive given him by Sgt. Schouten on March 10, and it is axiomatic that such a handicapping condition does not prevent an individual from telling the truth. Complainant has failed to establish handicap discrimination on this basis.

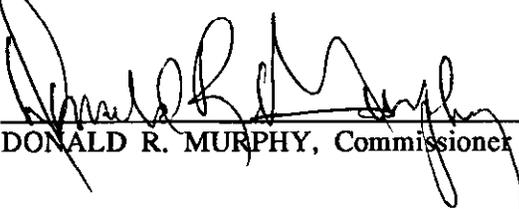
Order

This complaint is dismissed.

Dated: April 28, 1995 STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

LRM:lrn

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, 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 (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

**Petition for Judicial Review.** Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the

date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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

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

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

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats. 2/3/95