

LYNN OESTREICH,

Complainant,

v.

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

Respondents.

Case No. 87-0038-PC-ER

INTERIM
DECISION
AND
ORDER

A proposed decision and order was issued in this matter on December 14, 1990. The cover letter to the proposed decision explained that the parties had until January 14, 1991 to file objections or to request oral argument, with ten days to file any written response. On the last day for filing objections, the complainant filed a motion to tax fees and a motion to convene an evidentiary hearing on remedy. The respondent Department of Corrections (DOC)¹ filed a letter with the Commission on January 28, 1991, which purported to be an objection to the proposed decision as well as objections to the complainant's motions. A copy of the proposed decision and order is attached hereto. After considering the parties' submissions, the Commission rejects certain portions of the proposed decision and order as noted below. The remaining portions of the proposed decision and order are adopted in their entirety.

Respondent DOC contends that the proposed decision's conclusion that there is a cause of action for reverse handicap discrimination under the Fair Employment Act is a material error of law. This objection was filed two weeks after the January 14th date established in the cover letter to the proposed decision and order. Even if the objection had been received timely, the

¹Pursuant to the provisions of 1989 Wis. Act 31 which created the Department of Corrections, effective January 1, 1990, the authority previously held by the Secretary of the Department of Health and Social Services with respect to the positions that are the subject of this proceeding is now held by the Secretary of the Department of Corrections.

respondent has failed to adequately support its contention and it must be rejected.

The complainant has requested an evidentiary hearing on the issue of remedy in order to "produce proof from which salary diminution may be legally inferred" and has also moved for "an order approving costs, fees and disbursements in the total amount of \$2,344.24." The proposed decision and order addressed the issue of remedy even though there had been no briefing schedule on that issue. In light of the complainant's request, the Commission rejects the portion of the proposed decision commencing at the top of page 8 dealing with the issue of remedy, thereby permitting the complainant an opportunity to offer evidence regarding his allegation of salary diminution. The hearing may, if necessary, also relate to the motion to tax fees.

In reaching its decision to grant the complainant's motion for an evidentiary hearing, the Commission rejects DOC's argument that the complainant is getting a "second kick at the cat" after the record was closed. The rationale relied on for addressing the remedy issue was explained in the proposed decision as follows:

The briefing schedule that was established in this matter did not explicitly include the issue of appropriate remedy. However, the Commission will proceed to address that issue because neither party has specifically requested an opportunity to submit additional arguments on the issue of remedy. In addition, this decision has initially been issued in the format of a proposed decision, thereby providing the parties an opportunity to file objections.

This explanation makes it clear that the parties will not have had two opportunities to address the issue of remedy. The hearing examiner chose to address the question of relief in the proposed decision because it appeared that there might not be any disagreement between the parties. The complainant's motions have shown that the parties need to be provided an opportunity to create an evidentiary record and to offer arguments.


ORDER


Having found that the respondent discriminated against the complainant based on handicap, the Commission will contact the parties for the purpose of scheduling a conference in preparation for a hearing on the issue of remedy.

Dated: February 12, 1991 STATE PERSONNEL COMMISSION


LAURIE R. MCCALLUM, Chairperson

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DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

* * * * *

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Secretary, DEPARTMENT OF HEALTH
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* * * * *

PROPOSED
 INTERIM
 DECISION
 AND
 ORDER

This complaint arises from two promotions. Complainant alleges he suffered from reverse handicap discrimination with respect to the use of handicapped expanded certification for filling the promotional vacancies. An initial determination of "probable cause" was issued on December 21, 1988. The parties effectively waived a hearing and were directed to file briefs on the following issue:

Whether respondents discriminated against complainant on the basis of handicap in violation of the Fair Employment Act with respect to [their] use of handicapped expanded certification as part of the staffing process for the IRCD 2 at [Kettle Moraine Correctional Institution] and the ISD 1 position at [Waupun Correctional Institution] in November - December 1986, by not obtaining verification of the handicapped status of the person appointed to the ISD 1 position at WCI, pursuant to §ER Pers. 12.05(2), Wis. Adm. Code, prior to the use of handicap expanded certification.

The findings of fact set out below are identical to the investigative findings set out in the initial determination and have been admitted by the respondents pursuant to §804.11, Stats.

FINDINGS OF FACT

1. Complainant passed a departmental (DHSS) promotional examination for Institutional Residential Care Director (IRCD) 2, and was ranked 6th. The register from this exam was created in November, 1986.

2. This register was used to fill an IRCD 2 position at Kettle Moraine Institution (KMCI) and an Institution Security Director (ISD) 1 position (same pay range) at Waupun Correctional Institution (WCI).

3. Complainant's exam score was not high enough for certification for either of these vacancies.

4. An identical certification was made for each vacancy. These certifications included three candidates who had scored lower than complainant but who were certified on a handicapped expanded certification basis pursuant to §230.25(1n)(a)3. and (b), Stats. The certification date for the IRCD 2 position at KMCI was November 18, 1986. The certification date for the ISD 1 position at WCI was December 1, 1986.

5. The person appointed to the IRCD 2 position at KMCI, effective December 7, 1986,¹ was not among those certified under the handicapped expanded certification. The person who was appointed to the ISD 1 position at WCI, effective January 18, 1987, was one of those who had been certified on a handicapped expanded certification basis.

6. Respondents did not attempt to verify the handicap status of the WCI appointee prior to the use of handicap expanded certification. A physician's verification ultimately was made on June 12, 1987, and approved by DMRS on June 25, 1987.

7. The Wisconsin Personnel Manual: Staffing, which sets forth DMRS policy to be followed with regard to staffing transactions, but which has not been adopted as a rule in the Wisconsin Administrative Code, which was effective during the period in question, provides at §232.022 ("Handicapped Expanded Certification"), pp. 232-3, as follows:

"Prior to making an appointment of a person certified under Handicapped Expanded Certification, the handicap may be verified by the appointing authority if there is reason to believe that it is necessary to do so." (emphasis added)

¹ The person appointed to the IRCD 2 position at KMCI transferred to an Administrative Officer (AO) 1 (same pay range) vacancy at Columbia Correctional Institution (CCI), effective December 21, 1986. The person who held the AO 1 position at CCI transferred to the IRCD 2 position at KMCI, effective the same date.

8. At the time of the transaction in question, the Wisconsin Administrative Code provision governing handicapped expanded certification provided as follows at §ER Pers 12.05(2):

"Expanded certification of up to 3 additional names to hire the occupationally handicapped may be authorized by the administrator at the request of the agency. Such certification shall be limited to persons who have been certified by a physician, psychiatrist, psychologist or other appropriate specialist as having a disability which has been determined to substantially limit employment opportunities and which does not require the person to successfully complete a training program to overcome the vocational handicapping effects of the disability prior to becoming employable" (emphasis added)

9. After the appointment to the IRCD 2 position at KMCI, effective December 7, 1986, respondent DHSS could have, but did not, request an additional certification to replace the name of the person so appointed. If such a certification had been made, complainant, who was ranked sixth on the competitive register, would have been certified.

10. During the period in question, DER's Wisconsin Personnel Manual: Staffing, provided:

232.053 SUPPLEMENTAL CERTIFICATION

- I. Policy. When practical and feasible, appointing authorities should have a minimum of five candidates to consider for each vacancy. Supplemental certification is used when the number of interested and available candidates from an original certification is decreased to fewer than five.
- II. Procedure. When fewer than five candidates remain available for employment consideration because of any of the above reasons, one or more additional persons may be included in the certification in rank order so the appointing authority has an opportunity to choose from among five candidates (plus veterans, HEC, and MEC or WEC).

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden of proving the respondents discriminated against him based on handicap.

3. The complainant has sustained his burden.

DISCUSSION

In its interim decision and order dated June 29, 1988, the Commission held that the Fair Employment Act's prohibition against handicap discrimination includes a claim of "reverse discrimination," i.e. a claim brought by a non-handicapped person who alleges improper preferential treatment of one or more handicapped persons. The Commission also held that the complainant had standing to pursue his claim relating to the handicapped expanded certification process because his examination score was higher than the scores of the three persons who were considered due to handicapped expanded certification.

At the time of the transactions that are the subject of this complaint, the statutory basis for the handicapped expanded certification program was §230.25(1n), Stats. (1985):

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

1. Certifying up to 3 names of persons belonging to at least one of one or more specified racial or ethnic groups.
2. Certifying up to 3 names of persons of a specified gender.
3. Certifying up to 3 names of persons with a handicap.

(b) The administrator may certify names under par. (a) 1 or 2 only if an agency requests expanded certification in order to achieve a balanced work force within that agency. The administrator may certify names under par. (a) 3 only if an agency requests expanded certification in order to hire persons with a handicap.

The statute clearly provides that the use of handicapped expanded certification is not restricted to attempts to achieve a "balanced work force." As a consequence handicapped expanded certification does not meet the definition of "affirmative action" found in §230.03(2), Stats. (1985):

"Affirmative action" means specific actions in employment which are designed and taken for the purposes of ensuring equal opportunity and a balanced work force and of eliminating present effects of past discrimination.

Even though the handicapped expanded certification program did not meet the statutory definition of "affirmative action," HEC still had the effect of providing additional certification opportunities to handicapped individuals, thereby providing affirmative action in a general sense for the handicapped.

In Paul v. DHSS & DMRS, 82-156-PC, 82-PC-ER-69, 6/19/86, the Commission addressed a claim of discrimination premised on an inconsistency between the statute providing for expanded certification for minorities and the administrative rules promulgated under the statute:

The Fair Employment Act provides that hiring decisions are to be made without consideration of the race of the candidates. However, as noted above, affirmative action in state employment is specifically provided for in Ch. 230, Stats. A strong argument can be made that the legislature intended that these provisions would not be in conflict with the Fair Employment Law, and that transactions consistent with these provisions would not violate the Fair Employment Law. If the personnel actions in issue here fell within the definition of affirmative action in s. 230.03, Stats., and were carried out consistently with the remaining provisions of Ch. 230, Stats., and the rules promulgated thereunder, the actions would presumably also be consistent with the Fair Employment Act. Here the certification action was outside the scope of permissible affirmative action as specified in Ch. 230, Stats.

Under §ER-Pers 12.05(2), Wis. Adm. Code, the administrative rule promulgated by the respondent administrator of the Division of Merit Recruit and Selection, inclusion in handicapped expanded certification is limited to persons "who have been certified as a physician psychiatrist, psychologist or other appropriate specialist as having a disability." Here, names were included in the list before their disabilities had been certified by an appropriate specialist.

Administrative rules have the force and effect of law. Law Enforcement Standards Bd. v. Village of Lyndon Station, 101 Wis. 2d 472, 305 NW 2d 89 (1981). By failing to verify the existence of the disabilities prior to certification, the respondents violated the administrative rule and discriminated against the complainant based on handicap. The net effect of the respondents action was that three individuals who scored lower than the appellant on the qualifying exam but who were included on the certification list under handicapped expanded certification even though their handicaps had not been verified as required, were actually considered for the vacant positions.

Relief

The briefing schedule that was established in this matter did not explicitly include the issue of appropriate remedy. However, the Commission will proceed to address that issue because neither party has specifically requested an opportunity to submit additional arguments on the issue of remedy. In addition, this decision has initially been issued in the format of a proposed decision, thereby providing the parties an opportunity to file objections.

The key fact relative to the issue of remedy is that the complainant was himself never certified for either positions in question. There is no indication that, absent discrimination, the complainant would have been certified, much less selected, for either vacancy. Therefore, the appropriate relief to be awarded in this matter is a "cease and desist" order and an award of attorneys fees as permitted by Watkins v. LIRC, 117 Wis. 2d 753, 345 NW2d 482 (1984).

ORDER

The respondents shall cease and desist their conduct in violation of §ER-Pers 12.05(2), Wis. Adm. Code (1987). If the parties cannot reach agreement as to the appropriate fees to be awarded, the complainant is directed to submit a listing of fees and costs, consistent with §PC 5.05, Wis. Adm. Code, within 30 days of the date of this order.

Dated: _____, 1990 STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

AJT/gdt/2

DONALD R. MURPHY, Commissioner

GERALD F. HODDINOTT, Commissioner