

STATE OF WISCONSIN

PERSONNEL COMMISSION

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CHARLES WOOD,
 Complainant,

v.
 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Respondent.

Case No. 88-0019-PC-ER

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INTERIM
 DECISION
 AND
 ORDER

NATURE OF THE CASE

This case involves a complaint of handicap discrimination with respect to respondent's visual acuity standard for Conservation Warden hiring. Respondent filed a motion to dismiss for failure to state a claim upon which relief can be granted, and both parties have filed briefs. The underlying facts necessary for deciding the motion do not appear to be in dispute. The following findings are made solely for the purpose of resolving this motion.

FINDINGS OF FACT

1. Complainant applied for employment with respondent as a Conservation Warden in 1987. At that time, respondent's visual acuity standard for initial hiring as a Conservation Warden was 20/100 uncorrected, correctable to 20/20.
2. Complainant's uncorrected visual acuity was 20/400, correctable to better than 20/20.
3. Complainant did not score high enough on the civil service examination to be certified for consideration for employment pursuant to

the standard civil service certification process, § 230.25(1), Stats.

However, because of his vision limitation, complainant was considered to be handicapped and was granted handicapped expanded certification status pursuant to § 230.25(1n)(a)3., Stats. Complainant's civil service score was high enough to put him among the top three handicapped candidates, and therefore he was certified under handicapped expanded certification.

4. On December 21, 1987, respondent informed complainant that because he did not meet the visual acuity standard, he would no longer be considered for employment as a Conservation Warden. Complainant then filed this complaint of discrimination, alleging that respondent's action constituted handicap discrimination.

5. By letter of October 14, 1988, respondent advised complainant that it had decided to "temporarily delete the requirement for uncorrected vision of 20/100. . ." The letter went on to advise complainant as follows:

Consequently, though the temporary removal of the uncorrected visual acuity standard directly impacts Mr. Wood, it does not affect his eligibility to continue in the selection process. It is my understanding that Mr. Wood's civil service score was not high enough to place him in the top group of candidates. Therefore, his eligibility to continue in the selection process was based on his placement on the handicapped expanded certification list. Since the removal of the subject visual acuity standard removes his eligibility under HEC, the Department is not in a position to consider Mr. Wood for employment as a conservation warden at this time.

Nonetheless, until the standard is reconstituted, your client will be able to reapply for the position of a conservation warden without the disputed acuity standard creating an obstacle.

DISCUSSION

The present status of this matter is that respondent no longer has an uncorrected visual acuity standard. Therefore, complainant is eligible to compete for appointment as a Conservation Warden without having to deal with the barrier that standard presented. However, since complainant's

civil service score was not high enough to qualify him for regular certification, and respondent deemed him no longer eligible for handicapped expanded certification once its uncorrected visual acuity standard was deleted, respondent's move to delete the uncorrected vision standard left complainant in the posture of not being in a position to be appointed as a Conservation Warden, albeit for a different reason.

In support of its motion, respondent contends that as a result of its deletion of the uncorrected vision standard, it has eliminated any conceivable adverse employment action against complainant -- i.e., the only reason he would be denied employment as a Conservation Warden at this point is because of his score on the civil service examination, the validity of which has not been contested, and not because of any physical limitation.

In opposition to the motion, complainant argues that the deletion of the vision standard constitutes "retroactive law":

A retroactive law was defined in Matter of Estate of Bilsie, 100 Wis. 2d 342, 302 N.W.2d 508 (Ct. App. 1981), as a law which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past. . ." Id. at 357. In the present situation, prior to the department deleting the vision standard, Mr. Wood had a vested right to be on the HEC list, and consequently to be considered for employment as a Conservation Warden. By deleting the vision requirement, the Department took away this vested right, and imposed a new disability upon Mr. Wood, that disability being that he is no longer eligible for consideration for the Conservation Warden position. Complainant's brief, pp. 6 - 7.

There are two problems with complainant's position. First, assuming that his place on the handicapped expanded certification register can be deemed a "vested right," and respondent's action of changing its visual acuity standard can be deemed retroactive lawmaking, or even retroactive rule-making, it does not appear that it has any legal significance in this proceeding under the Fair Employment Act. That is, even if respondent's action constituted an improper retroactive quasi-legislative action, the

Commission's sole jurisdictional basis over this matter is the Fair Employment Act (FEA), and the mere fact that a transaction may have violated the civil service code or was otherwise illegal does not mean there was a violation of the FEA. In order for there to be an arguable violation of the FEA under the circumstances involved in this case, complainant would have to be alleging that respondent deleted its uncorrected visual acuity standard in an attempt to discriminate against him on the basis of his handicap. However, while in his brief complainant seems to be implying that respondent's action was not bona fide, he does not appear to be contending that it was discrimination because of handicap per se.

Furthermore, even if complainant's "vested right" theory could properly be raised in this proceeding, it is unlikely that his handicapped expanded certification status would be considered a vested right that could not constitutionally be impaired. See 16A Am. Jur. 2d, Constitutional Law § 669:

. . . A vested right may also be defined as the power to perform certain actions or possess certain things carefully and is substantially a property right. . . A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than a mere expectation of future benefit or interest founded upon an anticipated continuance of the existing general laws. The citizen has no vested rights in statutory privileges and exemptions; the state may change or take away rights which were created by the law of the state, although it may not take away property which has vested by virtue of such rights. . .

At the time respondent changed its vision policy, thus effectively depriving complainant of his handicapped expanded certification status, he was not employed as a Conservation Warden, and he had not been appointed to such employment effective in the future. The sole effect of complainant's handicapped expanded certification status was to give him eligibility to

be considered for employment.¹ It seems doubtful that people who are merely eligible for state employment under certain employment criteria acquire vested rights in such eligibility that prevent the state from ever changing those criteria.


While it appears on the record before the Commission that respondent's motion is well-grounded, the Commission will, in the interest of avoiding the possibility of piecemeal litigation, retain jurisdiction over this matter for a period of 30 days. During this period, complainant will have the opportunity to file a motion to amend his complaint if he is in a position to allege that respondent's action of deleting its uncorrected visual acuity standard was motivated by an intent to discriminate against him because of handicap, or that he suffered a cognizable adverse employment action during the period between December 21, 1987, when he was informed that he would no longer be considered for employment as a Conservation Warden because he did not meet the uncorrected visual acuity standard, and October 14, 1988, when he was advised that respondent had decided to temporarily delete said standard; or to bring on any other appropriate motion.

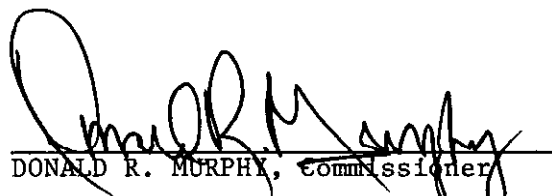
¹ Although complainant lost his theoretical eligibility to have been considered for employment, he had already been notified that he would not be considered further due to the vision requirement. Therefore, laying to one side the possibility that he could have established through his discrimination complaint that the vision standard was unlawful, the deletion of the vision standard holds open the possibility that he could obtain employment as a Conservation Warden as the result of a future staffing selection process if he were able to score high enough on the civil service exam to be certified without the aid of handicapped expanded certification.

ORDER

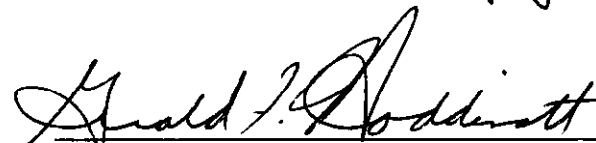
Respondent's motion to dismiss for failure to state a claim is granted. The Commission will retain jurisdiction over this matter for 30 days from the date of entry of this order while complainant will have the opportunity to file a motion or motions as aforesaid. Thereafter, the Commission will either direct further proceedings or order this matter finally dismissed.

Dated: May 18, 1989 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner

AJT:dmg
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GERALD F. HODDINOTT, Commissioner