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STATE OF WISCONSIN

PERSONNEL COMMISSION

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GERALD B. WOJTALEWICZ,
 Complainant,

v.
 Secretary, DEPARTMENT OF
 NATURAL RESOURCES,
 Respondent.

Case No. 90-0153-PC-ER

* * * * *

DECISION
AND
ORDER

Nature of the Case

This case was filed as a charge of discrimination based on age and perceived handicap. Investigation was waived and the case proceeded to hearing on July 23, 1992, before Laurie R. McCallum, Chairperson. The parties were directed to file briefs and a briefing schedule was established which would have been completed on October 2, 1992. Complainant failed to file his initial brief and, as a result, the briefing schedule was suspended.

Findings of Fact

1. The parties to this proceeding entered into the following stipulation of facts:

- a. On April 17, 1990, the Department of Natural Resources ("DNR") posted an advertisement for available Conservation Warden 1 positions.
- b. The Department of Employment Relations (DER) receives all applications for the Conservation Warden 1 positions. The first stage of the hiring process consists of DER administering a written examination to all applicants. DER then issues the DNR a certification list of all individuals who passed the written examination (scoring at least 70), and the applications of all eligible candidates on that list. These applicants are then considered for the second stage of the hiring process which includes a physical fitness test and an initial interview. Following the physical examination and first interview, all candidates are ranked. From this ranking, the Bureau of Law Enforcement decides to ask a set number of applicants (depending on the number of available

positions) to participate in the third hiring stage. The third stage consists of a second round of interviews, background checks, and psychological and medical examinations.

c. On August 13, 1990, complainant submitted an application to DER. On his application he noted that he had suffered a back injury in 1979.

d. After receiving complainant's application, DER administered the written exam to complainant, which he passed with an initial score of 78.91, and a final score, after adjustments for veteran's service, of 83.91.

e. Complainant was included among the list of 40 certified applicants sent to the Bureau of Law Enforcement at the DNR.

f. On September 13th, 1990, complainant completed his physical examination. He scored a 826.5 (700 points are required to pass).

g. Randy Falstad, a DNR Field Warden; and Dave Rasmussen and Mike Bartz, DNR Conservation Warden Supervisors, conducted the complainant's interview.

h. The Bureau of Law Enforcement used a point system to score the interviews of all eligible candidates for the Warden Recruitment Class of 1991. Each candidates was asked the same 13 interview questions. The maximum score from the interview questions was 100 points. An additional 20 points were allotted for the evaluation of a series of personality characteristics. The evaluation forms and interview sheets for the complainant are Respondent's Exhibit 5d.

i. At the closing of the first set of interviews, the 40 eligible candidates were ranked according to their combined scores on the physical fitness examination and the first interview.

j. The complainant received a combined score of 68.66, placing him 23rd from the top of the list of 40.

k. Complainant received a letter from Patrick W. Harkins, training Officer at the Bureau of Law Enforcement, dated September 18, 1990, informing him that he had not been selected to proceed to the next step.

1. On September 19, 1990, complainant filed a discrimination complaint against the DNR based on age and perceived handicap.

2. Complainant was certified as eligible for the subject Conservation Warden 1 positions as the result of Handicapped Expanded Certification (HEC). Complainant had the third highest exam score of the candidates certified as eligible through HEC. The lowest qualifying score of those candidates certified

other than through expanded certification was 88.75. Complainant's score, with the addition of veterans' preference points, was 83.91.

3. The personal information form submitted by complainant to DER as part of the application process for the subject positions indicated complainant's date of birth as November 20, 1946. This form was not transmitted by DER to DNR prior to the determination of complainant's interview score. Neither complainant's age nor his date of birth was included on any other information forwarded by DER to DNR as part of this recruitment process.

4. Complainant also filled out a personal information form required by the DNR as part of this recruitment process. This form indicated complainant's age (43) and date of birth. This form is filed upon receipt from the candidate and is not used as part of the recruitment process until background checks are conducted after completion of the first physical examination and first interview.

5. This recruitment was designed to fill 15 vacant Conservation Warden 1 positions and those selected through this recruitment constituted the Class of 1991. A decision was made to select 18 candidates on the basis of the first physical examination and first interview to proceed to the final stage of the selection process in the event that one or more of these candidates dropped out of the process or did not pass any of the subsequent parts of the selection process.

6. The following represents the scoring of complainant's responses to the interview questions by the three members of the interview panel. The numbers in parentheses are the scores complainant has argued he should have received:

<u>Question #</u>	<u>Rasmussen</u>	<u>Falstad</u>	<u>Bartz</u>
1.a.	1 (2)	0 (2)	3
1.b.	10	10	9 (10)
1.c.	4 (5)	3 (4)	3 (5)
2.	11	10	10
3.	2	2	2
4.	7	8	10
5.	5	5	4
6.	4	7	7

7.	4	4	3 (4)
8.	4	3	4 (5)
9.	2 (3)	3	1
personality	14	15	12 (12.8)

7. Question # 1.a. asked each candidate to describe his/her education and training which he/she felt could be of benefit working as a Conservation Warden. The scoring guidelines indicated as follows:

Education (2 points for each year of post high school education in law enforcement, natural resource fields, criminal justice; other fields -- 1 point/year

College degree (Bachelors or masters) 2 point bonus

Associate degree 1 point bonus

Max 10 points

8. In response to Question #1.a., complainant indicated that he had completed the six-month cadet training program at the Wisconsin State Patrol Academy and the 320 hour law enforcement training program at the Fox Valley Technical Institute.

9. Question #1.b. asked each candidate to describe any work experience which he/she felt could be of benefit working as a conservation warden. The scoring guidelines indicated as follows:

Work related experience in law enforcement, natural resources or related fields.

3 points/year Max 9 points

1 point - 320 hour

1 point - Internship

Max 10 points

10. In response to Question #1.b., complainant indicated that he had more than three years' experience in law enforcement and had completed the 320 hour technical school course in law enforcement.

11. Question #1.c. asked each candidate to describe any hobbies, sports, or other community activities which he/she felt could be of benefit working as a Conservation Warden. The scoring guidelines indicated as follows:

Sports, hobbies, scouting, 4-H, Etc.

1 point (Active involvement - 1 point up to 5)

Max 5 points

12. In response to Question #1.c., complainant indicated that he participated in hunting, fishing, trapping, boating, and snowmobiling.

13. Question #7 asked each candidate the following question: Besides enforcing fishing and hunting laws, what do you think are some other major job responsibilities of the conservation warden? The scoring guidelines indicated as follows:

- a. Public education and information
- b. Environment damage (pollution, spills, illegal disposal)
- c. Law enforcement safety programs
- d. Water regulations and zoning
- e. Endangered species protection
- f. Commercialization of resources (illegal sale)
- g. Commercial ventures (game farms, fur farms, commercial fishing, clamming)
- h. Cooperation with other agencies
- i. Assist in natural disasters
- j. Others

1 point each

Max 7 points

14. Complainant's response to Question #7 included items a., b., h., and a mention of forestry to satisfy the j. category.

15. Question #8 asked each candidate the following question: Assume you are a conservation warden. The proprietor of a local gas station indicated to you that your neighboring warden was using his state credit card to put tires on a personal truck. What would you do to solve it? The scoring guidelines indicated as follows:

Honesty is very important. Must maintain public confidence.
Verify information and go to your supervisor with information

and get back to proprietor to let him/her know corrections are being made. Supervisors to conduct investigation. This may cross agency lines, etc.

Max 5 points

16. Complainant's response to Question #8 indicated that he would attempt to verify the information and would then go to his supervisor, and that this may cross agency lines.

17. Question #9 asked each candidate to answer the following question: Relate your involvement in or knowledge of the DNR safety programs. The scoring guidelines indicated as follows:

- a. Instructor in any program (Boat, Snow, ATV - 1 each) 5 points
- b. Certified in any/each program - 2 points for each program
- c. Good general knowledge - 4 points

Max 8 points

18. In his response to Question #9, complainant indicated that he was aware of the hunting, snowmobiling, and boating programs.

19. The appropriate range of scores for the responses given by complainant to each of the questions for which complainant disputes his score is as follows:

1.a.	0-1
1.b.	10
1.c.	3-4
7.	4
8.	3-4
9.	2-3

20. Complainant's total scores after the first interview were as follows:

	<u>Rasmussen</u>	<u>Falstad</u>	<u>Bartz</u>
Total Interview Score	54	55	56
Personality Charac.	14	15	12
Total Score	68	70	68

Average Score: 68.66

21. If complainant's scores were changed to reflect the top scores in the appropriate scoring ranges described in Finding of Fact 19, above, the scoring totals for complainant's interview would be as follows:

	<u>Rasmussen</u>	<u>Falstad</u>	<u>Bartz</u>
Total Interview Score	55	58	59
Personality Charac.	14	15	12.8
Total Score	69	73	71.8

Average Score: 71.2

22. In order to have been included in the final group of 18 to proceed to the next part of the selection process, a candidate had to have an average score of at least 72. The only candidates allowed to proceed with the selection process with scores lower than 72 were the candidate ranked number 21 (Cocherl) after the interview who was the third highest ranking candidate certified through female expanded certification; and the candidate ranked number 25 (Burmesh) after the interview who had received the seventh highest score on the written examination. Mr. Burmesh was in his 20's and Ms. Cocherl was under the age of 40 at the time of the interview. It was the respondent DNR's practice with a group certification such as the instant one to include in this final group any candidate who received one of the top ten scores on the written examination. It was also respondent DNR's practice with a group certification such as the instant one to include a candidate in this final group if her score on the written exam placed her in the top three candidates for female expanded certification and if a candidate ranked lower than third for female expanded certification achieved a high enough interview score to be placed in the group to proceed to the next part of the selection process.. This was also the practice respondent DNR followed in regard to handicapped and minority expanded certification with group certifications' such as the instant one. After the first interview, there were two candidates certified through female expanded certification who received high enough interview scores to be placed among the top 18 candidates but whose scores on the written exam resulted in their ranking 4th and 5th for female expanded certification. Following their practice, respondent DNR then included Ms. Cocherl, the third ranked candidate as the result of female expanded certification, in the group to

proceed to the next step of the selection process. In contrast, the two HEC candidates included in the final group of 18 received higher written exam scores than complainant, and no HEC candidate receiving a lower written exam score than complainant was included in the final group of 18.

23. Neither complainant's age nor his date of birth was mentioned during the course of his interview. None of the written materials supplied to the interviewers prior to their scoring of complainant's interview responses indicated complainant's age or date of birth.

24. Of those finally selected for the subject 15 vacancies in the Class of 1991, none were age 40 or over, 2 were age 35 or over, 2 were under age 35 but over age 30, and 11 were age 30 or under. At least one member of the Class of 1989 was age 40 or over at the time he was selected. The record does not indicate how many of the candidates certified for the subject 15 vacancies in the class of 1991 were age 40 or over.

Conclusions of Law

1. The Commission has authority to hear and decide this matter pursuant to §230.45(1)(b), Stats.
2. The complainant has the burden to show that respondent discriminated against him on the basis of age as alleged.
3. The complainant has failed to sustain this burden.
4. Respondent did not discriminate against complainant based on his age with respect to the subject hiring decision.

Opinion

The parties agreed to the following issue:

Whether complainant was discriminated against because of age and perceived handicap by respondent when it failed to process complainant's application for conservation warden beyond the first step.

At the commencement of the hearing, complainant indicated that he wished to withdraw from his charge of discrimination the allegation of discrimination based on perceived handicap.

In McDonnell-Douglas Corp. v. Green, 411 U.W. 792, 5 FEP Cases 965 (1973), the Supreme established the basic allocation of burdens and order of presen-

tation of proof in cases alleging discriminatory treatment. The complainant must carry the initial burden of establishing a prima facie case by a preponderance of the evidence. In a case alleging age discrimination, this may be accomplished by showing: (1) that complainant was within the age group protected by the Wisconsin Fair Employment Act; (2) that complainant was adversely affected by the employer's action which is the subject of the complaint; and (3) there is evidence age was not treated neutrally in the employer's decision, i.e., the circumstances raise an inference of discrimination. If the complainant succeeds in establishing a prima facie case, the burden of production then shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employer's action. Once this is accomplished, the complainant must then be given a fair opportunity to show by a preponderance of the evidence that the employer's stated reasons for the action were in fact a pretext for a discriminatory decision. The ultimate burden of persuading the trier of fact that the respondent employer intentionally discriminated against the complainant remains at all times with the complainant, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP Cases 113 (1981).

Complainant did make out a prima facie case in regard to the subject hiring decision. As a person over the age of 40, complainant is a member of a protected group under the Wisconsin Fair Employment Act (FEA); complainant was adversely affected by respondent's decision not to hire him; and, since each of the successful candidates was under the age of 40, an inference of discrimination is raised.

Respondent did offer a legitimate, non-discriminatory reason for its hiring decisions, i.e., the fact that complainant did not score high enough in the interview to be included in the final group.

The remaining question then is whether the reason stated by respondent for its failure to hire complainant was in fact a pretext for a discriminatory decision. Since complainant failed to file a brief, it is not clear what the theory of complainant's case is in this regard and the Commission must attempt to draw an inference as to what it appears to be based on the evidence introduced by complainant in his case in chief.

In his opening statement at the hearing, complainant indicated that it was his position that the evidence would show that there was discrimination

through disparate impact as well as disparate treatment. Although complainant did introduce certain statistical evidence into the hearing record, this evidence does not show how many opportunities respondent had to hire candidates age 40 or over for Conservation Warden 1 positions and, as a result, complainant has failed to show that respondent's policies had a disparate impact on candidates age 40 or over.

Also in his opening statement at the hearing, complainant indicated that he would show disparate treatment through evidence that a candidate less qualified than complainant was selected for one of the Conservation Warden 1 positions in the Class of 1991. However, there is no evidence in the record relating to the qualifications of any of the candidates other than complainant.

It can be inferred from the record that complainant felt that the scoring of his interview by the three interview panel members demonstrated pretext. The Commission fails to understand how complainant could argue that one rater should have given him one score for his response to a question and another rater should have given him a different score, e.g., how complainant could argue that rater Rasmussen should have given him a score of 5 on Question # 1.c., and rater Falstad should have given him a score of 4. This aside, the scoring of complainant's interview by the members of the interview panel appears to be consistent with the scoring guidelines and consistent among raters. Even applying the scoring guidelines to give complainant the benefit of the doubt in regard to those questions for which he disputes the scoring would not move complainant's score up to the level required for inclusion in the final group of candidates, i.e., it would result in an average score of 71.2 and a score of at least 72 would have been required. Finally, complainant has failed to show that the scoring of his interview by the members of the interview panel differed from the panel's scoring of the interviews of younger candidates.

It can also be inferred from the record that complainant is arguing that the inclusion of candidates #21 and #25 in the final group of candidates despite the fact that their average score on the interview was less than 72 demonstrates pretext. However, respondent showed that this was consistent with its usual practice in regard to group referrals (See Finding of Fact 22, above) and complainant failed to successfully rebut this showing. In addition, this practice appears to be a logical outgrowth of the requirements that initial

hires in a group referral be made from those candidates who received one of the top ten scores on the exam or from those candidates who received one of the top three scores among those in their expanded certification group.

It can also be inferred from the record that respondent is asserting that the members of the interview panel had no reason to know complainant's age since none of the written materials made available to them indicated complainant's age or date of birth and complainant did not discuss his age during the interview. However, the Commission concludes that complainant's physical appearance could have led the members of the panel to assume that complainant was over the age of 40.

The complainant failed to demonstrate pretext and, as a result, failed to prove that he was discriminated against on the basis of his age in regard to the subject hiring decision.

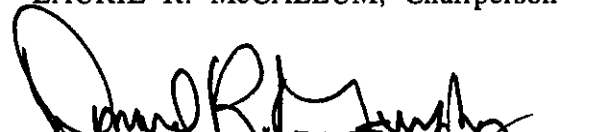
Order

This complaint is dismissed.

Dated: December 17, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM/lrm/gdt


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

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NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats., for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

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