

4. Complainant participated in the oral examination on July 24, 1990.
5. Complainant ranked sixth among the 27 top candidates based upon the oral exam results.
6. According to standard rules and procedures, the top five candidates after oral exam were asked to participate in a final interview conducted by the individual who would supervise the AA3-Trade position, as were two additional candidates who qualified with veterans points.
7. Respondent recruited for the position under handicapped expanded certification. Accordingly, the top three passing scores by individuals who claimed handicapped expanded certification status also were eligible to participate in the final interview. One additional candidate was invited to interview based on his claimed handicap status and this was Mr. Larry Forney who ranked #16, based on the oral exam.
8. Respondent computerized its scoring system for the top 27 candidates invited to the oral exam. Respondent's keypunch operator was expected to enter the following information from each candidate's application form: name, address, telephone number at home and work, social security number, self-designated ethnic code, self-designated sex code and whether the applicant claimed status for veteran's points or handicapped status.
9. Respondent's keypunch operator made a mistake when she entered information for complainant in that the keypunch operator did not note complainant's claimed handicapped status. Further, the keypunch operator was expected to proofread the entries and, if she did, the mistake was missed a second time.
10. Complainant would have been invited for the final interview based on his handicapped status but for the keypunch error noted in the prior paragraph. If complainant would have interviewed his chances of being selected for the position would have been better than not having an opportunity to interview. The record, however, is insufficient to indicate beyond speculation whether complainant would have been hired rather than James Holahan, the individual ultimately selected for the position.
11. The final interviews were conducted on August 14 and 15, 1990. Mr. Holahan was offered the job on or before September 6, 1990. He began

working in the position on Monday, September 10, 1990. Mr. Holahan is not handicapped.

12. Complainant received his notice of the oral exam results on September 1, 1993, at which time he noticed that the handicapped-status designation was not included. He contacted the vocational rehabilitation director, John, to discuss the matter but was unable to reach John for a few days. Complainant understood that John would telephone Barbara Jill Thomas, Respondent's Personnel Manager, about the matter.

13. The first opportunity Ms. Thomas had to talk with complainant was on September 12, 1990. Ms. Thomas did some checking in response to complainant's concerns and discovered the keypunching error. Respondent's first notice of the error, therefore, was on September 12, 1990; by which time Mr. Holahan already had started working in the position.

14. The keypunch error which occurred in relation to complainant's application is described in paragraph 9 above. No similar error occurred previously or since.

15. Respondent's failure to provide complainant with an opportunity to interview for the AA3-Trade position was due solely to the keypunching error previously mentioned and was not due in any part to complainant's handicap.

16. Respondent agreed to keep complainant advised of any vacancies in respondent's agency in which complainant might have an interest. Respondent has complied with this agreement in the past and continues to do so.

17. Respondent, in response to complainant's situation, assessed its procedures and made three changes to help prevent the same type of situation from reoccurring. The first change is that a code in red ink is written on the top corner of each application form to alert the keypuncher to applicant status as veteran or as a basis protected under the Fair Employment Act (such as handicapped status). The second change is to have someone other than the keypuncher proofread the information entered into the computer. The third change is to send candidates notice of their examination results prior to the final interviews to provide a more timely opportunity for candidates to raise concerns about potential keypunch errors.

CONCLUSIONS OF LAW

1. Complainant is a handicapped individual, within the meaning of s. 111.32(8), Stats.¹
2. It is complainant's burden to shown by a preponderance of the evidence that respondent discriminated against complainant on the basis of handicap when he was not interviewed for the AA3-Trade vacancy in September, 1990.
3. Complainant failed to meet his burden of proof.
4. Respondent did not discriminate against complainant on the basis of his handicap when he was not interviewed for the AA3-Trade vacancy in September, 1990.

DISCUSSION

Respondent did not dispute that complainant through hearing testimony established a prima-facie case of discrimination by showing: 1) he is a handicapped individual and thereby protected under the Fair Employment Act, 2) he applied for and was qualified to participate in the final interview for the AA3-Trade position, and 3) he was not given the opportunity to participate in the final interviews which resulted in the selection of a non-handicapped individual.

Respondent, however, showed that a keypunching error was the only reason why complainant did not advance to the final interview. Complainant did not show that the keypunch error was a false excuse, or that the offered excuse was a pretext used to exclude complainant because of his handicap.

The crux of this case was addressed in closing arguments. Complainant contends that respondent's keypunching system which resulted in the error was so inadequate that respondent, in essence, should have anticipated that such errors would occur. Under these circumstances, complainant argues, respondent should be estopped from offering the keypunch excuse as a successful defense to his discrimination claim. The Commission disagrees.

Respondent's keypunching process included a proofreading step (albeit without a requirement that the proofreader be someone other than the keypuncher). The system proved successful in the past and there was no

¹ Respondent did not challenge this element of complainant's case.

reason shown why respondent would expect the process to fail in the hiring for the AA3-Trade position. Absent this or some other evidence of pretext, complainant fails to sustain his burden of proof or persuasion.

The examiner also wishes to note that complainant did attempt to show at hearing that respondent has failed to keep him apprised of DOD vacancies. It was clear that respondent's understanding of which vacancies complainant would be interested in was based upon a short conversation between Ms. Thomas and complainant. It may be true that respondent's notion of the types of positions complainant is interested in pursuing is limited, but the solution for this potential problem rests with complainant, not with the Fair Employment Act. Specifically, complainant could correct this potential misunderstanding by providing additional information to Ms. Thomas. It might be prudent for him to do so in writing so Ms. Thomas has a document to refer to in the future to refresh her memory.


It is true that complainant should have had an opportunity for a final interview for the AA3-Trade position, that he was denied such opportunity through no fault of his own and due to the mistakes of others, and that he (and probably others) find the situation "unfair". However, the Fair Employment Act is not designed to address every unfairness in connection with employment. The primary² purpose of the Act is to remedy adverse employment actions when the adverse action was taken due to discriminatory motives, which was not true in this case.

² The Commission has revised this sentence from the Proposed Decision and Order to more accurately describe the purpose of the FEA.

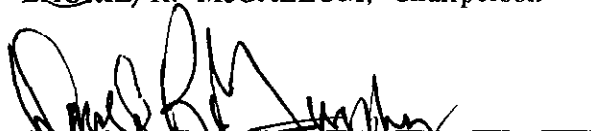
ORDER


It is ordered that the complainant's case be dismissed on the merits.

Dated: September 24, 1993 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

JMR


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

Parties:

Lanny Schimmel
1031 Anderson Drive #A207
Green Bay, WI 54304

Robert Trunzo
Secretary, DOD
P.O. Box 7970
Madison, WI 53707-7970

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.