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RANDY HOEFS,

Appellant,

v.

Administrator, DIVISION OF MERIT
RECRUITMENT AND SELECTION,

Respondent.

Case No. 91-0244-PC

* * * * *

DECISION
AND
ORDER

Nature of the Case

This is an appeal of a decision by respondent to remove appellant's name from an employment register. A hearing was held on May 7, 1992, before Laurie R. McCallum, Chairperson.

Findings of Fact

1. Appellant took an examination for State Patrol Trooper/Inspector (Enforcement Cadet) in December of 1990. In January of 1991, using the results of this exam, respondent generated a list of 200-250 certified candidates to fill 38 positions and forwarded it to the Division of State Patrol in the Department of Transportation (DOT).

2. As the result of a ministerial error, appellant had not received proper credit for his military service when this list of certified candidates was generated and his name was not included on the list.

3. Lt. Doug Van Buren, Chief of Personnel, Division of State Patrol, became aware of this error and contacted appellant some time in late July or early August of 1991 to advise him that an error had been made but that appellant would be given full opportunity to complete the application and recruitment process. Lt. Van Buren advised appellant that he would be forwarding some written application materials to him and that he should fill them out as quickly as possible and return them.

4. Appellant received these application materials; completed and signed them as quickly as possible; and mailed them to Lt. Van Buren's office where they were received on or around August 9, 1991.

5. These application materials included a form entitled "Enforcement Cadet Employment Application." This form included the following language on the top of the first page, in pertinent part:

Any falsification on this form will result in disqualification of your application or if discovered after employment may be grounds for discharge. Conviction of any offense will not necessarily preclude employment of an applicant unless circumstances substantially relate to the requirements of the position for which you are applying.

6. This form requests the applicant's signature on the final page and includes the following language in the space immediately above the signature line:

I certify to the best of my knowledge this application is true and complete. I understand that any misstatement forfeits my right to employment at this time for the position for which I am applying, and may affect future consideration for other positions in the department.

7 Also on the final page of this form was the following question:

COURT RECORD

Have you ever been convicted of any law violation including traffic law, other than parking tickets? List all convictions.

8. In response to this question, appellant listed the following:

Date	Location	Charge/Violation	Final Disposition
10/86	Fort Atkinson	OWI	fine/suspension
6/1969	California	joy riding on federal reservation	

9. The application materials forwarded to appellant by Lt. Van Buren also included a document entitled "Enforcement Cadet--Wisconsin State Patrol Applicant Informational Summary " This document included the following information, in pertinent part:

* * * * *

The applicant's driving record will be reviewed at the time of employment for three previous years.

* * * * *

HEARING STANDARD

Normal hearing in both ears Normal hearing is defined as: No more than a 20 decibel hearing loss at frequencies of 1000,2000, and 3000 Hertz in each ear

10. As part of his routine procedure, once Lt. Van Buren received the application materials such as those he had sent to appellant, he assigned a staff person to conduct a background investigation. This background investigation of appellant revealed that appellant had the following law violation convictions which he had not listed on his application form:

2/24/66	Reckless driving/fleeing an officer, lost driver's license for 6 months
11/13/66	Reckless driving, guilty of imprudent driving, paid \$35.00
4/15/67	Operating after revocation, failure to return registration plates and unlawful use of driver's license, paid \$211.55
1/21/69	Operating after revocation and causing bodily harm, paid \$107.00
7/1/70	Operating with a Foreign license while under revocation, paid \$109.00 and suspended for one year.
7/1/72	Operating after revocation, paid \$60.00
9/27/74	Battery, paid \$209.00
8/27/76	Speeding, plead no contest
7/14/78	Failure to report an accident, paid \$38.00
8/14/80	Operating motor vehicle while intoxicated, paid \$201 00
1/6/83	Speeding, paid \$43.60
7/15/86	Theft, paid \$82 50

11. As part of the routine hiring process, appellant was then scheduled for a physical agility test and completed that test. As part of the routine hiring process, appellant was then scheduled for a hearing test, a vision test, and an oral interview. The audiologist who conducted the hearing test concluded that, in the 1000-3000 Hertz frequency level, appellant had hearing losses which

ranged from 40 to 60 decibels in both ears. Appellant's hearing loss had been recognized as a disability by the Veterans Administration (VA) and, in the fall of 1989, a physician employed by the VA had prescribed hearing aids for appellant which he used occasionally while watching television but had not used for performing his job responsibilities as an over-the-road truck driver.

12. It was the unanimous recommendation of the interview panel that appellant not be offered a position. The basis for the recommendation was the panel's feeling that appellant was not credible. The members of the panel did not have information relating to the results of appellant's physical agility, hearing, or vision tests prior to making their recommendation. The panel members indicated to appellant that they had no role in the hearing assessment phase of the recruitment phase and gave him no other information relating to the hearing assessment phase.

13. In a memo to respondent dated November 5, 1991, Cynthia Morehouse, Director of DOT's Bureau of Human Resource Services, stated as follows, in pertinent part:

I am requesting removal of Randy Hoefs from the Enforcement Cadet register based on ER-Pers 6.10(1) and (5).

Mr. Hoefs was interviewed on October 23, 1991, for the position of Enforcement Cadet, at which time his hearing was tested by the University of Wisconsin, Department of Communicative Disorders. The results of the audiogram show a 40-45 decibel hearing loss on the right, and a 55-60 decibel hearing loss on the left. This degree of hearing loss exceeds the standard established for the Enforcement Cadet position, which does not allow for more than a 20 decibel hearing loss.

The applicant also made a false statement on the application in relation to prior law violation convictions. He listed convictions in October, 1986 and June, 1969. The background investigation reveals there were 12 additional convictions not reported by the applicant.

14. Respondent granted DOT's request and, in a letter dated November 8, 1991, appellant was notified that his name had been removed from the subject register.

15. Appellant filed a timely appeal of this removal with the Commission on December 5, 1991.

16. Both the position of State Trooper and Inspector involve law enforcement duties, including traffic law enforcement duties; and the use of radio transmission equipment during emergencies. The 1000-3000 Hertz frequency level represents the normal range of the human voice.

Conclusions of Law

1. This matter is appropriately before the Commission pursuant to §230.44(1)(a), Stats.
2. Appellant has the burden to prove that the decision to remove him from the subject employment register was contrary to §ER-Pers 6.10(1) and (5), Wis. Adm. Code.
3. Appellant has failed to sustain this burden

Opinion

The issue agreed to by the parties in this case is:

Whether respondent's action of removing the appellant's name from certification and the register of eligible candidates for the classification of Trooper/Inspector (Enforcement Cadet) was contrary to §ER-Pers 6.10(1) and (5), Wis. Adm. Code.

Section ER-Pers 6.10, Wis. Adm. Code, states as follows, in pertinent part:

In addition to provisions stated elsewhere in the law or rules, the administrator may refuse to examine or certify an applicant, or may remove an applicant from a certification:

(1) Who is found to lack any of the preliminary requirements established for the position;

* * * * *

(5) Who has made a false statement of any material fact in any part of the selection process;

The record clearly shows that appellant not only failed to satisfy the hearing requirement, i.e., a preliminary requirement for the Trooper/Inspector position for which he was competing, but also made a false statement on one of his application forms by failing to list 12 of his law violation convictions.

In regard to the hearing requirement, appellant argues that respondent should be precluded from applying this requirement since appellant was not advised of it prior to participating in DOT's hiring process. Not only does §6.10, Wis. Adm. Code, not require such notice of a preliminary requirement before it may be applied to remove a candidate from a register, but the record clearly shows that DOT sent appellant a document entitled "Enforcement Cadet-- Wisconsin State Patrol Applicant Information Summary" which listed and explained the hearing requirement at the same time the application materials were sent to him. The Commission concludes that respondent was correct in concluding that appellant did not meet one of the preliminary requirements of the subject position within the meaning of §6.10(1), Wis. Adm. Code.

In regard to his failure to list 12 law violation convictions on his application, appellant argues that he did not intend to misrepresent any item on the application form. Appellant's credibility in this regard is suspect. At the hearing, appellant first testified that he interpreted the information he received from DOT as requiring that he list only those convictions within the last 5 years. However, not only does this information make no reference to a 5-year time period, but one of the two convictions listed by appellant occurred in 1969, more than 20 years prior to the date that the application form was completed by appellant. Appellant then changed his testimony to indicate that the reason these 12 convictions were not listed was that he didn't have a lot of time to complete the application and he simply forgot about them. The Commission does not find it credible to believe that a person applying for a law enforcement position could simply forget about 12 convictions including drunk driving, battery, and theft. Appellant then changed his testimony again to offer the 5-year argument. The Commission concludes that respondent was correct in concluding that appellant made a false statement of a material fact on his application within the meaning of §6.10(5), Wis. Adm. Code.

Order

The action of respondent is affirmed and this appeal is dismissed.

Dated: July 22, 1992 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson

LRM//lrm/gdt/2


DONALD R. MURPHY, Commissioner


GERALD F. HODDINOTT, Commissioner

Parties:

Randy Hoefs
912 East Street
Ft Atkinson WI 53538

Robert Lavigna
Administrator DMRS
137 E Wilson St
P O Box 7855
Madison WI 53707

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.