
PATRICK D. BYRNE,

Petitioner,

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vs.

AUG 22 1994

Case No. 93cv003874

STATE PERSONNEL COMMISSION, PERSONNEL COMMISSION

Respondent.

**ORDER DENYING PETITION FOR REVIEW
AND AFFIRMING DECISION OF PERSONNEL COMMISSION**

Petitioner was not promoted to the position of captain with the Wisconsin State Patrol by the Department of Transportation (DOT). The Personnel Commission ruled that the decision of DOT not to promote petitioner was not based on his handicap (dyslexia) or on his race (a black lieutenant was promoted; petitioner, a sergeant, is white). Petitioner asks for judicial review of this decision (Personnel Commission Case No. 92-0152-PC-ER).

Initially petitioner was deemed eligible for handicapped expanded certification (HEC) in applying for this promotion to captain. He was notified on or before May 6, 1992, by DOT that he was not eligible for such certification because it could not be verified through either materials furnished by petitioner or by review of his work evaluations that his dyslexia in fact limited his capacity to work. The Personnel Commission ruled that petitioner's appeal of the HEC decertification on June 12, 1992 (more than 30 days after notification by DOT of the decertification) was untimely and that, in any event, the decision to decertify was neither illegal nor an abuse of discretion on DOT's part. (Personnel Commission Case No. 92-0672-PC).

Petitioner asks the court to review the findings and conclusions of the personnel commission pursuant to chapter 227, Stats.

DECISION

The facts relied upon by the personnel commission, along with citations to the record below, in reaching its decisions herein are set forth in DOT's Brief as it's "STATEMENT OF THE CASE." The court adopts DOT's statement and incorporates it into this opinion as APPENDIX A hereto.

A. Case No. 92-0672-PC -- Decertification of Petitioner from Handicapped Expanded Certification.

Section 230.44, Stats., provides in part as follows:

Appeal procedures. (1) APPEALABLE ACTIONS AND STEPS.

Except as provided in par. (e), the following are actions appealable to the commission under s. 230.45(1)(a):

* * *

(d) **Illegal action or abuse of discretion.** A personnel action after certification which is related to the hiring process in the classified service and which is alleged to be illegal or an abuse of discretion may be appealed to the commission.

* * *

(3) **TIME LIMITS.** Any appeal filed under this section may not be heard unless the appeal is filed within 30 days after the effective date of the action, or within 30 days after the appellant is notified of the action, whichever is later . . .

(Emphasis added).

On May 1, 1992, the DOT personnel office notified Mike Moschkau of the State Patrol

that petitioner had been ruled ineligible for HEC and that the captain position could not be offered to him (Tr. 52, 80-81, 102; R. Exs. 6, 8). Based on the record herein, May 1, 1992, is the effective date of the decertification action against petitioner by DOT.

On May 5 or 6, 1992, petitioner was notified by telephone that he did not qualify for HEC and that he should consider such telephone conversation as the date of his notification for purposes of an appeal. (Tr. 16-17, 28-29; R. Ex. 6).

Petitioner argues that the effective date of DOT's decertification action was May 26, 1992, the date on which the position of captain was offered to and accepted by Lieutenant Alvin Bishop. Petitioner maintains that his civil service appeal on June 12, 1992 was filed only 17 days after the effective date of the action.

Petitioner's argument ignores the evidence in the record of the May 1 notification by DOT personnel to Mike Mosachkau of petitioner's ineligibility for HEC and for the position. The time limits under §230.44(3), Stats., are clearly designed to be sure that an applicant for employment has a full 30 days after notification of an already effective decision to file a civil service appeal. Petitioner herein was notified of the earlier DOT decision to decertify him and failed to file an appeal within 30 days after he was notified of the fact of his decertification from HEC by DOT.

Petitioner also argues that §230.44(3), Stats., is a statute of limitations; that it is therefore not jurisdictional; and that DOT failed to raise the statute of limitations in its pleadings before the personnel commission, thereby waiving its objection. The language of §230.44(3) directly limits the power of the commission to hear an appeal: "Any appeal filed under this section may not be heard unless the appeal is filed within 30 days . . ." §230.44(3), Stats. The commission

has consistently held that this 30-day requirement is jurisdictional in nature, and has promulgated an administrative rule codifying this interpretation. §PC 1.08(3), Wis. Adm. Code, provides that "[a]ny party may move at any time to dismiss a case on the ground the commission does not have subject matter jurisdiction." See, Decision herein, at p. 13.

The commission is charged by law with interpreting and adjudicating disputes under Wisconsin's employment laws. §230.45, Stats. The commission is appropriately viewed as expert within its field. As such, the court appropriately defers in some measure to the agency's interpretation of law. See, §227.57(5), Stats.; Applied Plastics, Inc. v. LIRC, 121 Wis. 2d 271, 276 (Ct. App. 1084). Moreover, the commission's interpretation of §230.44(3) is rationally based in the plain language of the statute itself. See, American Motors Corp v. LIRC, 119 Wis. 2d 706, 710 (1984). I conclude, both *de novo* and in review of the reasonableness of the commission's legal interpretation, that §230.44(3) statutorily limits the jurisdiction of the commission to hear appeals to those filed within 30 days of the effective date or of the employe's notification, whichever is later. Since parties cannot confer subject matter jurisdiction on the commission by their waiver or consent, the commission correctly ruled that petitioner's untimely appeal deprived the commission of jurisdiction on the issue of decertification from HEC. See, Wis. Environmental Decade v. Public Service Comm., 84 Wis. 2d 504, 515 (1978); Weisensel v. DHSS, 179 Wis. 2d 637, 643-44, n. 2 (Ct. App. 1993). The decision below in Case No. 92-0672-PC is therefore affirmed.

B. Case No. 92-0152-PC-ER -- Alleged discrimination in promotion based on handicap or race

The commission in the exercise of its expertise in the adjudication of disputes under

§111.321, Stats., concluded that DOT did not unlawfully discriminate against petitioner on the basis of handicap or race when it decided not to promote him and to promote another to the rank of captain. The burden of showing that the commission erroneously interpreted the law, or acted without a substantial basis in the evidence is on the petitioner; the burden is not on the commission to justify its decision and order. City of La Crosse v. DNR, 120 Wis. 2d 168, 178 (Ct. App. 1984).

Petitioner's brief in chief in support of his petition for review makes generalized and unfocused arguments in support of a conclusion contrary to that reach by the commission herein. However, the fact that the evidence is in conflict or is inconsistent is not a sufficient basis for the reversal of the findings of the commission. E.F. Brewer Co. v. ILHR Dept, 82 Wis. 2d 634, 636 (1978); Eastex Packaging Co. v. DIHLR, 89 Wis. 2d 739, 745 (1979).

Whether an employer unlawfully discriminates against an employee presents a factual question of the employer's motivation. St. Joseph's Hospital v. Wisconsin E.R. Board, 264 Wis. 396, 401 (1953). The commission's finding on motivation must be affirmed if it is supported by substantial evidence. Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis. 2d 540, 562 (1967). Where there are two conflicting views of the evidence, each of which may be sustained by substantial evidence, it is for the agency to determine which view it wishes to accept. Robertson Transport. Co. v. Public Service Comm., 39 Wis. 2d 653, 658 (1968).

The commission found that DOT decided to promote Alvin Bishop to the position of captain, rather than petitioner, for reasons unrelated to petitioner's handicap or race. The commission did, and reasonably could, credit the testimony of both Meekma and Singletary that neither petitioner's handicap nor his race were factors in their decision. (Tr. 29-30, 44-48, 89,

94-97). The fact that petitioner was ranked as the top candidate by the oral interview panel is not conclusive on the issue of whether the factors articulated by Meekma and Singletary for the decision to promote Bishop rather than petitioner were pretextual.

Contrary to petitioner's assertion, an agency is not mandated by law to hire a person with a disability if the agency elects to use HEC. Section 230.25(1n), Stats., allows for expanded certification of additional persons with handicaps to be considered for appointment along with those candidates certified under the regular civil service procedure. It does not mandate which candidate shall be hired. If the legislature had intended that, once an agency requests HEC for handicapped persons, the agency must hire the handicapped person or persons certified over all candidates, including veterans, the legislature would have said so. The statute simply does not read that way. See, §230.25, Stats.

Petitioner argues that DOT used his decertification from HEC eligibility as a pretext so that it could hire a black candidate. The fact finder must determine whether the reasons articulated by the employer for its actions are a pretext for discrimination. See, Muskego-Norway, supra, at 562-63.

In this regard, the commission could reasonable credit and accept the testimony of Meekma and Singletary, that Bishop was hired due to his superior experience qualifications, including higher rank, and education, as well as in consideration of DOT's affirmative action plan and the fact that ethnic and racial minorities were underutilized at the level of state patrol captain classification. Decision and Order at p. 8. While the commission found that petitioner had demonstrated a *prima facie* case of race discrimination, it also credited as true DOT's showing of legitimate, non-discriminatory reasons for the Bishop promotion. The commission

made determinations of fact it was entitled to make, based on substantial evidence in the record. The commission did not contravene the law which provides that, although absolute racial preferences may be unlawful,¹ race may be considered as one factor among others in making employment decision, at least where a bona fide affirmative action plan is involved. University of California Regents v. Bakke, 438 U.S. 265 (1978); Steelworkers v. Weber, 443 U.S. 193 (1979).

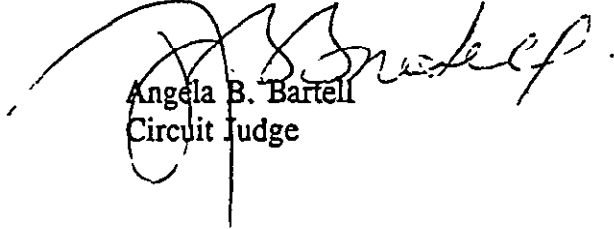
Since the decision of the commission in Case No. 92-0152-PC-ER is supported by substantial evidence in the record and does not contravene the law, it must be affirmed by this court.

CONCLUSION AND ORDER

For the reasons state above and based on the record herein, the decisions of the commission are hereby affirmed and the petition for review is hereby dismissed.

Dated: August 15, 1994.

BY THE COURT:


Angela B. Bartell
Circuit Judge

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¹ State v. ILHR Department, 77 Wis. 2d 126, 138-41 (1977).

APPENDIX A

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PERSONNEL COMMISSION

STATEMENT OF THE CASE

Patrick Byrne is employed by DOT as a sergeant in the State Patrol (Tr. 6-7).¹ He is dyslexic (Tr. 13-15; R. Exs. 3-5, 12). On February 21, 1992, he was certified to interview for the position of captain in the State Patrol (Tr. 16; R. Ex. 9). He was certified under handicapped expanded certification (HEC) which permits persons with disabilities to be certified in addition to those certified under normal civil service examination procedures (Tr. 32; R. Exs. 10-11). See sec. 230.25(1n), Stats. Prior to February 1992, Byrne had been certified under HEC for a lieutenant

¹References are to the transcript of testimony and the exhibits received at the hearing conducted by the Commission on January 8, 1993.

position or a captain position by DOT approximately eight times, and had never previously been decertified (Tr. 17-18).

In April 1992, Byrne was interviewed for the captain position by Ted Meekma, Administrator of the Division of State Patrol, Lieutenant Colonel William Singletary, Bureau Director of District Operations for the Division of State Patrol, and two others (Bev Larson and Nathaniel Robinson) (Tr. 16, 20, 35-38, 40, 43, 88). The interview panel unanimously agreed that Byrne was the number one candidate (Tr. 91). Meekma notified the DOT Secretary's office of the State Patrol's decision at that point (Tr. 92). At Meekma's direction, Singletary instructed Byrne to get a haircut in case Byrne was promoted to the captain position and had to meet the DOT Secretary (Tr. 22-23, 38-40, 48-49, 103-04).

Before a job offer may be made to a person who has been certified under HEC, the agency personnel office must verify the handicap (Tr. 60; R. Exs. 6, 10). Since Byrne was the number one candidate and because he was a candidate as a result of HEC, the State Patrol asked the DOT Bureau of Human Resource Services to verify Byrne's eligibility for HEC and thus to determine whether a job offer could be made to Byrne (Tr. 60, 79-80, 91-92).

About one or two weeks after the interviews, in the second or third week of April 1992, Meekma, Singletary, Colonel George Wenzel (the deputy division administrator) and Mike Moschkau (Bureau Director of the Bureau of Support Services) met to discuss the candidates for promotion, and the consensus was that Lieutenant Alvin Bishop, a black male, should be recommended to the DOT Secretary for the captain position (Tr. 29-30, 44-45, 89, 94; R.

13). The group decided to recommend Bishop because he had an associate degree, he attended the Northwestern nine-month law course (as had Byrne), he had served for six years as a district operations lieutenant, he had the most experience of any of the candidates who were interviewed, he scored very high on the written exam, he was a qualified candidate who could fulfill the duties, and he was the highest-ranking black officer in the State Patrol (keeping in mind DOT's affirmative action plan and the fact DOT had never had a black district captain) (Tr. 45-48, 94-96; R. Ex. 13). The meeting took place before the participants heard of the decision by the DOT Bureau of Human Resource Services concerning Byrne's eligibility for certification under HEC (Tr. 45, 49, 52, 92-93; R. Exs. 6, 8).

Singletary and Meekma both testified that they did not fail to recommend Byrne for the captain position either because of Byrne's race or because of his handicap (Tr. 48, 96-97). Singletary also testified that there was no final decision made to offer the captain position to Byrne before the decision was made to select Bishop (Tr. 49).

Loretta Dichraff, a DOT personnel specialist, was involved in the decision to verify whether Byrne was eligible for HEC (Tr. 57). Dichraff reviewed the documents submitted by Byrne relating to his dyslexia and concluded that his dyslexia was not a "handicap" for purposes of HEC because (1) Byrne's psychotherapist did not offer a professional opinion whether Byrne's dyslexia substantially limited his ability to obtain or retain employment, and (2) Byrne's favorable performance evaluations suggested that the dyslexia had


st affected his job performance (Tr. 62-78; A. Ex. 5-7; R. Ex. 3-5, 7, 12). Cynthia Morehouse, Director of the DOT Bureau of Human Resource Services, agreed with Dichraff's conclusion and made the decision that Byrne was not eligible for HEC (Tr. 63, 75, 81, 108-16).

On May 1, 1992, the DOT personnel office notified Mike Moschkau of the State Patrol that Byrne had been ruled ineligible for HEC and that the captain position could not be offered to him (Tr. 52, 80-81, 102; R. Exs. 6, 8). On May 5 or 6, 1992, Byrne was notified by telephone that he did not qualify for HEC and that he should consider such telephone conversation as the date of his notification for purposes of an appeal (Tr. 16-17, 28-29; R. Ex. 6).

Meekma made his recommendation to the DOT Secretary, and again to the Governor on May 21, 1992, that Bishop be promoted to the captain position, and the DOT Secretary and the Governor made the ultimate decision to promote Bishop (Tr. 96, 100-02). Meekma testified that the decision of the Bureau of Human Resources, finding Byrne ineligible for HEC, had no effect on his recommendation of Bishop rather than Byrne for the captain position (Tr. 97). On May 26, 1992, DOT confirmed Bishop's promotion to the captain position in writing, effective May 31, 1992 (Tr. 53, 100-01; R. Ex. 14).

On June 12, 1992, Byrne filed a civil service appeal and a complaint of race and handicap discrimination with the Commission. On September 8, 1993, after a hearing, the Commission issued its

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decision dismissing both the appeal and the complaint. Byrne now seeks judicial review.