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PAUL J. PELLITTERI,  
Petitioner,

vs.

Case No. 94CV3540

WISCONSIN PERSONNEL COMMISSION,  
Respondent.

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DECISION AFFIRMING THE WISCONSIN PERSONNEL COMMISSION'S  
DECISIONS AND ORDERS

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Petitioner Paul Pellitteri ("Pellitteri") seeks judicial review of two decisions made by the Wisconsin Personnel Commission ("Commission") under the Wisconsin Fair Employment Act ("WFEA"). The Commission decided: (1) that the Wisconsin Department of Revenue ("DOR") reasonably accommodated the handicap of Pellitteri; and (2) that the Commission lacks jurisdiction to add the State of Wisconsin ("State") as a separate party respondent. For the reasons stated below, I affirm both of the Commission's decisions.

**BACKGROUND**

The DOR employed Pellitteri as a shipping and mailing clerk from 1972 until his termination in May, 1990. In September of 1987 Pellitteri suffered permanent injuries to his right ankle and heel in an automobile accident not related to his employment. These injuries rendered him unable to perform his regular job, which required standing and lifting on a full-time basis.

For a period of at least seven months, starting November 3, 1989, and lasting until

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termination, the DOR changed Pellitteri's job duties to include four hours of sit-down clerical duties and four hours of "regular light duty." Finding ¶10. Because of Pellitteri's extremely low job classification (Pay Range 5), the civil service code prohibited the DOR from permanently transferring Pellitteri to any sit-down clerical positions, each of which provided higher pay than Pay Range 5.

The DOR has a written policy entitled "Disability Accommodation Policy and Procedures" which states that employees "will be counseled regarding their rights to other positions in state employment." Exhibit C7, p. 6. Agnes Cammer, who was the DOR's Employee Development and Training Officer, and the DOR's Affirmative Action Officer counseled and assisted Pellitteri, although the exact nature of this assistance is in dispute. The DOR terminated Pellitteri's employment on May 4, 1990.

On July 11, 1990, Pellitteri filed a handicap discrimination complaint against the DOR with the Commission. Pellitteri's complaint alleged that the DOR: (1) failed to reasonably accommodate his handicap by refusing to transfer him to a job in a different state department; and (2) harassed him because of his handicap. On October 30, 1992, the Commission initially determined there not to be probable cause to believe either that DOR supervisors harassed Pellitteri, or that the DOR failed to reasonably accommodate Pellitteri's handicap. Pellitteri appealed.

On April 23, 1993, Pellitteri filed a motion to join the State as a separate party respondent. On September 8, 1993, the Commission issued an interim decision and order denying Pellitteri's motion on the grounds that the Commission lacks jurisdiction to add the State as a separate party.

At a prehearing conference on November 9, 1993, Pellitteri withdrew his harassment claim. At this conference it was decided that the only issue for hearing would be whether the DOR counseled or assisted Pellitteri regarding transfer opportunities to other state departments. The hearing was held on December 20, 1993.

On October 26, 1994, after issuing a proposed decision and after oral arguments, the Commission issued its final decision and order. The Commission decided that the DOR reasonably accommodated Pellitteri's handicap.

Pellitteri now seeks judicial review of the Commission's decisions: (1) that the DOR reasonably accommodated Pellitteri's handicap; and (2) that the Commission lacks jurisdiction to add the State as a separate party respondent.

### STANDARDS OF REVIEW

#### I. Standard of Review for the Commission's Decision that the DOR Reasonably Accommodated Pellitteri's Handicap.

Here, the issue of "reasonable accommodation" is a mixed question of law and fact. The possible existence and nature of the DOR's duty under the WFEA, regarding the transfer of handicapped employees to other state departments, is a question of law. As questions of fact are the actual (disputed) measures taken by the DOR to accommodate Pellitteri's handicap, including counseling about transfer opportunities.

As for the Commission's findings of fact, they are conclusive if supported by substantial evidence in the record. Chicago, M., St. P. & P. RR. v. ILHR Dept., 62 Wis. 2d 392, 396 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gateway City Transfer Co. v. Public Service Comm., 253

Wis. 397, 405-06 (1948) (quoting Edison Co. v. Nat'l L.R. Board, 305 U.S. 197, 229 (1938)).

When more than one inference can reasonably be drawn, the agency's finding is conclusive.

Vocation, Tech. & Adult Ed. Dist. 13 v. ILHR Dept., 76 Wis. 2d 230, 240 (1977).

A reviewing court, however, is not bound by an administrative agency's conclusions of law.

Sauk County v. WERC, 165 Wis. 2d 406, 413 (1991). There are three standards of judicial

deference to an administrative agency's statutory interpretations: (1) the "great weight" or

"rational basis" standard, applied where the agency's experience, technical competence, and

specialized knowledge aid the agency in its interpretation and application of the statute, and

where a legal question is closely intertwined with factual determinations, or where the agency's

interpretation and application of the law is of long standing; (2) the "due weight" or "great

bearing" standard, applied where the agency's decision is "very nearly" one of first impression;

and (3) the "no weight" or "ab initio" standard, applied where the issue is "clearly" one of first

impression, and where the agency has no special experience or expertise in determining the

issue. Sauk County, 165 Wis. 2d. at 413-14; Local No. 695 v. LIRC, 154 Wis. 2d 75, 82-84

(1990); West Bend Educ. Ass'n v. WERC, 121 Wis. 2d 1, 12 (1984); Beloit Educ. Ass'n v.

WERC, 73 Wis. 2d 43, 67 (1976).

Here, the "rational basis" standard governs my review of the Commission's decision of whether the DOR reasonably accommodated Pellitteri's handicap. The Commission has much experience to aid it in determining whether an employer's accommodation of its employee's handicap is "reasonable" and when the accommodation is insufficient. In this sense, the Commission's expertise extends to the "reasonableness" of transferring handicapped employees to employers other than the DOR. Thus, the Commission's decision that the DOR reasonably

accommodated Pellitteri's handicap will be affirmed so long as: (1) the factual findings upon which the Commission's decision was based are supported by substantial evidence in the record; and (2) there was a "rational basis" for the Commission's legal conclusion regarding the reasonableness of the DOR's accommodation.

**II. Standard of Review for the Commission's Decision that it Lacked the Jurisdiction to Add the State as a Separate Party Respondent.**

Decisions of an administrative agency which deal with the scope of the agency's own power are not binding on a reviewing court. Board of Regents v. Wisconsin Pers. Comm., 103 Wis. 2d 545, 551-53. Indeed, questions concerning an agency's jurisdiction generally present questions of law, which are reviewable by the court "ab initio." Id. The instant issue is clearly one of first impression, and the Commission has no special expertise in determining this issue. Thus, I will give no deference to the Commission's decision that it lacks jurisdiction to add the State as a separate party respondent.

**DECISION**

**I. The Reasonableness of the DOR's Accommodation.**

**A. Are the factual findings underlying the commission's decision supported by substantial evidence in the record?**

In reaching its conclusion that the DOR reasonably accommodated Pellitteri's handicap, the Commission partially relied upon its factual findings regarding actions taken by the DOR to accommodate Pellitteri. The Commission found that the DOR: (1) temporarily restructured Pellitteri's job to fit his handicap; (2) counseled him of his rights to other positions in the DOR; (3) informed him about vocational rehabilitation services; (4) granted him paid leave to attend computer training; (5) assisted him in obtaining opportunities to upgrade his skill level so that

he could apply for advanced positions; (6) provided him with a list of testing dates; (7) provided him with a list of classifications, counterpart to his own classification, for which he would be eligible for transfer if vacancies existed in other state agencies; and (8) referred him to the employe handbook, which explains how to apply for positions in other agencies. There is substantial evidence in the record to support all eight of the factual findings listed above.

**B. Was there a rational basis for the Commission's legal conclusion of "reasonable accommodation?"**

Based upon the factual findings listed above, the Commission clearly had a rational basis to conclude that the DOR had reasonably accommodated Pellitteri.

**II. The Commission's Jurisdiction over the State.**

As an administrative agency, the Commission's powers are limited to those expressly conferred or fairly implied from the four corners of the statutes under which it operates. State v. ILHR Dept., 77 Wis. 2d 126, 136 (1977). Any reasonable doubt of the existence of an implied power of an administrative agency should be resolved against the exercise of such authority. Id.; Basinas v. State, 104 Wis. 2d 539, 546 (1981).

The Commission lacks the jurisdiction to add the State as a separate party respondent. The Commission's jurisdiction is set forth in § 111.375(2), Wis. Stats., which states:

This subchapter applies to each agency of the state except that complaints of discrimination . . . against the agency as an employer shall be filed and processed by the personnel commission . . . .

Thus, the Commission's jurisdiction is expressly limited to cover only state agencies, not the

State itself. Although it is arguable that the State as a separate entity has a duty to reasonably accommodate handicaps, the Commission lacks jurisdiction to add the State as a party to its proceedings. The legislature would have used broader jurisdictional language in § 111.375(2), Wis. Stats., if it had intended the Commission to exercise jurisdictional authority over the State itself, rather than over "each agency of the state."

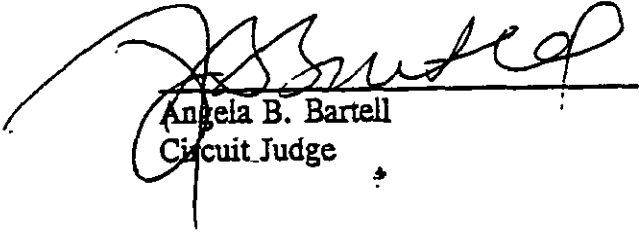
### CONCLUSION AND ORDER

For the reasons stated above, and based on the record herein, the Commission's decisions are hereby AFFIRMED.

THE FOREGOING ORDER IS THE FINAL ORDER OR JUDGMENT FOR PURPOSES OF APPEAL. NO SUBSEQUENT DOCUMENT IS CONTEMPLATED BY THE COURT.

Dated: July 19<sup>th</sup> 1995.

BY THE COURT:

  
Angela B. Bartell  
Circuit Judge

cc:

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