

discrimination against petitioner was justified and that it made reasonable attempts to accommodate petitioner's handicap. The pertinent factual findings of the Commission were that:

1. Petitioner had injured his back while on the job at EAS on January 2, 1995, and that he was granted a medical leave from February 27, 1995 through June 21, 1996 when his employment was terminated by the Superintendent of EAS "due to continuing medical problems that preclude [petitioner] from performing the essential functions of [petitioner's] position."
2. The Position Description for "Youth Counselor 2" included the following:

"Position Summary" This is the objective level for positions performing rehabilitation and security work in a juvenile correctional institution. Supervise youth's daily activities to ensure the basic safety and security of staff, youth, and the public in a correctional facility. This position may require physical intervention with assaultive and/or aggressive delinquent youth. Work is performed under the limited supervision of the Supervising Youth Counselor, Institution Unit Supervisor, or Youth Security Director.

"Goals and Worker Activities" include:

20% A. Ensure maintenance of cottage security and safety, ensure security of assigned area of responsibility, and ensure safety and security of youth in that area.

A1. Take and report required visual and physical counts pursuant to post orders.

A2. Perform random security checks of assigned youth and area of responsibility.

A3. Immediately notify shift supervisor (and Section Manager, if available) in the event of emergencies such as fire, accidents, run-aways or any unusual behavior or incidents which may endanger students or staff . . .

30% B. Provide counseling, case managements assistance and other treatment services to youth . . .

20% C. Ensure that physical need of assigned youth are maintained in the areas of food, clothing and general health . . .

20% D. Maintain order and discipline within the cottage as part of a team.

D1. Perform required personal searches of youth and their physical environment according to institution policy and procedure.

D2. Provide appropriate physical intervention and restraint for physical altercations involving youth.

D3. Provide necessary assistance to staff during disturbance situations.

D4. At the direction of supervisor staff, apply restraints to youth who are endangering themselves or others.

D5. Responsible for proper handling and use of handcuffs and restraining devices pursuant to institution policies and procedures.

D6. Under supervision, participate in planned room entry.

D7. Enforce institution policies and procedures on a consistent and equitable basis in regard to youth conduct as set forth in Department of Health and Social Services Administrative Rules 333.

D8. Utilize deescalation techniques as taught in POSC (Principles of Subject Control).

D9. Complete paper work for youth and institution as required.

"Knowledge, Skills and Abilities" include:

Knowledge of the proper techniques and uses of handcuffs and other restraints . . .

Must have visual acuity and the physical ability to walk, stand, bend, squat, run, jump, climb and apply restraints.

Ability to lift resident weighing 125 pounds or more . . .

Ability to perform subject control and self-defense techniques as identified in Principles of Subject Control (POSC) training.

"Physical Requirements" include:

Amount of sitting and standing varies according to team tasks assigned. Sits at desk and cottage tables while working with colleagues and residents. Stands and walks while making routine rounds to check rooms and when moving from one cottage to another on 5, 10, and 30 minutes basis with occasional random visits. At times, it may be required to lift residents in the event of a suicide attempt or pulling a resident from a smoke filled room - either as a part of a team or while working alone. May have to physically control or restrain young and health[y] youths while trying to subdue fighting or resisting youths, or when applying restraints. Subject to sprains, strains and back injuries while physically interacting with youths. Visual acuity to the extent of being able to observe youths in darkened rooms at night.

The following statement appeared at the foot of the Position Description: "Any employee, or applicant for employment, with a disability as defined by the Americans with Disabilities Act, must be able to perform the physical requirements outlined herein with or without a reasonable accommodation."

3. On April 22, 1996 the Superintendent of EAS received an evaluation by a physician employed by the Veterans' Administration. The evaluation indicated petitioner was permanently and "totally disabled" with respect to petitioner's job, but not with respect to other work. In response to the question as to "when will patient recover sufficiently to perform the essential duties," the physician said "never." The doctor noted that petitioner was incapable of performing the following "duties of patient's job": "Lifting more than 50lbs, repetitive bending, lifting, pushing, pulling" but that he "may work with above limitations." The physician set petitioner's work limitations as lifting, pushing, pulling and carrying a maximum of 35 to 50 pounds, and bending a maximum of 2 to 6 times per hour. This physician would have been sent a copy of the Youth Counselor 2 position description for review in terms of deciding whether petitioner was disabled.
4. The Superintendent of EAS sent petitioner a termination letter dated May 10, 1996 which stated that petitioner could apply to the Division of Vocational Rehabilitation for evaluation and job

placement services or retraining if he was found eligible, indicated how petitioner could pursue disability retirement, and listed persons petitioner should contact regarding job opportunities as a consequence of lateral transfers or demotions. The letter was based on the Superintendent's conclusion that the work restrictions from petitioner's doctor on April 22, 1996 prevented petitioner from performing the essential duties of his Youth Counselor 2 position. The letter included the following paragraph:

You are a Youth Counselor 2 which is a pay range "09". There may be other positions in the state system which you may be eligible for later transfers or demotions. Please contact Ms. Mulligan regarding other possible job opportunities that may be available that commence (sic) with your capabilities. Enclosed is a form where you can provide information as to the kinds of positions you are willing to seek employment in.

Petitioner met with Rene Marquardt, Personnel Director at EAS on May 10, 1996. Petitioner received relevant documents at that time, and Ms. Marquardt went over a list of positions that were vacant and being filled. The lead time before the scheduled termination on June 21st gave time to work with petitioner to find other employment. At the May 10th meeting, Ms. Marquardt gave petitioner instruction regarding the codes he needed to know in terms of the entries on the roster of vacancies. Ms. Marquardt also told petitioner that if he had some questions or wanted more information, he should contact her.

5. On May 15, 1996, EAS received a document entitled "Transfer As an Accommodation Referral Information" from petitioner. The document indicated that petitioner was willing to transfer to a position in the same pay range as Youth Counselor 2, and was willing to work on a permanent part-time basis, both within and outside of his current employing unit. However petitioner indicated he was not willing to accept a reduction in pay or a demotion to a position in a lower pay range. Under the heading of "all classifications that you believe you are qualified for," petitioner listed Teaching Assistant, Supervisor, and Counselor. All of those classifications are in the same pay range and

schedule as Youth Counselor 2. Petitioner indicated he did not have the clerical skills typically required for a Program Assistant 2 position.

Petitioner did not contact other state agencies, including the Department of Employment Relations, in order to pursue transfer opportunities on his own.

6. On June 24, 1996 the Superintendent of EAS informed petitioner by letter that his accommodation request was being referred to the DHSS central personnel office "for a 12 month period of time to be apprised of appropriate position vacancies in DH&SS for reinstatement" under the policy governing transfer as an accommodation. The letter further advised that petitioner had reinstatement eligibility to positions at or below pay range "09" for a period of 3 years from his termination date.

Petitioner was an employee of DHSS at the time of his termination on June 21, 1996. Therefore, his reinstatement eligibility was with that agency. However, EAS was transferred from DHSS to DOC as of July 1, 1996, so Ms. Marquardt no longer had access to information from DHSS after that time. Petitioner was notified of the transfer in a letter and during a conversation with Ms. Marquardt in a 30 day period around May or June of 1996.

7. Other Youth Counselors have been terminated after receiving permanent work restrictions which meant they could not perform the essential elements of the job.

At all times after his surgery, had petitioner been employed as a Youth Counselor 2 at EAS and had he been asked by his supervisor to leave a cottage assignment to provide assistance to deal with a large-scale problem outside of the cottage, he would have declined the supervisor's request due to his physical status and restrictions.

EAS has consistently applied a policy permitting temporary assignment of light duty to Youth Counselors who have been injured at work, during their healing period. Once the end of healing is reached the Youth Counselor may not have any permanent medical restrictions that are inconsistent with the listed physical requirements for the job.

Management at EAS would have a reduced ability to respond to emergencies if Youth Counselor positions had permanent light duty restrictions, and it would increase response time in terms of suicides, fires, batteries to other Youth Counselors and other emergency situations. It would also make it more difficult for supervisors to make assignments.

If EAS chose to assign someone with restrictions inconsistent with the YC position description to a regular Youth Counselor post on a permanent light duty status, EAS would have to assign a second Youth Counselor in the same post.

A. Factual Findings of the Commission

Petitioner claims that the findings of the Commission are improper because they are not supported by the evidence in the record. The court is confined to the determination of whether there was any credible evidence to sustain the findings that were made. *E.F. Brewer Co. v. ILHR Department*, 82 Wis.2d 634, 636, 264 N.W.2d 222 (1978). It is the function of the Commission, and not the court, to determine the credibility of evidence or of witnesses and it is for the Commission to weigh the evidence and to decide what should be believed. *Id.* at 636-637. The Commission's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences. *Hamilton v. ILHR*, 94 Wis.2d 611, 618, 288 N.W.2d 857 (1980).

In this case, the court affirms the Commission's findings of fact because they are supported by substantial evidence in the record.

B. Rational Relationship vs. Reasonable Probability Standard

Petitioner also argues that the Commission erroneously applied the "rational relationship" standard instead of the more rigorous "reasonable probability" standard to DOC. If DOC's actions are to be measured against the latter, the court would be obliged to reverse because DOC did not conduct the required individual testing of petitioner. *See, Boynton Cab Co. v. ILHR Department*, 96 Wis.2d 396, 409, 291 N.W. 2d 850 (1980). The "rational relationship" test, however, does not mandate individual testing but, rather, requires only that the employment standard bear a rational relationship to the employer's safety obligations to the public and its own employees. *Samens v. LIRC*, 117 Wis.2d 646, 672, 345 N.W. 2d 432 (1984). In *Samens*, the Wisconsin Supreme Court expanded the application of the "rational relationship" test beyond the traditional limitation of cases involving common carriers of passengers to a "groundman" position for an electric utility concluding that the highly hazardous nature of the position, when considered along with the high degree of care imposed upon the utility, justified its application rather than the more burdensome "reasonable probability" standard. In the instant case, the Commission applied the "rational relationship" test for the reason that the Youth Counselor 2 position entails a special duty of care for the safety of the general public in that Youth Counselors at EAS carry out security responsibilities at a maximum security institution. The Commission now argues in its brief that the Youth Counselor 2 position meets the criteria established in *Samens* for application of the "rational relationship" test.

Petitioner argues that the "reasonable probability" standard is the proper burden of proof because petitioner's third shift Youth Counselor position was "mainly a sedentary,

clerical position with the exception of the patrol positions" (petitioner's brief, p.16) and that it "required very little contact with the young offender residents" (petitioner's brief, p.16). Petitioner concludes that his position did not involve hazardous activities like those in *Boynnton* and *Samens* and that, therefore, application of the "rational relationship" test by the Commission was improper. Alternatively, petitioner takes the position that, even if the "rational relationship" test applies in this case, the Commission's determination that DOC satisfied this burden of proof is improper because there was no individual, case-by-case assessment done as required by *Racine Unified School District v. LIRC*, 164 Wis.2d 567, 605, 476 N.W. 2d 707 (Ct. App. 1991), and §§111.34(2)(b) and (c), Stats (1995-96).

The court employs a *de novo* review when a legal conclusion reached by an administrative agency is one of first impression, as is the case here. *UFE, Inc. v. LIRC*, 201 Wis.2d 274, 285, 548 N.W. 2d 57 (1996).

The court agrees with the Commission that just as the groundman in *Samens* endangers the lives of other workers and members of the public by virtue of the highly hazardous nature of his work with electricity if he is unsuccessful in the execution of his job duties, petitioner's inability to meet the 125 pound lifting requirement endangers the life of an inmate who attempts to hang himself when petitioner is unable to lift him up, endangers the safety of other staff members and inmates when he is unable to assist in a fire evacuation or in quelling a riot, and endangers the public when he is unable to assist in preventing an escape from EAS. Therefore, the court determines that the Commission properly applied the "rational relationship" standard in its decision. The court further finds that the Commission properly conducted an individualized case analysis of petitioner's handicap and its

relationship to his ability to adequately undertake the job-related responsibilities of his Youth Counselor position. There is undeniably a rational relationship between petitioner's handicap and the fact that EAS is a maximum security institution housing violent residents and that physical assaults among residents and against staff are not uncommon, as established in the record.

C. Reasonable Accommodation

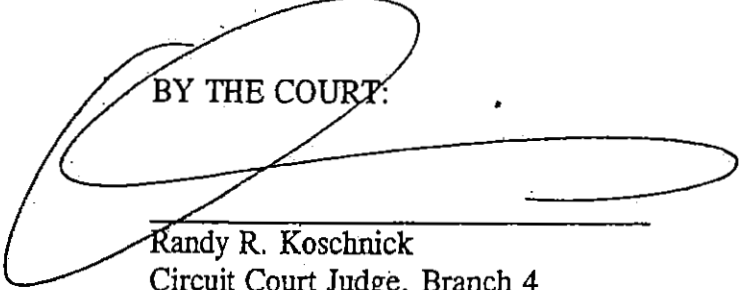
Petitioner next argues that the Commission failed to reasonably accommodate his handicap as required by §111.34(1)(b), Stats. (1995-96). The Commission correctly points out that its determination on this issue is a factual one and is therefore subject to reversal only upon a finding by the court that it is not supported by substantial evidence in the record, relying on *McMullen v. LIRC*, 148 Wis.2d 270, 276-277, 434 N.W. 2d 830 (Ct. App. 1988), and, *Target Stores v. LIRC*, 217 Wis.2d 1, 19-20, 576 N.W. 2d 545 (Ct. App. 1998). The court finds that the Commission's determination that EAS reasonably accommodated petitioner is supported by substantial evidence in the record: EAS reasonably accommodated petitioner's handicap by giving him a leave of absence for over one year and by providing him with information about transferring to other positions. Petitioner chose to significantly limit his options by requiring the same pay range as there were very few positions assigned to that pay range and none were available at that time. Further, the Commission's finding that petitioner failed to follow up on employment opportunity information provided by EAS is supported by the record and further undermines petitioner's position on this issue.

CONCLUSION

For the foregoing reasons, the Final Decision and Order of the Commission is hereby affirmed.

Dated at Jefferson, Wisconsin, this 7th day of September, 2001.

BY THE COURT:



Randy R. Koschnick
Circuit Court Judge, Branch 4

CC: Attorney Edith M. Petersen
Attorney David C. Rice