

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN J. SANFRATELLO,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 90-6475
)	
PALM BEACH COUNTY SCHOOL BOARD,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case at West Palm Beach, Florida, on February 7, 1991, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties at the hearing were as follows:

APPEARANCES

FOR PETITIONER:	Michael L. Cohen, Esquire Barristers Building 1615 Forum Place, Suite 1-B West Palm Beach, FL 33401
FOR RESPONDENT:	Hazel L. Lucas, Esquire School Board of Palm Beach County 3970 RCA Boulevard, Suite 7010 Palm Beach Gardens, FL 33410

STATEMENT OF THE ISSUES

The basic issue in this case is whether the Respondent engaged in an unlawful employment practice within the meaning of Section 760.10, Florida Statutes, by not hiring the Petitioner.

PRELIMINARY STATEMENT

This case had its genesis in the timely filing of a Charge of Discrimination in which the Petitioner asserted, "[o]n October 25, 1988, I was denied rehired to the position of a Bus Driver," and in which he also asserted, "I believe I have been discriminated against because of my handicap, diabetes. . . ." Following an investigation and efforts by the Florida Commission on Human Relations to resolve the case informally, the Petitioner filed a timely Petition For Relief. In the Petition for Relief, the Petitioner asserted that the Respondent had wrongfully "terminated" his employment and also asserted that the Respondent's allegedly wrongful conduct was based on the Petitioner's obesity. The Petition For Relief also expressly adopted and incorporated by reference the "Petitioner/Employee's previous Complaints."

The Respondent filed a timely Answer to the Petition For Relief, in which the Respondent denied all allegations of unlawful conduct and set forth several affirmative defenses. The Respondent's Answer was subsequently amended in certain minor details.

At the hearing on February 7, 1990, the Petitioner testified on his own behalf, but did not call any other witnesses. The Petitioner did not offer any exhibits of his own, but did state his intent to rely on certain exhibits offered by the Respondent. The Respondent called three witnesses to testify at the hearing and presented the deposition testimony of two other witnesses. The Respondent also offered eleven exhibits, all of which were received in evidence. (Two of the exhibits were transcripts of deposition testimony.)

Following the hearing, a transcript of the proceedings was filed with the Hearing Officer on March 6, 1991. By order at the close of the hearing, the parties were allowed twenty days from the filing of the transcript within which to file their proposed recommended orders. As of the date of this Recommended Order, the Petitioner has not filed any post-hearing document. The Respondent filed a proposed recommended order containing proposed findings of fact and conclusions of law. The substance of all proposed findings of fact submitted by the Respondent has been incorporated into the Findings of Fact which follow, with the exception of a few unnecessary details.

FINDINGS OF FACT

1. The Respondent's Policies 3.10 and 3.11 set forth conditions of employment and requirements for pre-employment medical examinations which must be complied with by "all applicants who are recommended for employment" by the Respondent School Board.

2. The Petitioner was initially employed by the Palm Beach County School Board as a probationary bus driver effective November 3, 1981. On August 18, 1986, the Petitioner submitted his resignation from that position effective June 11, 1986.

3. On September 16, 1988, the Petitioner submitted a new application for employment with the Respondent in the position of school bus driver. Pursuant to School Board policy, the Petitioner was referred to the Occupational Health Clinic for his pre-employment physical examination.

4. The Respondent's application process, which is governed by School Board Policies 3.10 and 3.11, requires that all applicants for employment sign a form which informs the applicants of the employment practice. The information sheet, which the Petitioner executed, has a section wherein the applicants acknowledge that they "must successfully pass health screening administered by the District's Occupational Health Clinic" to be considered for employment.

5. The Manager of the Respondent's Occupational Health Clinic is Ms. Linda Cherryholmes-Perkins. She has held that position since January of 1987. Ms. Cherryholmes-Perkins has a Bachelor's Degree in Nursing, a Master's Degree in Nursing, and is licensed as an Advanced Registered Nurse Practitioner. As Manager of the Occupational Health Clinic, Ms. Cherryholmes-Perkins oversees the pre-employment process, which all applicants for full-time employment must satisfy.

6. During the Petitioner's pre-employment physical examination, he was tested to insure that he met both the Florida Department of Education Standards and the Respondent's Bus Driver Standards. The Respondent's Bus Driver Standards have been approved by the Department of Education, Division of Public Schools, School Transportation Management Section. An applicant who fails to meet both the Florida Department of Education Standards and the Respondent's Bus Driver Standards is ineligible to drive a school bus for the Respondent.

7. The Petitioner knew he had to satisfactorily complete the pre-employment process to be eligible for employment. When the Petitioner was examined in connection with his 1988 application for employment, he was found to be suffering from uncontrolled diabetes, uncontrolled hypertension, and gross or morbid obesity. Because the Petitioner had not been previously diagnosed as having diabetes, he was assigned to and was allowed to perform twenty-one hours of probationary services before the Respondent discovered that the Petitioner was not qualified to be a school bus driver.

8. When it was discovered that the Petitioner did not meet the school bus driver requirements, he was placed in a "medical hold" status by the Occupational Health Clinic. The "medical hold" status was for thirty days. During the "medical hold" period the Petitioner was given an opportunity to demonstrate compliance with the State of Florida Standards and with the Respondent's Bus Driver Standards. The Respondent accommodated the Petitioner in this regard by providing him with free follow-up testing during the "medical hold" period. At the end of the "medical hold" period, the Petitioner still failed to meet the State and School Board employment standards. During that period the Petitioner also failed to follow his physician's medical prescription. At the conclusion of the "medical hold" period the Petitioner was given a medical denial for the position of school bus driver. The primary reason for the medical denial was the Petitioner's diabetes, which was still uncontrolled. Secondary reasons were the additional health complications resulting from the Petitioner's hypertension and obesity. As a result of the uncontrolled diabetes alone, it was unsafe for the Petitioner to drive a school bus, because patients with that condition are at risk of having cognitive problems. The Petitioner's other problems made it even more unsafe for him to drive a school bus because patients with uncontrolled hypertension are at greater risk of stroke, heart attack, and similar cardiovascular incidents, and the Petitioner's obesity caused him to have a limited range of motion in his spine.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

10. Section 230.23(5), Florida Statutes, authorizes the Respondent to "designate positions to be filled and to prescribe the qualifications for those positions."

11. Section 234.091, Florida Statutes, states, in pertinent part, that "[e]ach school bus driver shall ... possess such other qualifications as are prescribed by the state-board...."

12. Rule 6A-3.0141(5)(a), Florida Administrative Code, requires that applicants for employment as school bus drivers submit "to the Superintendent a written application for employment in a form prescribed by the School Board." And Rule 6A-3.0141(5)(c), Florida Administrative Code, requires an applicant for a school bus driver position to "successfully pass a physical examination Form ESE 479, given by a physician designated by the School Board and a reflex test administered by the school district."

13. It is uncontested that the Petitioner resigned from his original position with the Respondent in 1986. It is also uncontested that the Petitioner submitted a completed application for new employment on September 16, 1988. Since the Petitioner was reapplying for the school bus driver position after a two year break in employment, the Petitioner was subject to the employment requirements of Rule 6A-3.0141(5), Florida Administrative Code.

14. It is not disputed that during the Petitioner's pre- employment physical examination he was found to be suffering from diabetes which was so severe as to require that the Petitioner be treated with insulin. After the Petitioner was placed on insulin, he failed to follow his medical prescription. Because of the safety risks which result from uncontrolled diabetes, the absence of such a condition is a "bona fide occupational qualification reasonably necessary for the performance of the particular employment." See Kraft v. Bechtel Power Corporation, 483 So.2d 56 (Fla. 3d DCA 1986.) Further, because of those same safety risks, a person with the Petitioner's medical condition is not entitled to a "trial run" at the job. See School Board of Pinellas County v. Rateau, 449 So.2d 839 (Fla. 1st DCA 1984).

15. Section 760.10(8)(a), Florida Statutes, provides, in pertinent part:

(8) Notwithstanding any other provision of this section, it is not an unlawful employment practice under ss. 760.01-760.10 for an employer ... to:

(a) Take or fail to take any action on the basis of ... handicap ... in those certain instances in which ... absence of a particular handicap ... is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

16. On the basis of all of the foregoing, it is concluded that the Respondent in this case has not committed an unlawful employment practice within the meaning of Sections 760.01-760.10, Florida Statutes.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that a Final Order be issued in this case dismissing the Petition For Relief and denying all relief sought by the Petitioner.

DONE AND ENTERED at Tallahassee, Leon, County, Florida, this 26th day of July, 1991.

MICHAEL M. PARRISH, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 1991.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing Exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.