

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

BRIAN TOCHER,

Charging Party,

-v-

STATE OF MONTANA, DEPARTMENT OF  
PUBLIC HEALTH AND HUMAN  
SERVICES

Respondent.

Case No.: 0051011559

ORDER

On June 10, 2005, Brian Tocher (Tocher) filed a complaint with the Department of Labor and Industry's Human Rights Bureau (Department) alleging that the Department of Public Health and Human Services (DPHHS), discriminated against him based on his disability of visual impairment. He also alleges that he had applied for five jobs with DPHHS during the 180 days preceding the filing of his complaint, but DPHHS has failed to hire him even though he was qualified for the positions. Following an informal investigation, the Department determined that a preponderance of the evidence did not support Tocher's allegations of unlawful discrimination. Further, the Department determined that although Tocher was entitled to a hiring preference based on his disability, DPHHS was not required to hire Tocher because his qualifications were not substantially equal to the individual hired in each of the five cases. Therefore, the Department issued a Notice of Dismissal. Tocher filed objections with the Montana Human Rights Commission (Commission) and requested oral argument. DPHHS appeared through counsel and Tocher's counsel participated by telephone before the Commission on March 20, 2006.

The Commission reviewed the decision of the Department to dismiss the complaint using an abuse of discretion standard. *Mont. Code Ann. § 49-2-509(4)(2003)*;

*Admin. R. Mont. 24.9.1714(3)*. After careful and due consideration of the record and argument presented by the parties, the Commission finds that the Department's conclusion that Tocher was not discriminated against in DPHHS hiring decisions is not supported by the record. Specifically, the Department has failed to provide sufficient documentation to support its conclusions. Therefore, the Commission concludes there has been an abuse of discretion. The Commission also questions whether a case largely involving public employment preference issues under Title 39; Chapter 30 is properly before the Commission.

IT IS HEREBY ORDERED, that Brian Tocher's objection is **sustained**.

When the Commission sustains a Charging Party's objections to the dismissal of a complaint, the Commission will reopen the case by remanding it to the Hearings Bureau to give notice for hearing. *Admin. R. Mont. 24.9.1714(4)(b)*. A party may ask a district court to review a decision of the Commission to remand a contested case to the department. *Admin. R. Mont. 24.9.1714(7)*

DATED this \_\_\_\_ day of March, 2006.

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Chair Franke Wilmer  
Human Rights Commission

## CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this \_\_\_\_\_ day of March 2006.

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Montana Human Rights Bureau