



pertain to each position. The Bureau does not revise the examination content for each examination, but uses the same one over and over.

The Bureau has had and has consistently used for at least nine years an internal rule that a person may not take the same examination within a six month interval.

The Bureau has a further internal rule that a person has a right to use a previous score for a same examination within six months of the creation of that score; and for same examination after six months from the creation of that score and within a year thereof he has the option to use it.

The Respondent concedes that Appellant had the right to use her score on the register of October 15, 1969 for the subject examination, but denies that she was ever refused that right. Appellant testified that one John Preston of the Bureau denied her request for reuse of the score. Preston testified that he never discussed the matter with Appellant.

This Board does not find it necessary to resolve this issue for it becomes academic. It is clear that reuse of the score would not have benefited the Appellant. The score of 72 on the register of October 15, 1969 adjusted to the subject examination would produce a grade of 77.43. That still would place five people ahead of Appellant and preclude her certification for the position. Record, page 19 and 20.

This Board believes that the Bureau's rule that forbids an applicant to take the same written examination within a concurrent six month period is undoubtedly one that can be justified from the standpoint of sound personnel administration. It reduces the number of candidates and probably prevents the less capable from scoring above their normal level because of the factor of familiarity with the test content.

However, that is not an answer to the validity of such a rule. The Bureau of Personnel is administering a program within the corners of a statute. True, the Bureau or this Board can by rule implement a statute in areas where it is silent or where it is skeletal or where it directs implementation. The Bureau or this Board may not by rule change anything that is provided by statute.

It so happens that there is a statute, s. 16.13 Wis. Stats. that prescribes in detail the reasons for the director to refuse to examine, or after examination refuse to certify an eligible. The reasons are in ten categories. The statute reads as follows:

- "16.13 Applicants and eligibles may be barred; qualifications, bonds may be required. (1) The director may refuse to examine the applicant, or after examination to certify an eligible:
- (a) Who is found to lack any of the preliminary requirements established for the examination for the position or employment for which he applies;
  - (b) Who is physically or mentally so disabled as to be rendered unfit for the performance of the duties of the position to which he seeks appointment, except that a person shall not be discriminated against because of total or partial blindness unless normal eyesight is absolutely indispensable to do the physical acts to be performed;
  - (c) Who is addicted to the habitual use of intoxicating liquors to excess;
  - (d) Who has been guilty of any crime or of infamous or notoriously disgraceful conduct;
  - (e) Who has been dismissed from the public service for delinquency or misconduct;
  - (f) Who has made a false statement of any material fact;
  - (g) Who directly or indirectly gives, renders, or pays or promises to give, render or pay any money, service or other valuable thing to any person for or on account of, or in connection with, his test, appointment or proposed appointment;
  - (h) Who practiced, or attempted to practice any deception or fraud in his application, in his certificate, in his examination, or in securing his eligibility or appointment;

(i) Who refuses to furnish testimony as required in s.16.05(3)(a); or  
(j) Except on promotions whose work record or employment references are unsatisfactory.

(2) Whenever the director refuses to examine an applicant, or after an examination to certify an eligible, as provided in this section, then said director, if requested by the person so rejected within 10 days of the date of receipt of such notice of rejection, shall give to him a full and explicit statement of the exact cause of such refusal to examine or to certify, as the case may be. Appeal may be had from the decision of the director in accordance with s. 16.05(1) provided notice of such appeal is received by the director not more than 10 days after the date of such statement.

No place in any of the ten categories is there any direct reference to barring an applicant because he took the same examination before and within six months. The interpretation of none of the categories can be strained to include that reason.

A statute such as this which is in detail one of limitation to its contents. The categories are exclusive of any others and are not referenced as illustrations. No person or body except the legislature can enlarge it to include reasons not contained therein.

Accordingly, this Board concludes that the Bureau's rule that forbids an applicant to take the same examination within a concurrent six month period is an involved rule. It should not be hereafter invoked.

Despite the fact that Appellant had a void rule applied to her application she substantively was not damaged by it. Appellant did take this same examination three times during the space of a little more than a year. The first time she scored 72, the second time she failed and the third time she scored 74 or 75. In none of the instances did she score high enough to be ranked on the register created from that examination to be in any real contention for appointment. As stated earlier, if she had reused the first passing score

for the examination she was not allowed to take, she would have been graded 77.43 and ranked in the sixth position on the register. If the last examination score of 74 or 75 would have been related back to the subject examination, she would have had a grade two points higher and still be ranked sixth.

Appellant made no claim that she was in any way disadvantaged in the three other examinations that she took. She advanced no reasons why she might do relatively better in the examination she was barred from than she did in the others. It is utter speculation that she might.

This Board feels that under the circumstances it would do more mischief than good to set aside the subject examination, the register, the certification, and the appointment therefrom. It certainly would injure many innocent persons and probably accomplish no more than "giving the Appellant another kick at the cat."

This probably is a Pyrrhic victory for the Respondent, but nevertheless his counsel shall draw Findings of Fact and Conclusions of Law, consonant with this opinion dismissing the Appellant's appeal.

Dated: \_\_\_\_\_, 1971.

STATE BOARD OF PERSONNEL

BY \_\_\_\_\_  
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Member Brecher and Serpe  
did not participate in  
this hearing.