STATE OF WISCONSIN	: CIRCUIT	COURT :	DANE COUNTY
DOROTHY WAGGONER and	* * • • • • • • • • • • • • • • • • • •		F * * * * * * * * * * * * * * * * * * *
ETHEL DENNISTON,			
	Petitioners,	,	
v.		Case	No. 134-442
STATE OF WISCONSIN (PERSONNEL BOARD),		ډ.	
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Respondent,

## JUDGMENT

This action having come on for hearing and the issues having been duly heard, and a decision having been duly rendered by the Court on July 21, 1972,

NOW THEREFORE IT IS ORDERED AND ADJUDGED that the Memorandum Decision of the Respondent State of Wisconsin Personnel Board, dated October 8, 1971, be and the same is hereby reversed;

IT IS FURTHER ORDERED AND ADJUDGED that said Respondent Personnel Board enter an order directing Wilbur J. Schmidt, Secretary of the Department of Health and Social Services, to prepare and file a fair and accurate evaluation report for the potitioners, Ethel Denniston and Dorothy Waggoner, for the period of April 1, 1969, through March 31, 1970, and, upon receipt of said fair and accurate evaluation reports, that said Secretary of the Department of Health and Social Services then consider and determine the eligibility of said petitioners for merit salary increases retroactive to July 1, 1970.

Dated at Madison, Wisconsin this // day of August, 1972.

M C. SACHTJEN

Circuit Judge

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STATE OF WISCONSIN	CIRCUIT	COURT	DANE C	COUNTY
DOROTHY WAGGONER and ETHEL DENNISTON,		* #134-442 •		
VS •	Petitioners,	MEMO	RAIDUM	DECISION
STATE OF WISCONSIN (PERSONNEL BOARD),		• •		
an	Respondent.	•		

This is a petition by Dorothy Waggoner and Ethel Denniston, both of whom are employed in the classified service as Registered Nurses 3 in the Department of Health and Social Services, Division of Health, for review under sec. 227.15, Stats., of the decision of the State Personnel Doard dated October 8, 1971, which, for reason of lack of jurisdiction, dismissed their appeals from the action of their appointing suthority, Secretary Wilbur J. Schmidt. Er. Schmidt, on December 4, 1970, in the third stop of the department's grievance precedure, removed the unfavorable evaluation reports from the personnel files of both employees and refused to grant them any merit salary increase retroactive to July 1, 1970, on the basis of a lack of information on which to judge the quality of their work.

Chapter 25 of the Wisconsin Administrative Code authorizes State departments to formalize departmental grievance procedures. The grievance procedure established for Health and Social Services employees contains four steps, culminating with an appeal to the Personnel Board. Such appeal, however, is available only "if the grievance alleges a violation or incorrect interpretation or unfair application of a Personnel Board rule or statute or a function which the director of personnel has affirmatively delegated to the department

Both petitioners' contention on appeal was that Mr. Schuidt's refusal to grant them merit increases because no reliable evaluation report was available denied them the opportunity to have their eligibility for a merit increase considered on the basis of a factually accurate report evaluating their performance during the period in question. The Personnel Board held that the petitioners' grievances involved only the correctness of a judgment decision of the Department of Health and Social Services and, therefore, dismissed the appeal.

We are of the opinion that the petitioners' grievance involved substantially more than a judgment decision of the Department of Health

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and Social Services. Their grievance was directed at the department's failure in their case to adhere to the merit salary determination policy. That policy is set forth under the Civil Service statutes, sec. 16.105(2)(c), Stats. That subsection directs the Personnel Board to establish rules for assuring that state departments follow procedures which promote the legislative intent that merit increases be granted on the basis of meritorious service, "including therein the use of performance standards, evaluation reports, and such other measurements as they may require." This statute imposes the duty upon the department to fairly and accurately evaluate the work of its employees in considering their eligibility for merit salary increases. Its refusal to grant merit increases to these petitioners on the basis of the unavailability of an accurate evaluation of their work was, we feel, an abdication of their statutory responsibility to investigate and prepare an accurate report.

> This violation of sec. 16.105(2)(c) brings the matter within the jurisdiction of the Personnel Board by virtue of sec. 16.05(3), Stats., which provides that the Personnel Board has the authority to:

> > "(3) Make investigations concerning all matters touching the enforcement and effect of ss. 16.01 to 16.32 and the rules prescribed therounder concerning the action of any employe of the department of administration and any person in the public service, in respect to the execution of said sections."

Though, as the respondent points out, an administrative agency cannot create power in itself by the adoption of rules which are not grounded in statutory authority, it is the opinion of the court that sec. 16.05, Stats., provides sufficient statutory basis to allow the Personnel Board to function as an appeal board in grievances alleging a violation or incorrect interpretation or unfair application of a Personnel Board rule or statute.

This action is properly before this court since we have determined that the appeal to the Personnel Board was proper, and under sec. 227.15, Stats., judicial review was not available to the petitioners until the Personnel Board completed the administrative decision-making process, which occurred when the Board declined jurisdiction.

For the reasons herein stated, we deem it appropriate relief to remand this case to the Personnel Board with instructions that

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they take the necessary action to insure that the petitioners receive fair and accurate performance valuations for the period in question.

Counsel for the petitioners may prepare an appropriate judgment for the court's signature.

Dated: July 21, 1972

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BY THE COURT:

/s/ William C. Sachtjen William C. Sachtjen, Judge

cc Attys. Lerner, Vergeront

## STATE OF WISCONSIN

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BEFORE THE BOARD OF PERSONNEL

Dorothy Waggoner and Ethel Denniston,	)
Petitioners,	)
VS.	)
Wilbur J. Schmidt, Secretary Department of Health and Social Services,	)
Respondent.	)

This matter having initially been heard by the Board and it determined that the Board did not have jurisdiction to hear the matter, and an appeal from this decision having been duly made to the Dane County Circuit Court, and a judgment having been made, dated August 11, 1972, wherein such determination has now been reversed, and the matter remanded to this Board for an appropriate order;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED That Wilbur J. Schmidt, Respondent Secretary of the Department of Health and Social Services, is ordered to prepare and sign an appropriate performance evaluation report for each of the Appellants herein for a merit determination for an award or denial of a merit salary increase to become effective July 1, 1970, and upon such determination, to pay such award, if any, as so determined, to the Appellants herein. Dated at Madison, Wisconsin this  $\int S \mathcal{Y}$  day of September, 1972.

STATE BOARD OF PERSONNEL

CHA IRMAN

ORDER