STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DEPARTMENT OF ADMINISTRATION,
BUREAU OF PERSONNEL and
DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS,

Petitioners, DECISION ON REVIEW

vs.

STATE PERSONNEL BOARD,

Respondent. Case No. 147-407

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH I

This is a proceeding under Chapter 227 to review decisions of the State Personnel Board (hereinafter referred to as the Board) which rejected certain actions and decisions of the Director of the Department of Administration (DOA) with respect to certain civil service examinations, as well as certain appointments made as a result of these examinations.

The facts surrounding this controversy are ably stated in the learned brief of the learned assistant attorney general, who is representing DOA, DILHR, and the Bureau of Personnel on this review. The facts as taken from the record are as follows:

"STATEMENT OF FACTS

In July, 1973, DILHR sought DOA permission and was granted delegated authority to conduct an examination, subject to the general supervision of DOA, for the newly created civil service positions of district employment security director (I 21-24; III 108-109; Appellants' Ex. 5).[1] DOA personnel analyst, John Preston, who had ten years experience in test development, was primarily responsible for construction of the examination (I 40; II 8; III 107; V 117). Daniel Wallock, another DOA personnel analyst who had expertise

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[1] " Hearings in this matter before the board lasted seven days. The transcript of testimony is divided into nine separately numbered volumes which will be identified hereinafter as follows: 'I' (March 27, 1974); 'II' (July 25, 1974, a.m.); 'III' (July 25, 1974, p.m.); 'IV' (July 26, 1974, a.m.); 'V' (July 25, 1974, p.m.); 'VI' (August 12, 1974); 'VII' (August 13, 1974); 'VIII' (September 14, 1974); and 'IX' (October 5, 1974)."

in statistics and test validation, provided technical assistance to Preston, and reviewed and approved the examination at its various stages of development (I 8-9).

"Preston first discussed the district employment security director positions with DILHR personnel director Don Weinkauf and with George Kaisler, an administrator in DILHR's Employment Security Division (I 41). He also studied the basic job specifications (I 41-42). Then, he reviewed a large number of job elements in DOA's job element bank, and in conjunction with Kaisler, selected twenty-three (23) job elements which he thought might be related to the district director positions (I 42; III 115-116). Next, after the twenty-three elements were evaluated and rated by Kaisler and three other experienced DILHR administrators as to whether they were necessary or desirable for the position in question, Preston averaged the results of the four raters' job analyses and ranked the job elements (I 42; III 118; Resp. Ex. 4). Finally, Preston eliminated ten of the twenty-three elements which he determined were either impractical to test for or were unfair to certain applicants (I 71, 81; III 120; IV 42). Of the remaining thirteen elements, Preston further determined that seven elements could best be tested by written examination, and six by oral examination (III 121, 124).

"In order to develop the written examination, Preston went to a DOA bank of examination items which were developed by professional examiners and consultants (I 42; III 125). He selected ninety (90) items for the written exam (V 11). The number of items assigned to each of the seven job elements to be tested on the written exam was based partly on the availability of test items, and partly on Preston's judgment as to how many were "good" items and as to how many were necessary to test each job element (V 84; V 124-125). Preston felt an item was a good item if it measured what persons needed to know to do the district director job, if in the past candidates who tended to do well on an overall test also did well on that item, if the item discriminated well (showed differences) between candidates, and if the answer was right (V 14-15, 20, 26, 31, 45, 49). He was aided in his selection by the fact that for approximately 80 percent of the items in the item bank, there was an item analysis showing statistically how good the test item was (V 20-21). As to how many items are necessary to test a job element, Preston felt that it was essential for some elements to have several items in order to discriminate as between candidates and to minimize the factor of chance (III 124; IV 72). For example, the job element 'written communications,' which was ranked last of the seven job elements to be tested on the written exam, was assigned 25 items on the exam, including 15 vocabulary items (IV 58, 72). Preston felt that if only a few vocabulary items were included, chance could play a tremendous role in who would do best on the exam (IV 55-57, 72). The written examination (Resp. Ex. 17) was conducted in late August, 1973 (V 49). Prior to scoring the exam, ten items were eliminated which detracted from its reliability (VI 144).

"After the written examination, Preston provided DILHR personnel manager Weinkauf with an evaluation form containing the job elements to be tested in the oral examination (VI 26; Resp. Ex. 11). Weinkauf was responsible for the oral examination, and he empaneled an oral

board consisting of a partner in a management consultant firm, an AFL/CIO staff representative, and a retired state department personnel director (VI 24-25). He developed two questions for use in the oral exam, in consultation with Kaisler, which Weinkauf felt were job related (VI 29, 43, 54-55).

"William Komarek, a DILHR personnel assistant, actually handled the oral exam (VI 60). He sent a letter with a job information sheet (Resp. Ex. 20) to each oral board member and asked that each prepare three questions in advance (VI 60, 89-90). He did not indicate in the letter which elements on the job information sheet were to be tested in the oral exam, but on the first day of the oral examination process (there were six days altogether), he spent extra time briefing the board on how to complete the evaluation form (Resp. Ex. 11) and deciding what questions would be asked (VI 89-91, 95-96, 107-108). Komarek felt the questions developed by the oral board members related to the job elements to be tested (VI 71). All of the 88 candidates were asked similar questions (VI 70; VII 90).

"The oral exam counted 60 percent, the written exam counted 30 percent, and seniority counted 10 percent (II 90). After veterans points were added, appellant Kuter ranked thirty-first in total examination score and appellant North ranked forty-sixth (VII 90). Neither was among the thirty persons considered or the eighteen persons selected for the district director positions, and they appealed to the board in October, 1973 (Board Exs. 1-2). A hearing on their appeals was commenced on March 27, 1974. After the appellants had called two witnesses, the board announced that the burden of proof would be imposed on DOA and DILHR to demonstrate that the examination for district employment security directors was valid in accordance with the U. S. Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (189-90). This announcement was reiterated and embodied in an interim decision and order dated July 24, 1974. After six more days of hearing, the board issued its final decision and order on July 3, 1975, which rejected DOA's director's actions and decisions with regard to the examination, certification and appointments concerning the district director position, and remanded the matter to the director for action in accordance with the board's decision. DOA and DILHR commenced the present proceeding on July 25, 1975, to review both the interim and final decisions and orders of the board."

Unfortunately, this is another one of these internecine disputes which has arisen between various agencies of our state government. All too often these disputes seem to involve the various agencies and boards making up the petitioners and the respondent in the case at bar. It should be noted that learned and exhaustive briefs have been filed by counsel for parties on each side. In addition, a comprehensive brief has been filed by counsel for the Wisconsin State Employees Union on behalf of the two unsuccessful applicants, i.e.,

Mr. Kuter and Mr. North, who joined with the State Personnel Board in challenging the validity of the examination and the appointments made thereunder.

Finally, an amicus curiae brief has been filed by counsel for the 17 District Employment Security Directors who were certified and appointed to their respective positions as a result of the disputed examination and have served in such positions since sometime in the fall of 1973.

As indicated, in its final decision and order of July 3, 1975, the Board rejected the DOA's Director's actions and decisions with regard to the examination, as well as its certifications and appointments of district directors made under such examination, and remanded the matter to the Director for action in accordance with the Board's decision. DOA and DILHR then commenced this review proceeding to seek review of the Board's action.

As we see it, there are four basic issues involved in this review.

(1) Were the Board's decision and order made or promulgated upon unlawful procedure?

(2) Was the Board's order in excess of its statutory authority insofar as it rejected the appointments to the district employment security director positions which, as indicated, have now been filled for over three years?

(3) Must examinations for civil service positions in the DILHR meet U. S. Equal Employment Opportunity Commission (EEOC) Guidelines on Employment Selection Procedures, 29 C.F.R. Part 1607, if they are to be deemed of such character as to meet the requirements set forth in sec. 16.12 (4), Wis. Stats.?

(4) Was the examination as given for District Employment Security Director of such a nature and character so as to fairly determine the qualifications, fitness and ability of the persons examined as required by sec. 16.12 (4), Wis. Stats.?

In our judgment, by answering questions (2) and (3) above we can effectively dispose of this review.

LEGALITY OF THE BOARD'S ORDERS

The Board apparently took the position that if the examination was invalid then the 17 appointments thereunder were void as a matter of law. The Board did this by what we think was applying an invalid rule retroactively so as to invalidate the appointments in question.

Section 16.05 (a) (b) and (c), Stats., delineate the Board's rule-making authority:

> "(1) The Board shall:
>
> "(a) Adopt rules necessary to carry out this section. Notice of the contents of such rules and amendments thereto shall be given promptly to the appointing authorites affected thereby.
>
> "(b) Participate in public hearings held by the director in the rule-making process.
>
> "(c) Review and approve proposed rules and amendments, upon approval by the board, shall be submitted to the governor subject to his approval before taking effect, but if he does not disapprove within 10 days after receipt thereof, such rules and amendments shall become effective as though approved."

Sections 227.01 (4), 227.02, 227.021 and 227.022 through and including 227.027, Stats., state with specificity the procedures to be followed by agencies in their adoption of rules. Clearly, these rule-making procedures were not followed by the Board. The Board failed to hold the required public hearing, secs.227.02 and 227.022, Stats., failed to give notice of such a hearing, secs. 227.02 and 227.021, Stats., failed to file any rules, sec. 227.025, Stats. The rule evolving from these proceedings, namely, that invalidation of a civil service examination also invalidates appointments made pursuant thereto, is also infirm. Adoption of such a rule exceeds the Board's power to "affirm or reject the action of the director and, in the event of rejection, . . . issue an enforceable order to remand the matter to the director for action in accordance with the Board's decision." Sections 16.05 (1) (f), Stats.

In addition, the Board's order was clearly in excess of its statutory authority when it rejected the appointments to the district employment security directors' positions, which were made by DILHR, not the Director of the Bureau of Personnel.

Sec. 16.03, Stats., provides in material part as follows:

> "(4) (a) The director ... shall hear appeals of employes from personnel decisions made by appointing authorities when such decisions are alleged to be illegal or an abuse of discretion and such decisions are not subjects for . . . hearing by the board.
>
> "(d) The director shall not grant an appeal under this subsection unless he receives a written request therefor within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later . . . (T)he director shall hold a hearing thereon and shall either affirm or reject the action of the appointing authority * * *.
>
> "(e) No action of an appointing authority relating to appointments shall be upset unless the action is appealed within 6 months after the effective date of the action. . . .
>
> "(5) The director may issue enforceable orders * * * Such orders may be appealed to the board."

Sec. 16.05, Stats., provides in part:

> "(1) The board shall:
>
> * * *
>
> "(e) Hear appeals of employes with permanent status in class, from decisions of appointing authorities when such decisions relate to demotions, layoffs, suspensions or discharges . . . . After the hearing, the board shall either sustain the action of the appointing authority or shall reinstate the employe fully * * *. (Emphasis added).
>
> "(f) Hear appeals of interested parties and of appointing authorities from actions and decisions of the director. After such hearing, the board shall either affirm or reject the action of the director and, in the event of rejection, may issue an enforceable order to remand the matter to the director for action in accordance with the board's decisions * * *."

The Board's authority to hear appeals is expressly limited by sec. 16.05 (1) (e)-(h), Stats. Subsections (g) and (h) did not apply here because this was not an appeal involving county merit system rules or state employe bargaining. Sec. 16.05 (1) (e) did not apply because Kuter and North did not appeal from a decision by an appointing authority relating to demotion, layoff, suspension or discharge.

Sec. 16.05 (1) (f) did apply, however, and this limited the Board's authority to "hear appeals of interested parties and of appointing authorities from actions and decisions of the director." In other words, the only real issue before the Board was whether or not the examination was conducted properly and whether or not it was a valid examination. Under the statutes the Board had no authority

to void the appointments made in this case. As earlier noted, the appointments here were made by DILHR, not the Director of DOA, and sec. 16.05 (1) (f) only authorizes the Board to reject and remand the actions and decisions of the director. Thus the Board exceeded its statutory authority in rejecting the appointments made by DILHR to the district directors' positions.

It should be noted that Mr. Kuter and Mr. North were not without legal recourse if they sought to upset the DILHR appointments. Sec. 16.03 (4) (a), Stats., authorizes DOA's Director to hear appeals from decisions of appointing authorites not appealable to the Board under sec. 16.05 (1) (e), Stats. The director may then issue enforceable orders and such orders are appealable to the Board. Sec. 16.03 (5), Stats. Thus Kuter and North could have appealed the DILHR appointments to DOA's Director on the ground that the examination was invalid, and if he decided against them, they could have then appealed his decision to the Board. Voight v. Wis. State Personnel Board (Dane County Circuit Court, May 8, 1975, Case No. 145-300.) However, such an appeal to the director is now precluded because of the time limitations contained in secs. 16.03 (4) (d) and (e), Stats. When using the term DOA's Director, this is synonymous with the term Director of the Bureau of Personnel.

For the reasons stated above, the Board's decision and order was clearly beyond its statutory authority in declaring invalid the appointments made by DILHR as to appointing authority. The objecting parties, Kuter and North, had a clear legal remedy by appealing first to the Director of the Bureau of Personnel, and if dissatisfied by his decision, then taking an appeal therefrom to the Board.

MANDATORY APPLICABILITY OF THE EEOC GUIDELINES

In its decision the Board held that the subject examination was not administered and conducted pursuant to EEOC Guidelines, and that the Board in adopting such Guidelines was merely applying sec. 16.12 (4), Wis. Stats. This application of EEOC Guidelines as a condition precedent to the conduction of a valid civil service exam was apparently a retroactive application of another new rule. Certainly,

if the Board was going to adopt EEOC Guidelines, it should have done so by the promulgation of a valid rule before the test in question was administered. In this review we do not have to pass on the efficacy of the Title 7 Guidelines of the Civil Rights Act of 1964. These Guidelines were obviously set up for the purpose of guaranteeing freedom from discrimination against minorities under the Federal Civil Service System. The subject of discrimination against minorities, or for that matter discrimination against any group for any reason, is not germane to the subject review. We say this because there is no claim whatever that any discrimination occurred in the setting up or giving of the subject examination, including the appointments made thereunder.

In its decision, the Board stated as follows:

> ". . . (W)e adopt as a policy objective the intent of Congress as expressed in Title VII by the EEOC Guidelines. We utilize the standard of measurement that Congress has adopted." (Board Dec., July 24, 1974, p. 5).

After making the above statement, the Board then imposed upon DOA and DILHR "the burden of proving by the greater weight . . . of the evidence that the test as given was valid and job related in accordance with the EEOC Guidelines for validity." In our judgment, this was the retroactive application of an invalid rule as such rule was not adopted pursuant to the requirements of sec. 227.01 (4), Stats., and sec. 227.023 (1), Stats.

Consequently, whether or not such EEOC Guidelines are a proper interpretation of sec. 16.12 (4), Stats., we consider that this was the retroactive adoption and application of an invalid rule. The least that the Board of Personnel could have done was in advance inform the Director of the Bureau of Personnel of the EEOC requirements before the specifications for the examination in question were devised and the examination administered.

It should also be pointed out in passing that the EEOC Guidelines are very controversial and have not been uniformly either adopted or administered by the federal agencies. Also even in federal discrimination cases where such Guidelines are often given deference, it is

only where a prima facie case of discrimination is established that the Guidelines even come into play. Albermarle Paper Co. v. Moody, (1975), 422 U.S. 405, 95 S. Ct. 2362. Certainly such disputed Guidelines should not be given the effect of law in Wisconsin and particularly where the issue of discrimination is not even present. See Warshafsky v. The Journal Co. (1974), 63 Wis. 2d 130, 216 N.W. 2d. In Warshafsky the court rejected EEOC Guidelines insofar as they suggested Title VII superceded a state law which distinguished between minor boys and girls for purposes of street trades permits. In so doing, the court commented:

> "While such guidelines are to be given great deference by the court in interpreting Title VII, Griggs v. Duke Power Co. (1971), 401 U.S. 424, 434, 91 Sup. Ct. 849, 28 L. Ed. 2d 158, the administrative agencies have no power to declare state laws unconstitutional. Determinations as to the interpretation and constitutionality of statutes is still exclusively vested in the courts. Williams v. Madison (1962), 15 Wis. 2d 430, 113 N.W. 2d 395. The jurisdiction of the E.E.O.C. is limited solely to proceedings before that agency in determining whether there has been a violation of federal law. Thus, while this court recognizes the expertise exercised by the E.E.O.C. in its interpretation and application of Title VII, it is our opinion that 29 C.F.R. 1604.2 (b) (2) as it applies to state protective laws of juveniles in general and sec. 103.23, Stats., in particular is in error . . . ." 63 Wis. 2d at 147-148.

Thus we must conclude that the Board here erred as a matter of law in interpreting sec. 16.12 (4), Stats., as requiring compliance with EEOC Guidelines, even where discrimination was not at issue.

PROCEDURAL IRREGULARITIES

Petitioners here take the position that in conducting its lengthy hearings in the instant proceeding the Board engaged in several procedural irregularities which require at least a remand for a new hearing. Such claims of irregularities include (a) shifting the burden of going forward with the burden of proof from the appellant to the state agencies, DOA and DILHR; (b) denial of due process rights to the 17 employees certified to the positions in question. These persons were not made parties to the proceeding and frankly were given very short shrift at the hearings themselves, i.e., the right to talk for no longer than five minutes each; (c) the

fact that Board members Serpe and Wilson did not attend any of the hearings, and there is no real proof that they read the complete record nor were adequantely informed of its contents. We have considered these claimed irregularities but do not feel that in and by themselves they are crucially prejudicial nor would they standing alone require reversal of the orders at issue; however, in view of our holding that the orders of the Board went beyond its statutory authority, and further that it illegally invoked the retroactive application of an invalid rule, it is not necessary to consider the alleged procedural irregularities further.

VALIDITY OF THE EXAMINATION

Admittedly, there is conflicting evidence in the record as to whether or not the actual examination administered here was of such a character as to fairly determine the qualifications, fitness and ability of the persons examined. Sec. 16.12 (4), Stats. This issue was succinctly stated by Board Chairman Ahrens at the hearing when he stated:

> ". . . (A)ll this Board can hope to decide, was it (the examination) a reasonably satisfactory way of selecting the best candidate for this position; not was it perfect; nor could it have been changed, but was it a reasonably satisfactory method, reasonably satisfactory attempt to select candidates for this position . . ." (VIII 47).

What bothers the Court in this context is whether the experts -- the technical experts from DOA and DILHR, as well as the Director of the Bureau of Personnel on the one hand are not better able to evaluate the character and effectiveness of an examination than can the Personnel Board on the other hand. We say this because the Personnel Board is admittedly made up of a number of non-experts, and the composition of that Board changes with reasonable rapidity. The law is not clear as to just how far the Personnel Board may go in putting its expertise above that of the agency experts in determining the effectiveness and validity of a civil service examination. All we can say in this regard is if in the future any written and oral examination which was as important as the examination here at issue, i.e., it covered 17 newly created positions, is to be given,

such exam should be cleared in advance at least informally with the Board of Personnel. Such a procedure would eliminate the time consuming and very costly hearings and review proceedings which have resulted from the subject conflict. In other words, newly administered exams of substantial import should be checked out ahead of time with the Board -- especially is that true if the Board has the final say with respect to the validity of such exams. Such a procedure would eliminate the retroactive rejection of the appointments that were here made. Such retroactive rejection of appointments of persons who have now served over three years makes no sense at all, and in any event could have been forestalled here had the Board sought a stay order at the time the certifications were made and Mr. Kuter and Mr. North had taken their initial appeal. In the Court's judgment, the Board, as well as Kuter and North, waived any right to have a retroactive nullification of these appointments by failing to at least seek such a stay order.

The decisions and orders of the Board are hereby reversed, and the case is remanded to the Board for further proceedings consistent with this decision. Counsel for the petitioners may prepare a formal form of judgment reversing the decision and remanding the case to the Board as indicated. A copy of the proposed judgment should be furnished counsel for the State Personnel Board, as well as counsel for the State Employees Union and counsel for the 17 district employment security directors before submission to the Court for signature.

Dated February 25, 1977.

BY THE COURT:

Richard W. Bradbeer
Circuit Judge

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

DEPARTMENT OF ADMINISTRATION,
BUREAU OF PERSONNEL and
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AND HUMAN RELATIONS,

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v.

STATE PERSONNEL BOARD,

Respondent.

NOTICE OF ENTRY
OF JUDGMENT

Case No. 147-407

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PLEASE TAKE NOTICE that a judgment, of which a true and correct copy is hereto attached, was signed by the court on the 16th day of March, 1977, and duly entered in the Circuit Court for Dane County, Wisconsin, on the 17th day of March, 1977.

Dated at Madison, Wisconsin, this 18th day of March, 1977.

BRONSON C. LA FOLLETTE
Attorney General

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Assistant Attorney General

Attorneys for Petitioners.

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

DEPARTMENT OF ADMINISTRATION,
BUREAU OF PERSONNEL and
DEPARTMENT OF INDUSTRY, LABOR
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v. Case No. 147-407

STATE PERSONNEL BOARD,

Respondent.

JUDGMENT

The above entitled proceeding having come on for hearing before the Honorable Richard W. Bardwell on September 24, 1976; and

The petitioners having appeared by David Rice, Assistant Attorney General, the respondent having appeared by Benjamin Southwick, the intervenor Wisconsin State Employees Union having appeared by Jean Lawton, the amicus district employment security directors having appeared by Michael Ehrsam, and intervenors Richard North and David Kuter having appeared without counsel; and

The court having fully considered the written and oral arguments of the parties, and the record herein; and

The court having entered its decision on review on February 25, 1977,

IT IS ADJUDGED, ORDERED, AND DECREED that the decisions and orders of the State Personnel Board are hereby reversed and the case is remanded to the Board for further proceedings consistent with this court's decision on review.

Dated at Madison, Wisconsin, this 16th day of March, 1977.

BY THE COURT:

Richard W. Bardwell

RICHARD W. BARDWELL
Circuit Judge, Branch 1

filed March 17, 1977