

STATE OF WISCONSIN

STATE PERSONNEL BOARD

* * * * *

DAVID M. KUTER AND RICHARD A. NORTH,

Appellants,

v.

C. K. WETTENGEL, Director, State
Bureau of Personnel, and PHILIP
LERMAN, Secretary, Department of
Industry, Labor, and Human Relations,

Respondents.

Case No. 73-152 and 73-159

* * * * *

OFFICIAL

INTERIM
DECISION ON REMAND

Before: DeWitt, Morgan, Warren and Hessert, Board Members.

This case is back before the board on remand following reversal of the decisions and orders of the board by the Dane County Circuit Court, see Department of Administration, Bureau of Personnel, and Department of Industry, Labor, and Human Relations v. State Personnel Board, No. 147-407, judgment entered March 16, 1977:

"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."

Following the filing of the return by the circuit court on July 15, 1977, the parties to this appeal were requested to file statements concerning further proceedings before the board.

In its memorandum decision, the court held that the board erred in rejecting the appointments to the district employment security director

Kuter and North v. Wettengel and Lerman
Case Nos. 73-152 and 73-159
Page Two

positions, because the board lacked statutory authority to do so, and that it constituted the application of an invalid rule retroactively. The court also held that the board erred in utilizing EEOC guidelines in reviewing the examination because this also was the retroactive application of another invalid rule. Aside from this determination of error, the court did not make any determination regarding the validity of the examination, although it did discuss the question to some extent.

The general law governing administrative proceedings following remand is well stated in 73 C.J.S. Public Administrative Bodies and Procedures, §241:

"Judicial decisions on appeal from administrative decisions or orders determining questions of law are final and conclusive on the administrative body . . . Thus, the power of the administrative body to so modify or change its decision is terminated as to questions decided on the appeal. Hence the administrative body is precluded from entertaining another proceeding for the same relief where the right to the relief has been judicially determined on the merits by the court, unless applicant shows that different conditions have arisen and are operative since the former hearing, but it is not precluded from entertaining further proceedings as to issues which are expressly left open by the judicial decision . . .

* * *

Where a cause is remanded to the administrative body, the remand does not dismiss or terminate the proceedings, or encroach on the administrative functions, but returns the case to the administrative body in order that it may take further action in accordance with the law and it is incumbent on the administrative body to execute the judgment embodied in the mandate of the court. An administrative agency may reopen the case after remand, or completion of the judicial proceedings, for fraud or mistake or changed conditions, but it may not reopen the case on a ground passed on by the court on appeal. Where an administrative decision or order is reversed or vacated and remanded, the case stands as if no decision or order had ever been made, and the administrative body has the right to proceed in a manner not inconsistent with the view expressed in the reversing or vacating decision, and in such case the administrative body has

Kuter and North v. Wettengel and Lerman
Case Nos. 73-152 and 73-159
Page Three

been held authorized to try the case anew, or to rehear the matter as it sees fit, and it is vested with discretion to decide whether to conduct only a reconsideration or a full hearing."

The Wisconsin Administrative Procedure Act is consistent with the possibility of further proceedings on remand. See sec. 227.20, Wis. Stats.:

"(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the law."

Initially, it is determined that at least at this point, there is no need for further evidentiary hearings. The evidentiary hearings before the board in this case covered seven days and approximately 1,200 pages of transcript. None of the findings of fact were disturbed by the circuit court on review.

It is further determined, based on the foregoing authorities and the decision of the circuit court, that this board is bound by the court's decision that it lacked the power to order the positions in question vacated, and that therefore this remedy is foreclosed and there is no reason for further proceedings relating to that facet of the case. For the same reasons, it is determined that the board is bound by the court's determination that the EEOC guidelines could not properly be applied to this case.

The only area of this case that possibly remains open for further proceedings before the board is the matter of the adequacy of the examination. See decision of Dane County Circuit Court, No. 147-407, February 24, 1977, pp. 10-11:

"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 that if in the future any written and oral examination which was as important as the examination here at issue . . . is to be given, such exam should be cleared in advance at least informally with the Board of Personnel."

Kuter and North v. Wettengel and Lerman
Case Nos. 73-152 and 73-159
Page Four

If the board were now to make a new determination as to the extent and standard of its review of examinations on appeal under sec. 16.05(1)(f), Stats., and to apply that standard to the exam in question, these determinations would be in the nature of a declaration of rights only, since the board is bound by the court's ruling that it is without authority to reopen these positions to competition, and thus it appears that appellants are without a tangible remedy in this forum. However, this does not render the appeal moot. See Watkins v. DILHR, 69 Wis. 2d 782, 233 N.W. 2d 360 (1975).

The appellants perfected an appeal of the examination in question and pursuant to sec. 16.05(1)(f), Stats., are entitled to a review of that examination. Following the hearing and decision by the board, the court determined, among other things, that the board applied the wrong standard of review to the examination, but did not decide what was the appropriate review. Rather, the court remanded the case to the board for further proceedings. Based on the foregoing authorities, the board believes it has the authority and the duty to address those questions not foreclosed by the circuit court decision, so long as the appellants wish to continue with their statutory appeal rights.

ORDER

It is ordered that this appeal be scheduled for prehearing conference.

Dated: September 15, 1977. STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson