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DAVID M. KUTER, RICHARD NORTH, and  
WISCONSIN STATE EMPLOYEES UNION,

Appellants,

v.

SECRETARY, DEPARTMENT OF INDUSTRY, LABOR  
AND HUMAN RELATIONS, and DEPUTY DIRECTOR,  
STATE BUREAU OF PERSONNEL,

Respondents.

Case Nos. 73-152, 159

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**OFFICIAL**

OPINION AND ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal pursuant to s. 16.05(1)(f), stats., of an examination. The matter is back before the board following remand 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 (3/16/77). The board entered an "interim decision on remand" on September 15, 1977. A prehearing conference was held and the parties agreed that the board might decide the case on the basis of the existing record without further proceedings or arguments. The parties also have agreed to the following issues:

Was the reliability and validity of the examination of such character to determine the qualifications, fitness and ability of the persons examined?

If the State of Wisconsin Personnel Board finds that the examination did not meet the above issue, what compensation, recourse, or other viable alternatives are available to Mr. North and Mr. Kuter?

FINDINGS OF FACT

The board incorporates by reference as if fully set forth the facts contained in the opinion and order entered July 3, 1975.

CONCLUSIONS OF LAW

1. The reliability and validity of the examination in question was not of such character to determine the qualifications, fitness and ability of the persons examined.

2. The personnel board is bound by the decision of the circuit court in DOA, et al. v. State Personnel Board, no. 147-407 (3/16/77), that it lacks the power to order the positions in question vacated, and therefore this remedy is foreclosed.

3. The appellants are entitled to what amounts to a declaratory ruling with respect to the adequacy of the examination in question.

OPINION

As was pointed out in the interim decision dated September 15, 1977, the evidentiary hearings in this appeal were extensive and the circuit court disturbed none of the original findings of fact on review. Following remand, the parties have waived further hearing and in the board's opinion, it is appropriate to rely on the original findings.

The circuit court determined that the board had applied the wrong standard of review (EEOC guidelines) to the examination, but did not decide what was the appropriate standard. In a subsequent decision, May, et al. v. Knoll, et al., Wis. Pers. Bd. Nos. 76-66, 101, 124 (6/13/77), the board held:

We do not believe that content validation requires compliance with any particular set of guidelines. At the time of the Kuter and North decision, it appeared appropriate to utilize the EEOC guidelines. Since that time there have been changes in the case law that served as a partial basis for the decision, and developments in the field of psychological testing theory have been brought to our attention. These matters support a conclusion that adherence to a specific set of guidelines should not be required. Test validation is a subject

with a field of recognized scientific and technical knowledge. The question of what constitutes appropriate evidence of validity should be determined by reference to competent theory in that field. This does not require but rather is inconsistent with a requirement of adherence to a particular set of guidelines if the evidence is that other criteria have a sound basis in scientific theory. (pp. 13-14)

The stipulated issue following remand utilizes the concept of validation. During the hearing the respondents relied on a theory of content validation. The board concluded that the exam was not content valid. This conclusion was based on general validation principles and was not tied to the EEOC guidelines. This conclusion was not overruled by the circuit court, and the board discerns no reason to reach a different conclusion following remand.

With respect to the question of the remedy, the circuit court held that the board lacked statutory authority to reject the appointments in question. In the "interim decision on remand" the board held that it was bound by this aspect of the court's decision. The board is unable to ascertain any other remedy beyond the determination that the exam was inadequate.

There are no statutory provisions for the award of money damages, costs, or expenses. The board possesses only those powers which are granted to it by the legislature through legislative enactment. Safe Way Motor Coach Co. v. City of Two Rivers, 256 Wis. 35, 39 N.W. 2d 847 (1949); American Brass Co. v. Wisconsin State Board of Health, 245 Wis. 440, 15 N.W. 2d 27 (1944). Administrative agencies have no common law powers. Nekoosa - Edwards Paper Co. v. PSC, 8 Wis. 2d 582, 99 N.W. 2d 821 (1960). The supreme court has reiterated a relatively conservative approach to the question of the implied powers of administrative agencies. See State ex rel. Farrell v. Schubert, 52 Wis. 2d 351, 358, 190 N.W. 2d 529 (1971): "any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority."

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The state claims board has the authority to recommend payment (or make payments less than \$1,000) of claims against the state:

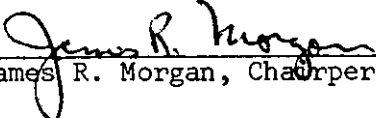
. . . on which the state is legally liable, or one which involves the causal negligence of any officer, agent or employe of the state, or one which on equitable principles the state should in good conscience assume and pay . . . (s. 16.007(5), Stats.)

Whether there may be in this case the basis for a meritorious claim obviously is a question only the claims board could answer. The personnel board merely wishes to ensure, in light of the second stipulated issue, that the appellants are aware of this statutory provision.

ORDER

The actions and decisions of the director with respect to the district employment security director examination are rejected. In light of the conclusion that no tangible remedy is available, this matter is remanded to the director for information only.

Dated: June 16, 1978. STATE PERSONNEL BOARD

  
James R. Morgan, Chairperson