OFFICIAL

STATE OF WISCONSIN PERSONNEL BOARD

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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

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OPINION AND ORDER

Before AHRENS, Chairman, JULIAN and STEININGER.
JULIAN, writing for himself and AHRENS and STEININGER.

OPINION

Background Facts

On October 2, 1973, Appellant David M. Kuter filed an appeal, wherein he challenged the fairness of the examination for the position of District Employment Security Director in the Department of Industry, Labor, and Human Relations: Among the bases for his appeal was the claim that both the questions in the written portion of the examination and at the oral board interview were not job related. On October 11, 1973, Appellant Richard A. North filed an appeal wherein he also challenged the job relatedness of the written portion of the examination.

On March 27, 1974, the matters came on for hearing before Chairman Ahrens, and Board Members Julian and Steininger. After hearing a portion

of the Appellants' testimony, the Board ruled that on the issue of test validity the burden of proof would be allocated to the Respondents on the grounds that 1) federal law requires that an employer who uses a test for employment decision show that such test has validity in accordance with EEOC guidelines and 2) due process requires that the employer take the burden on the issue. The Board held that the standard of proof would be the ordinary civil standard of the greater weight of the preponderance of the evidence.

EEOC Guidelines Require Test Validation

The Civil Rights Act of 1964, which by recent amendment is applicable to the Respondents, provides for the creation of the Equal Employment Opportunity Commission, which has authority to issue suitable procedural regulations to carry out the provisions of the law. 42 U.S.C. 2000e - 12(a). The EEOC has issued guidelines on employe selection procedures. The guidelines rest on the premise that properly validated tests can significantly contribute to the implementation of non-discriminatory personnel policies, as required by title VII. The statement of purpose indicates that the EEOC had found in the cases before it doubtful testing practices that tended to have discriminatory effects adverse to those minority persons the law seeks to protect. Further, it found that, in many instances, tests are being used without "evidence that they are valid predictors of employee job performance." The EEOC concluded that it must give recognition to the possibility of discrimination in the application of test results. The guidelines are designed to be standards for employers to determine if their selection procedures conform to their affirmative obligations under title VII of the Civil Rights Act. 29 CRF 1607.1(c).

The EEOC guidelines require that test users have prescribed evidence available, which demonstrates the validity of their tests. Such evidence of validation "should consist of empirical data," which can be examined for possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates." Minimum standards for validation must be based on studies using procedures such as those described and published by the American Psychological Association. The minimum standards for validity studies relate to the 1) representativeness of the applicant groups, 2) test scores and subsequent employe job evaluation being separate, 3) full descriptions of adequate employe job performance, 4) review of minority job ratings for evidence of bias, and 5) separate data for minority and nonminority groups.

Court Has Approved Guidelines

The EEOC guidelines require that employers be able to show their tests do not have the effect of supporting past discrimination. Such guidelines has received judicial approval. In Griggs v. Duke Power Co. 401 U.S. 424 (1971), the Court said:

> "The Objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. 401 U.S. at 429, 430.
>
> ...The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' 420 F. 2d, at 1232. We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrealted to measuring job capability. [emphasis supplied.]

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. [emphasis supplied.] More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. 401 U.S. at 432.

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting Sec. 703(h) to permit only the use of job related tests. The Administrative interpretation of the Act by the enforcing agency is entitled to great deference. See, e.g. United States v. City of Chicago, 400 U.S. 8 (1970); Udall v. Tallman, 380 U.S. 1 (1965); Power Reactor Co. v. Electricians, 367 U.S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. 401 U.S. at 433, 434.

From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of Sec. 703(h) to require that employment tests be job related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. [emphasis supplied] Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." 401 U.S. at 436.

The federal regulations, which have been approved by the Court, as a matter of law, require that test users be able to demonstrate that their tests be job related as a protection against such test unwittingly measuring characteristics, unrelated to the job, but characteristics of particular groups of persons, who in the past have been discriminated against.

The Policy of the State Law is the Same as the Federal Law

Independent of our obligations to follow federal law, we 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.

The merit principle seeks to fill State positions with applicants for employment who are competent to perform their work efficiently. At the same time, the statutes prohibit unlawful discrimination, which causes applicants who are qualified to be denied employment for reasons which are not job related.

> "No discrimination shall be exercised in the recruitment application, examination or hiring process against or in favor of any person because of his political or religious opinions or affiliations or because of his age, sex, handicap, race, color, national origin or ancestry except as otherwise provided." Sec. 16.14, Wis. Stats., 1971.

This section contains the same anti-discrimination policy as the federal Civil Rights Act and, we believe, properly interpreted requires the same affirmative obligations of the federal law not to freeze the status quo of prior discriminatory employment practices, not to use tests with built-in headwinds for minority groups, and not to extol good intentions, but to take positive steps that result in minority employment. For that reason, a finding of prohibited discrimination in a particular case is not necessary before an employer is subject to the requirement of being able to show its tests are valid under State law either. We conclude that the state policy under Chapter 16 should require no less. Both federal and State policy require this of the State as an employer.

If any conflict between the federal and state law should develop, the federal law would control. This situation is analgous to the law related to the enforcement of collective bargaining agreements. Section 301 of the Labor Management Relations Act gives the federal courts jurisdiction to entertain suits to enforce collective bargaining agreements, while the Wisconsin Employment Peace Act makes violation of a collective bargaining agreement an unfair labor practice. When employers engaged in interstate commerce are so charged before the WERC, the state administrative agency applies federal law. Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1964).

The State Has the Burden of Proof on the Question of Test Validation.

The State has the burden of proof on the issue of test validation. While the normal burden of proof falls to the party asserting a claim, administrative agencies are not required to adhere strictly to the rules of evidence applicable in courts of law. Examples of the law as it relates to the procedures to be followed by quasi-judicial bodies are seen in the following excerpts from Wisconsin Supreme Court cases:

> "The commission is not a court and is not required to conduct its proceedings according to the course of courts." Maryland Casualty Company v. Industrial Commission, 230 Wis. 363, 371, 284 N.W. 36 (1939).

> "Administrative boards in performing quasi-judicial functions are not required to follow all the rules of procedure and customary practices of courts of law. As the court stated in Gray Well Drilling Company v. State Board of Health, 263 Wis. 417, 58 N.W. 2d 64 (1953) at 419.

> 'The function of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies as that function belongs to the legislature.'"

State ex rel Wasilewski v. Board of School Directors of City of Milwaukee, 14 Wis. 2d 243, 268, 111 N.W. 2d 198 (1961).

> "... the commission does not proceed as a court and court practice and court rules do not apply to an administrative hearing unless made so to apply by the statute."

Gateway City Transfer Company v. Public Service Commission, 253 Wis. 397, 407, 34 N.W. 2d 238 (1948).

The Board concludes that it must exercise its authority to make rules governing its proceedings,[1/] in order to give meaning to the federal law requiring evidence of test validation as an aid to eradicating the effects of past unlawful discrimination. The Civil Rights Act 1964 as applies to the State prohibits discrimination which in many instances, certainly in instance of race, would be a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Secondly, we conclude that basic fairness to the Appellants requires that the State, in these proceedings, not be in the position of being able to put in no proof at all and be successful should the Appellants be unable to show that the test is invalid. Test validation is obviously a technical and complex subject and, at the same time, a matter that a large employer like the State of Wisconsin does for good management purposes. If the State has developed studies or theories that substantiate its position that a test is valid it should be able to demonstrate it to the public so that they will have confidence in the sound business practices of their government. At that point, the Appellants will be able to point out with

[1/] Section 16.05(3), Wis. Stats., 1971.

particularity in what manner they contend that the State's validation is in error. This will result in a more orderly and clear presentation of the evidence and the fair hearing the Appellants are entitled to as a matter of due process. We conclude that when the matter comes on for further proceeding the burden of proof shall be upon the State to prove by the greater weight of the credible evidence that the examination in question was valid. The State has the burden of proof only on the issue of the validity of the examination and not on the other issues in the case. The Appellants continue to have the burden of proof on other issues in this appeal.

ORDER

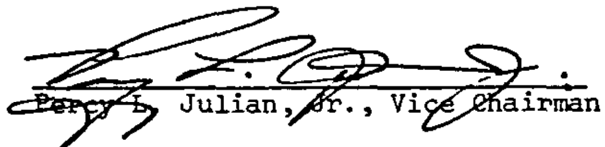
IT IS ORDERED that the burden of proof on the issue of the validity of the examination is on the Respondents.

IT IS FURTHER ORDERED that the burden of proof on issues other than the validity of the examination is on the Appellants.

Dated July 24, 1974.

STATE PERSONNEL BOARD

BY



Percy L. Julian, Jr., Vice Chairman