

STATE OF WISCONSIN

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 JOHN KELEHER,

 Appellant,

 v.
 VIRGINIA HART, Chairperson,
 Department of Industry, Labor & Human Relations,

 Respondent.

 Case No. 75-15

OFFICIAL
 OPINION
 AND
 ORDER

Before: DEWITT, Chairperson, WILSON, WARREN, MORGAN and HESSERT, Board Members

Nature of the Case

This matter is before the board as a request for investigation pursuant to Section 16.05(4), stats. The respondent obtained from Dane County Circuit Court a temporary writ of prohibition. The court granted a motion to quash that writ following a hearing, and the case was then heard by a board hearing examiner.

Findings of Fact

This case involves a selection process for Account Examiner II conducted by the respondent on a delegated basis from the director pursuant to Section 16.03(2), stats. This examination was announced on an agencywide, competitive promotional basis. The only applicant was Ms. Johnson, the incumbent, who had been filling the position on a temporary basis because of the illness of the prior permanent employe. Ms. Johnson met the required training and experience and was certified without examination because she was the only applicant. The appointing authority then determined to request an additional certification. Two persons, including Mr. Keleher, were certified from an open competitive register that had been established following an examination. Mr. Keleher interviewed for the position while the other person withdrew. Following this interview Ms. Johnson was appointed to the position

because she was considered by the appointing authority to be better qualified. Mr. Keleher had 29 credits in accounting at the University level and 3½ years experience as an Account Examiner 3. Ms. Johnson had a one year bookkeeping course at a vocational school. As part of his interview, Mr. Keleher was given an adding machine proficiency test and performed as well or better than any of the employes in the Bureau of Fund Accounts.

Conclusions of Law

It is concluded based on this record that the respondent did not violate any of the provisions of Subchapter II of Chapter 16 of the statutes, including the prohibition on sex discrimination, Section 16.14, or the rules of the director, Wisconsin Administrative Code, in the conduct of this selection process. The appellant argued that it was improper that Ms. Johnson was not required to take a competitive examination while he was. However, pursuant to Section Pers. 12.02, W.A.C., a promotional process is preferred over an open competitive process. The agency followed this directive in announcing the examination on a promotional basis. When Ms. Johnson was the only person to apply for and be certified for the position, the agency could have appointed Ms. Johnson at that point without any prejudice under the civil service statutes and rules to the appellant. Once the agency decided to ask for an additional certification, calling into play the register upon which the appellant received his place by competitive exam, it was not required by statute or rule to have examined Ms. Johnson at that point.

The appellant argues that this state of affairs is inconsistent with Section 16.01(2), stats., which provides in part: ". . . the bureau of personnel . . . shall develop, improve and protect a state-wide personnel management program which assures that the state hires the best qualified persons available . . .,"

As well as Section 16.11(1), stats.: "Appointments to, and promotions in the classified service, shall be made only according to merit and fitness, which shall be ascertained so far as practicable by competitive examination." However, there are other provisions throughout subchapter II which make it clear that in the interest of promoting other policies, civil service personnel management may take into account other factors besides strict merit. To list a few examples:

Section 16.12(2): "Competitive examinations shall be free and open to all applicants who are residents of this state" (emphasis supplied)

Section 16.12(7): "A preference shall be given to any qualifying veteran . . . 5 points shall be added to his grade; and if such veteran has a disability which is directly traceable to war service, he shall be accorded another 5 points."

Section 16.08(7): "EXCEPTIONAL EMPLOYMENT SITUATIONS. The director shall provide, by rule, for exceptional methods and kinds of employment . . . and for other exceptional employment situations such as to employ the mentally handicapped, the physically handicapped and the disadvantaged."

In addition to these examples, there is the previously cited Section Pers. 12.02, W.A.C., which provides priority to a promotional over an open competitive selection process, which was operative in this case.

Following its review of the certified applicants, the appointing authority is vested by Section 16.20, stats., with wide discretion in making the appointment. It is not necessary to reach any finding or conclusion in this case as to whether the appellant or Ms. Johnson was better qualified for the position since the agency is not required to appoint the best qualified from among those certified. The agency may not base its decision on improper criteria as set forth in Section 16.14, however. The fact that the appellant was in some respects better qualified than Ms. Johnson or that there might exist within the agency an imbalance of women employes in certain areas, including the position in question here, does not form the basis for a conclusion that the appointment decision involved improper motives.

One final point concerns a discrepancy we perceive between Section Pers 12.02, W.A.C., and Section 16.15, stats. The latter provision provides:

"When, in the judgment of the director, the group of applicants best able to meet the requirements for vacancies in positions in the classified service are available within the classified service, such vacancies shall be filled by competition limited to persons in the classified service who are not employed under Section 16.21."

This language clearly contemplates the exercise of the director's (or his or her delegate's) judgment on a case by case basis dependent on some kind of evaluation of the pool of potential applicants within the classified service. The rule of the director provides for an automatic preference for the use of promotional processes: ". . . employment register shall normally be used in the following order of preference, subject to the discretion of the director: (a) promotional, (b) open competitive."

In the instant case, the appellant was not directly affected by the use of a promotional register because he eventually was certified for the position and the appointing authority was neither required to appoint the person with the highest score, had both taken an examination, nor the best qualified person in an absolute sense. However, we do call this variance between the rule and the statute to the attention of the director so that he may take appropriate action.

Order

This case is dismissed.

Dated July 22, 1977

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson