
BERNARD MAY,

Appellant,

v.

VERNE KNOLL, Deputy Director,
State Bureau of Personnel,
VIRGINIA B. HART, Chairperson
Dept. of Industry, Labor and Human Relations,

Respondents.

Case No. 76-66

LEROY SHOREY,

Appellant,

v.

VERNE KNOLL, Deputy Director,
State Bureau of Personnel,
VIRGINIA B. HART, Chairperson
Dept. of Industry, Labor and Human Relations,

Respondents.

Case No. 76-101

DAVID M. KUTER,

Appellant,

v.

VERNE KNOLL, Deputy Director,
State Bureau of Personnel,
VIRGINIA B. HART, Chairperson
Dept. of Industry, Labor and Human Relations,

Respondents.

Case No. 76-124

OFFICIAL

FINDINGS, CONCLUSIONS,
OPINION AND ORDER

Before: DEWITT, Chairperson, MORGAN and HESSERT, Board Members,
(Dana Warren did not participate in the deliberations on or decision
of this case.)

OPINION

Nature of the Case

This is an appeal of the administration of competitive promotional examinations for positions within DILHR Job Service, pursuant to S. 16.05(1)(f), stats.

Findings of Fact

All three appellants in these appeals which have been consolidated for hearing and decision have been at all relevant times permanent employes in the classified service, DILHR. None have any expertise in personnel testing or test validation. They applied for positions as Job Service Supervisor 5 - Milwaukee Area, Waukesha Area (JSS 5) and as Job Service District Director 2 - Oshkosh and Janesville areas (DD 2). Both of these positions were filled through competitive promotional examinations open to departmental employes only.

The JSS 5 position was announced on December 8, 1975 (Respondent's Exhibit 1). It contained the provision that persons applying might be considered for employment in similar positions within this classification during the next 6 months in the Milwaukee or Waukesha areas. The DD 2 position was announced April 6, 1976. The training and experience requirements were slightly lower than for the JSS 5 position. (Respondent's Exhibit 9). It contained a statement that applicants would be considered for those vacancies only.

A structured oral examination for the JSS 5 position was conducted in January, 1976, and the examination for DD 2 in May, 1976. The appellants all participated in the first examination and were given numerical scores on a 0-100 scale. Following the announcement of the second examination, and in late April or early May, 1976, the bureau of personnel decided to reuse the structured oral exam given for the first examination (JSS 5), and to integrate the scores with those achieved by persons applying for the DD 2 position who had not already applied, been tested, and scored for the JSS 5 position. The bureau also decided to deny persons who had taken the exam in connection with the JSS 5 position the opportunity to retake the examination again, at least in part because the bureau had

determined as a matter of policy that persons would not be permitted to retake the same oral exam within 6 months because this would give them an unfair advantage over persons only tested once.

The appellants all applied for the DD 2 position and were ultimately determined to have the requisite training and experience for the position. Their scores were integrated with those of all other DD 2 examinees including those taking the exam for the first time as well as those who, like the appellants had taken the examination for JSS 5. None of the appellants were certified.

The bureau utilized two 3 member boards for the two examinations. There was only one common member. The identity of the panels is as set forth on Respondent's Exhibit 8, a copy of which is attached. In accordance with the hearing examiner's recommendation, Ms. Warren, a member of the JSS 5 panel who subsequently was appointed to the personnel board, has not participated in the decision of this appeal since the makeup and conduct of the panel are in question here. The panels used the same examination questions and format in both instances (see sealed Respondent's Exhibit 16). In January, 1976, it had snowed the day before the exam was given, and the roads were snow-covered and icy on the day Mr. May took the exam. The DD 2 exam was given in May of that year when there was no snow.

At no time were the persons who took the first exam cautioned or in any way told that they should not discuss the content of that exam with other persons. There was no evidence presented on the question of whether any of those examinees in fact had such discussions. Both sides expressed opinions that it would be likely (appellants) or unlikely (respondents) that such exchanges occurred based on their general experience as state employees over the years.

Following the second examination, and on or about June 18, 1976, a register was established for the DD 2 position as a product of analysis of the scores. The formal register as reflected in the notice of examination results

(Appellant's Exhibit 1) was dated June 25, 1976. The difference in dates was due to clerical delay. In the interim period after or on about June 18, 1976, and before June 25, 1976, the appointing authority conducted interviews of those certified.

One of the persons from the bureau connected with the development and administration of the examinations was Dan Wallock, an employe selection supervisor in charge of a number of professional employes all involved in test validation. Mr. Wallock has a B.S. in psychology and was involved in a PhD/masters program in psychology for which he did research in testing of sub-human primates, an area which from a technical and statistical standpoint requires the same training as the testing of humans. He completed all of the required degree course work in this program but not the thesis.

The exam development process began with job analysis by job experts who identified and evaluated the importance of various knowledges, skills, and abilities needed for success at the entry level. The job experts were selected on the basis of recommendations by the DILHR personnel office and the information concerning their familiarity with the positions provided by the experts themselves. The JSS 5 job experts, Messrs. Machesky, Brooks, and Heisse, all were in supervisory positions vis-à-vis the positions in question. The DD 2 job experts, Mssrs. Kehl and Kaisler, were present or past supervisors.

The material developed through the job analysis was then grouped into related categories from which were developed the "dimensions" to be tested for with regard to JSS 5. (Respondent's Exhibit 7 - summary of job analysis). This process also involved a mathematical analysis of the responses written on the job analysis questionnaire forms. The exam questions (Respondent's Exhibit 16) were prepared by Mr. Wallock and another specialist in this area employed by the bureau in conjunction with the job experts. These questions were intended to elicit behavior relevant to the dimensions listed in Respondent's Exhibit 7.

They also developed bench marks to be used as guidelines by the panelists in evaluating the answers of the examinees.

With respect to the DD 2 exam, both Mr. Kehl and Mr. Kaisler completed job analysis questionnaires (Respondent's Exhibits 13 and 14) in the same manner as did the job experts for the first position (JSS 5). Following a review of this analysis and the receipt of opinions from both Kehl and Kaisler that the two positions were essentially similar, it was determined that the same dimensions (Respondent's Exhibit 7) and the same examination were appropriate for both jobs.

The qualifications of the panel members are as follows: Ms. Ettenheim is an associate professor, Institute of Governmental Affairs, UW-Milwaukee, who has been used as a consultant in a variety of matters by the job service. She has developed expertise in the needs of the Milwaukee area including needs relevant to job service functions. Mr. Gintz, the common member of both panels, is a retired administrator of the Division of Workers Compensation and has had experience as an assessor in the states Career Executive Assessment Center. Ms. Warren is the Manpower Coordinator/Senior Personnel Specialist, Milwaukee City Civil Service Commission and a personnel selection specialist knowledgeable in the test validation area. Mr. Fortunato is the District Manager, Ohio Bureau of Employment Services and Mr. Mattson is the District Supervisor - South East Minnesota, Minnesota Employment Service.

Prior to each examination the panelists were briefed by the job experts on the duties and responsibilities of the positions. Then the exam and exam process were reviewed in detail. During the examination all of the candidates were asked the same questions in the same order by the same panelists. The panelists scored the examinees independently of the other panelists. Following the examination all of the scores were converted to the standard 0-100 civil service scale by the DILHR personnel office. All mathematical calculations were double checked by a test validation expert from the bureau of personnel.

Following each examination, the grades were analyzed by a process of statistical analysis. (See Respondent's Exhibits 2 and 12 for JSS 5 and DD 2 respectively). Among other things this analysis revealed interrater reliability levels of .83 and .92 for the JSS 5 and DD 2, respectively. These figures indicate a relatively high level of agreement among the panelists in their evaluation of the examinees. Additional analysis (Respondent's Exhibit 17) revealed that there were no statistically significant differences in scores among candidates for the two positions.

Conclusions of Law

These conclusions will be responsive to the 7 issues to which the parties stipulated plus the eighth issue over which the parties disagreed but which the hearing examiner ruled would be whether or not the examination was content validated. With respect to the burden of proof, it is concluded that the burden is on the appellants as to all issues except that of test validity, where the burden is on the respondents. This conclusion is grounded on the same reasoning found in Kuter & North v. Wettengel, 73-152, 159 (3/3/75), pp. 9-10.

1. Was it a violation of the statutes relating to civil service testing procedures to use different oral boards to administer the same examination and then to integrate the scores from both panels for the position of Job Service District Director 2?

There is no specific statutory prohibition against this procedure. The statutes, S. 16.12(4), provide that "All examinations for positions in the classified service shall be of such character as to determine the qualifications, fitness and ability of the persons examined." S. 16.12(3), provides in part:

"The director may appoint specially constituted boards of examiners for the purpose of conducting oral examinations as a part of the recruitment procedure for certain positions. Each such board may include one representative from the department of administration and from 1 to 3 other well-qualified members, of whom at least 1 or 2 shall not be permanent employees of the state. The outside members shall be well-qualified, impartial, and of recognized attainment in their respective fields."

The latter provision does not prohibit by its terms the use of two different oral boards. However, the boards must meet the stated criteria in subsection (3) and be an effective selection process consistent with the requirements set forth in subsection (4).

We conclude that the board members met the criteria set forth in S. 16.12(4). They all had familiarity with the job service function or the field of psychological testing or both. They all were of "recognized attainment in their respective fields." While there was very little evidence concerning Messrs. Fortunato and Mattson, it was established that they were, respectively, District Manager, Ohio Bureau of Employment Services, and District Supervisor, South East Minnesota, Minnesota Employment Service. We believe that the term "attainment" in the language cited above means "accomplishment" or "achievement" which may be evidenced by reaching the supervisory positions when there is an absence of evidence that would denigrate that position or tend to prove the opposite.

There was no evidence that the board members were not impartial. To the contrary, the statistical evidence concerning the exam results all indicated that both panels acted impartially and provided a consistent selection device. The appellants' primary concern in this area was that the board members who did not have direct background in the job service area (i.e., 2 out of the 3 members of the first panel by which the appellants were examined) would have been less favorable to them than the second panel whose members all had job service type backgrounds. However, there was no evidence presented by the appellants in support of this hypothesis. The respondents proffered competent opinion evidence that the examination was constructed such that these differences in the panel make-up would not make a difference in the scores. Also, the respondents proffered statistical evidence that the boards were both reliable and comparable examination tools.

The reuse of the examination itself violates no specific statutory prohibition and again must meet the requirements of S. 16.12(4), stats. The key to

the determination to reuse the examination was the determination that the positions were sufficiently comparable in terms of required tasks, knowledges, skills, and abilities so that the same dimensions would be appropriate for measurement. The job experts for the DD 2 positions both indicated that the positions were essentially the same and after going through the initial stages of the job analysis process agreed that the same dimensions were appropriate for measurement. There was no evidence that any differences in the salary range, geographical location of the vacancies, or other factors had any bearing on the central attributes of the positions insofar as testing is concerned.

The decision to integrate the scores resulting from both examinations for the DD 2 position is subject to S. Pers 11.01(3), W.A.C.: "Names may be integrated into employment registers when, in the judgment of the director, the needs of the service will be benefited." In this case the use of the exam the second time and concomitant integration of scores resulted in a substantial savings in the resources of the bureau. Inasmuch as there also was no violation of the above cited statutory requirements relating to the examination functions, we conclude that there was no violation of S. Pers 11.01(3), W.A.C.

2. Did the differences in the two job announcements result in a violation of the statutes pertaining to the civil service testing procedures when the scores from the Job Service Supervisor 5 examination were integrated into the list for the Job Service District Director 2 position?

The JSS 5 announcement (Respondent's Exhibit 1) stated the "Persons who apply now may be considered for employment in similar positions with this classification title during the next six months in the Milwaukee or Waukesha areas." The DD 2 announcement (Respondent's Exhibit 9) stated "Applicants will be considered for these two positions only." The appellants expressed concern that the announcement for the first exam provided no notice that the scores might be reused for other positions such as DD 2. The

DD 2 notice did not provide notice that the JSS 5 scores would be reused for filling the DD 2 vacancies and persons who took the exam for JSS 5 would not be allowed to retake the exam for DD 2. The reason for the failure of notice is apparent inasmuch as the decision to reuse the exam and scores was not made until approximately a month after the second announcement. The question is whether the failure of notice was a violation under state statutes.

The appellants, who have the burden of proof on this issue, have not cited any statute that was violated by the process followed here, and we have been unable to ascertain any. So long as the reuse of the test and scores did not violate the general statutory requirement provided by S. 16.12(4), stats., that "Examinations for positions in the classified service shall be of such character as to determine the qualifications, fitness and ability of the persons examined," as well as the other provisions provided below, the differences in the announcements were not improper.

3. Did reuse of the examination questions for the Job Service Supervisor 5 position in the examination for the Job Service District Director 2 position provide an advantage to those who took the exam the second time, and if so, did this result in a violation of the statutes pertaining to the civil service testing procedures?

Looking to the second part of this issue first, S. 16.12(10), stats., provides: "Every precaution shall be taken to prevent any unauthorized person from gaining any knowledge of the nature or content of the examinations that is not available to every applicant." If the reuse of the exam provided an advantage to those who took the exam the second time, there would be a violation of this subsection or S. 16.12(4), stats., depending on the nature of the advantage.

One of the appellant's major concerns in this area was the possibility that persons taking the second exam might have obtained knowledge of the questions either advertantly or inadvertantly, from persons who took the exam the first

time. As was noted in the findings, there was no direct evidence on whether or not this actually occurred. Rather, the appellants relied on their collective opinion based on their years of experience as state employes that such exchanges were likely to have taken place. The respondents offered a contrary opinion. There was no admonition or warning given the first group of examinees not to discuss the examination. Approximately 3 months elapsed between the first exam and the decision to reuse the exam questions and scores. Finally, the respondent's expert witness proffered the opinion that general information about the exam such as might be gained from general discussion with someone who had taken the exam would not significantly affect the chances of doing well of the person who obtained the information. He further testified that in his opinion the only evaluation of the exam results that would constitute evidence that someone had access to enough specific information about the exam questions to provide a meaningful advantage would be if there were abnormally high scores on the second exam, and this was not the case. The reliability studies and the comparison of the mean scores obtained by the two groups of examinees in his opinion supported the thesis that both oral exams were reliable and valid instruments that were functionally equivalent.

The appellants also alleged that the difference in weather between the two exams was or contributed to an unfair advantage to the second group of examinees. From a commonsense standpoint, it certainly seems preferable to take an examination in May rather than in January after having negotiated snow covered streets. However, there was no expert opinion offered on whether this factor would really make a difference in exam results. Even from a commonsense standpoint, while it may seem preferable to take an exam under clement conditions, we would not be prepared to say that the difference in weather would have any significant impact on the test results. As was noted in the preceding paragraph, the statistical evidence supports the conclusion that the two oral examinations were in large

measure functionally equivalent instruments. Based on the record in this case, we must conclude that the appellants have failed to sustain their burden of proof on this issue.

4. Did the use of the scores from the examination for the Job Service Supervisor 5 position for the Job Service District Director 2 position constitute a pre-selection or a pre-deletion list; and if so, did this constitute a violation of the statutes pertaining to the civil service testing procedures?

We conclude that the reuse of the scores did not constitute a "pre-selection" or a "pre-deletion" list in any manner that contravenes the civil service statutes.

5. Were the oral board members objective in making their evaluations; and if not, did the lack of objectivity constitute a violation of the statutes relating to the civil service testing procedures?

For the reasons discussed above, we conclude that the board members were objective in making their evaluations.

6. Is the Director of the Bureau of Personnel required by statute to develop a new examination each time a different position in the classified service is filled?

For the reasons discussed above, we conclude that the answer to this question is no.

7. Does the Director of the Bureau of Personnel have the authority to establish minimum periods of time within which a person may not take the same examination a second time?

The director has broad authority to administer examination processes generally. See S. 16.12, stats. There is no specific prohibition against the establishment of minimum periods of time within which a person may not take the same examination a second time, and we conclude that such action by the director is permissible unless it constitutes a violation of a more general statutory provision such as S. 16.12(4), Stats.: "All examinations...shall be of such character as to determine the qualifications, fitness, and ability of the persons examined," and (10): "Every precaution shall be taken to prevent any unauthorized person from gaining any knowledge of the nature or content of the examinations that is not available to every applicant."

In this case the respondent proffered expert testimony that 6 months was an appropriate period within which retaking of the same examination should not be permitted because it would provide an unfair advantage to the examinee over persons who only took the exam once. While the appellants disagreed with this opinion, they did not offer expert opinion or other evidence that the retaking of a structured oral exam within 6 months would not result in an unfair advantage to the examinee over persons only examined once.

The determination of the time period in question here clearly involves the exercise of professional judgment and discretion. A line must be drawn between a period that is obviously too short and one that is obviously too long. The appellants had the burden of proof on this issue and on this record we must conclude that they failed to discharge this burden and that the director has the authority to establish a time limitation on retesting, both generally and as was found to be imposed in this case.

8. Whether or not the examination was content validated.

For a test to be content valid, "...the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance." Jones v. N.Y.C. Human Resources Admin., 391 F. Supp. 1064, 1076 (S.D.N.Y. 1975); affd. 528 F. 2d 696., Kuter & North v. Wettengel, Wis. Pers. Bd. 73-152, 159 (7/3/75), p. 10. The Kuter and North decision also held that the United States Equal Employment Opportunities Commission guidelines, 29 C.F.R. 1607, were the appropriate standard of measurement of compliance with S. 16.12(4), stats., and the requirements of test validation. This decision cited a number of federal court cases applying the EEOC guidelines in 42 U.S.C. 1983 federal equal protection claims as well as in Title VII cases heard by the EEOC.

The United States Supreme Court subsequently has held that it is inappropriate to utilize EEOC guidelines outside the Title VII context, where the

EEOC exercises a specific Congressional mandate. See Washington v. Davis, ___ U.S. ___, 96 S. Ct. 2040 (1976). The Court also noted: "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationships to job performance." Note 13, 96 S. Ct. at 2051. The Equal Employment Opportunity Coordinating Council, consisting of a number of federal agencies including the Department of Labor, the EEOC, the Civil Rights Commission, the Civil Service Commission, and the Department of Justice, published proposed uniform federal guidelines on employee selection procedures. The EEOC dissented from this proposal. Board's Exhibit 2, Federal Register, Vol. 41, No. 136 (7/14/76). In 1975, the Division of Industrial Organizational Psychology, American Psychological Association, published "Principles for the Validation and Use of Personnel Selection Procedures." Board's Exhibit 1. This document is the official statement of the Division concerning procedures for validation research, personnel selection, and promotion, with the express purpose of outlining principles of good practice in the choice, development and evaluation of personnel selection procedures.

The respondent's expert witness testified that the procedures utilized in the development and administration of the examination in question were in accord with a consensus of experts in the field and the foregoing board exhibits. He also testified that in his opinion the examination met the original EEOC guidelines as well.

We conclude, based on the findings concerning the manner in which the exam was developed and the expert opinion referred to above, the exam was content valid. We do not believe that content validation requires compliance with any particular set of guidelines. At the time of the Kuter & 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.

ORDER

The actions and decisions of the respondents are affirmed and this appeal is dismissed.

Dated June 13, 1977.

STATE PERSONNEL BOARD


Laurene Dewitt, Chairperson