

STATE OF WISCONSIN

STATE PERSONNEL BOARD

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SIDNEY A. FOYE,

Appellant,

v.

SECRETARY, DEPARTMENT OF REVENUE and  
DEPUTY DIRECTOR, STATE BUREAU OF  
PERSONNEL,

Respondents.

Case No. 77-192

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**OFFICIAL**

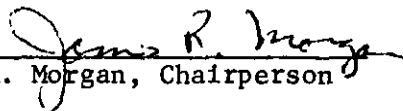
ORDER

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

The Board does not adopt the hearing examiner's attached Proposed Opinion and Order but rather dismisses this case on mootness grounds. This is based on the receipt by the Board of a letter dated January 20, 1978, from the Director, also attached, following the promulgation of that proposed decision, which has the effect of directly overturning the Department of Revenue's decision to deny Mr. Foye admission to the examination. None of the parties has appealed this decision.

Dated: 2-20, 1978.

STATE PERSONNEL BOARD

  
James R. Morgan, Chairperson

STATE OF WISCONSIN

STATE PERSONNEL BOARD

\* \* \* \* \*  
 SIDNEY A. FOYE,  
                                   Appellant,  
 v.  
 SECRETARY, DEPARTMENT OF REVENUE and  
 DEPUTY DIRECTOR, STATE BUREAU OF  
 PERSONNEL,  
                                   Respondents.  
 Case No. 77-192  
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PROPOSED  
OPINION AND ORDER

Before:

NATURE OF THE CASE

This is an appeal pursuant to s. 16.05(1)(f), Stats., of a decision refusing appellant admission to an examination.

FINDINGS OF FACT

- 1. On August 31, 1977, the department of revenue announced a competitive promotional departmental examination for Tax Compliance Supervisor 1 - CP - Revenue. (Respondents' Exhibit 1)
- 2. This selection process was administered by the department on a delegated basis from the bureau of personnel.
- 3. The required training and experience for admission to the examination consisted of two years of experience at the tax representative 2 level or an equivalent combination of training and experience.
- 4. The appellant applied September 12, 1977 for this position and was denied admission on the sole ground that he lacked the necessary training and experience as aforesaid.

5. The appellant has been employed by the respondent department continuously since January, 1962.

6. Since June 1964, appellant's position has been classified as tax representative 1. Prior to that date, he had served in an investigator 1 position except for a period of approximately four months as tax representative 2.

7. For approximately four years prior to the date of his application, the appellant has performed a substantial majority of the "Examples of Work Performed" listed in the class specifications for tax representative 2 (Joint Exhibit 2), and has possessed the "required skills knowledges and abilities" for that classification.

8. The appellant's application was ultimately reviewed by the department's chief of personnel services Mr. Kaphingst who affirmed his subordinate's decision to deny appellant admission to the examination.

9. Mr. Kaphingst had performed a job audit of appellant's position in June, 1977, as a result of appellant's request for reclassification.

10. Mr. Kaphingst determined that appellant's position was correctly classified, at tax representative 1, rather than tax representative 2.

11. Previously, in late 1974 or early 1975, appellant's position was included in a survey by the bureau of personnel which resulted in certain position reallocations but not appellant's position.

12. Mr. Kaphingst based his decision to deny appellant entry to this examination in part on a provision in the Wisconsin Personnel Manual published by the State Bureau of Personnel (joint Exhibit 6); s. 176.145:

"The following assumptions are made in reviewing state employe applications:

1. Employes are functioning at the level of their job classification.
2. Positions are properly classified and allocated."

13. In Mr. Kaphingst's view, the foregoing provision did not permit him to look beyond the surface of the actual civil service classification of an applicant's position, in this case the appellant's, to determine whether or not the actual duties and responsibilities were commensurate with the higher, required level for admission to the examination.

14. The appellant filed his appeal (Board's Exhibit 1) with the personnel board on October 1, 1977.

15. Based on this record, it is found that the appellant had an "equivalent combination of training and experience" to two years of experience at the tax representative 2 level as set forth in the promotional announcement (Respondent's Exhibit 1).

#### CONCLUSIONS OF LAW

1. The personnel board has jurisdiction over this appeal. See ss. 16.03(2) and 16.05(1)(f), Stats.

2. The Wisconsin Personnel Manual (Joint Exhibit 6) provisions at § 176.145, relative to assumptions about civil service classifications, should not be applied as irrebuttable presumptions.

3. It having been found on this record that the appellant had an equivalence to the requisite training and experience, it must be concluded that respondents erred in failing to admit appellant this examination. See s. 16.12(2), Stats.

#### OPINION

The appellant offered testimony concerning his duties and responsibilities in relation to performance at the level contained in the class specifications for tax representative 2. Although this testimony was self-serving, it certainly did not lack credibility. Against this testimony the respondents' evidence

consisted solely of the conclusions or opinions reached by the bureau of personnel and the agency personnel head in their audits of the appellant's position. There was no evidence offered of the specific facts that formed the foundation for these opinions. While these conclusions or opinions have some probative value, greater weight must be assigned to the appellant's testimony than to the bald assertions of conclusions or opinions proffered by respondents.

The provision in the Wisconsin Personnel Manual, §176.145, relating to assumptions that employes are functioning at the level of their job classifications and positions are properly classified and allocated, is undoubtedly reasonable and appropriate so long as it is not applied in practice as an irrebuttable presumption. If an employe can demonstrate performance at the required level despite the classification of the position at the lower level, he or she should be allowed to take the examination. A contrary rule would elevate form over substance.

It should be emphasized that in the board's opinion, the bureau or agency does not have a responsibility to make an independent inquiry in each case. Rather it may rely on the classification of the applicant's position except that it must evaluate assertions that the applicant has performed at a higher level than his or her position classification. In this particular case, the agency was aware of the appellant's assertions by its recent denial of his reclassification request, but felt it was bound by the actual classification pursuant to the foregoing provision of the personnel manual, in addition to having denied the reclassification request on the merits.

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Case No. 77-192  
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ORDER

The actions and decisions of the respondents are rejected and this matter is remanded for action in accordance with this decision.

Dated: \_\_\_\_\_, 1978

STATE PERSONNEL BOARD

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James R. Morgan, Chairperson

STATE OF



1771. 172000 ~  
WISCONSIN

MARTIN J. SCHREIBER  
Governor

DEPARTMENT OF ADMINISTRATION

JOHN TORPHY  
Secretary

State Bureau of Personnel  
1 West Wilson Street, Room 244  
Madison, Wisconsin 53702

January 20, 1978

Mr. Gerald Hoddinott  
Personnel Director  
Wisconsin Department of Revenue  
201 East Washington Avenue, Room 428  
Madison, WI 53702

RECEIVED

JAN 20 1978

STATE PERSONNEL BOARD

RE: Foye Appeal - Tax Compliance Supervisor 2

Dear Mr. Hoddinott:

On November 8, 1977, a prehearing conference was held before a State Personnel Board Hearing Examiner in the matter of Sidney A. Foye vs. Secretary, Department of Revenue and Deputy Director, State Bureau of Personnel (case no. 77-92).

At that prehearing Mr. Foye was advised by Anthony Theodore, Board Hearing Examiner, that since certification was eminent, his appeal relative to denial of admission to the examination was unlikely to provide him the remedy he sought since even if he prevailed the Board lacks authority to take action regarding the appointment process once a certification has been made. Mr. Foye was advised by Mr. Theodore that based on Kuter and North vs. Wettengel the remedy he was seeking would be available only if necessary action to stay any certification from the existing register were taken by the Director.

Mr. Foye met with me in my office immediately following the prehearing. He requested that, in keeping with Mr. Theodore's suggestion, I issue an order preventing certification from the list until he had an opportunity to have the merits of his complaint heard.

After listening to Mr. Foye's arguments, I frankly had some concerns that he might in fact be qualified to compete in the examination. I realized, however, that to some degree this involved a matter of individual judgement and that I lacked complete information about the decision. As a result, I decided that since an appeal had already been filed with the Board, the Board, not I, should decide on the validity of the judgement exercised in the instant case.

After confirming that a hearing on the merits of this appeal could be held within a few days, I did issue an order that no appointment be made from the Tax Compliance Supervisor 2 register until a decision had been reached by the Board.

A hearing was held in this matter on November 22, 1977. The hearing examiner found in favor of Appellant Foye, concluding that the Department of Revenue was unable to establish that Mr. Foye's testimony that he met minimum requirements was inaccurate.

After this proposed Opinion and Order was issued, the Board decided to exercise its option to further review the matter before making a final decision.

It has now been slightly more than two months since the hearing and the Tax Compliance Supervisor 2 position remains unfilled. The Department of Revenue is approaching its annual period of peak workload and I am concerned about this significant delay in the filling of an important position.

Furthermore, after reviewing Mr. Theodore's letter of December 7, 1977, to the members of the Personnel Board in which he quotes certain testimony relevant to the issue of Mr. Foye's qualifications and discussion of this matter with members of my staff, I am inclined to agree that the Department erred in evaluating Mr. Foye's qualifications. Mr. Foye's thirteen years as a Tax Representative 1 was given no consideration in determining his qualifications. It is my opinion that regardless of whether he is now or ever has functioned on a regular basis as Tax Representative 2, there is ample reason to believe that in thirteen years he had sufficient occasion to perform duties normally assigned to the Tax Representative 2 level as to qualify him to take the examination to which he was denied admission.

For the reasons stated and to avoid any further delay in staffing this vacancy, I am now overturning the Department of Revenue's decision to deny Mr. Foye an opportunity to compete. By means of this letter I am directing that Mr. Foye be allowed to take the Tax Compliance Supervisor 2 examination and that his score be integrated with those of persons already examined. My staff will make special arrangements for Mr. Foye to be examined. When his score has been integrated onto the register you may consider my stay order of November 18, 1977, to be lifted and proceed to make an appointment from the register.

In making this decision, I want to make clear to all parties that it is made on the basis of facts known to me which I consider sufficient to render such a judgement. This decision is not to be interpreted in any way as an acceptance of the Hearing Examiner's proposed Opinion and Order as final. This decision is a result of my determination that Mr. Foye meets the minimum qualifications for admission to the examination, that he should be afforded an opportunity to compete and that an order from the Personnel Board is unnecessary at this point to resolve the present impasse.

You will be contacted by members of my staff by January 20 so that appropriate arrangements can be made.

Sincerely,

  
VERNE H. KNOLL  
DEPUTY DIRECTOR

VHK:DW:11

cc: James Morgan, Dana Warren, Calvin Hessert, Anthony J. Theodore,  
Dennis Conta, Sidney Foye