STATE OF WISCONSIN PERSONNEL BOARD

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

Appellants,

v.

C. K. WETTENGEL, Director,
State Bureau of Personnel;
PHILIP LERMAN, Secretary,
Department of Industry, Labor and
Human Relations,

Respondents.

Case Nos. 73-52, 159

OFFICIAL

OPINION AND ORDER

Before: Percy L. Julian, Jr., Susan Steininger, John Serpe and Nellie Wilson

NATURE OF THE CASE

These consolidated appeals challenge the validity of promotional examinations for positions as District Employment Security Directors, Department of Industry, Labor, and Human Relations. The appellants are unsuccessful applicants for the positions. During the course of the hearings, on July 24, 1974, the Board entered an interim opinion and order, attached hereto as Appendix A, which held that the respondents have the burden of proving by the greater weight of the preponderance of the evidence that the test is valid, or job-related, in accordance with Equal Employment Opportunity Commission (EEOC) guidelines, 29 CFR 1607, for validity. The Wisconsin State Employees Union first appeared as amicus and then intervened.

FACTS

The examination in question in this proceeding followed a decision within DILHR to fill newly-created positions of District Employment

Security Directors (DESD's). DILHR sought from the Bureau of Personnel and was granted a delegation of authority to conduct the examination under the general supervision of the Bureau. Normally, the Bureau would conduct such an examination. The reason for the delegation was the need for an expedited selection process expressed by DILHR.

Daniel Wallock, a personnel analyst with the Bureau, supervised the development of the examination. He has done post-graduate work in psychology, statistics, and research methodology. His employment duties include exam validation. He also provides technical assistance on exams to Bureau personnel analysts who lack a technical background. He reviewed and approved the various stages of this examination development.

John Preston, a personnel analyst with the Bureau, had the major responsibility for actually putting the examination together. He has some college course work but does not have a college degree. He has had about ten years experience with the Bureau, primarily in test development, and has had in-service training in the area.

After having received a description of the job from DILHR, Mr. Preston consulted the job element "bank" maintained by the Bureau and selected a long list of job elements or functional employment attributes that he thought might be relevant to the DESD job. He and George Kaisler, Director of the Bureau of Administrative Support for the Employment Security Division, DILHR, an upper level experienced DILHR administrator,[1] then selected twenty-three (23) of these elements for inclusion on forms to be used by experienced administrators to rate those job elements necessary or desirable for the position of DESD.

After Mr. Preston prepared the job rating forms using these twenty-three (23) elements, the forms were completed by Mr. Kaisler and three (3) other experienced upper-level DILHR administrators. Mr. Preston utilized these results to compile a list of job elements in ranking order. From

[1]An administrative chart of DILHR is attached hereto as Appendix B. This was also part of the record as Respondent's Exhibit 1.

this list he selected seven (7) elements that in his judgment could and should be tested in a written exam and six (6) in an oral exam. He decided not to test at all for ten (10) elements.

In order to develop the written exam, Mr. Preston consulted the Bureau item "bank," a collection of exam items or questions catalogued according to what they are supposed to measure. These items have been developed by a variety of sources such as commerical testing services, sister states, and Bureau personnel. Many have been used previously and are accompanied by various information such as data on statistical reliability developed as a result of previous use, or item analysis. He selected a total of ninety (90) items for use on this exam. No new items were developed.[2]

He determined the number of items to be used for each element to be tested on the basis of his evaluation of the importance of each element and the number of items he considered to be good items in the item bank. Some elements were assigned more items and hence more proportionate weight on the exam than would be consistent with their ranking in the job analysis based on the opinions of the four (4) raters. For example, written communications, a job element which was rated twelfth (12th) out of the thirteen (13) elements selected for testing was assigned twenty-five (25) out of the ninety (90) items selected for the written exam and would accordingly account for about 28% of the written score. Again this was the result of Mr. Preston's analysis of the importance of each element combined with the practical necessities of the written test vehicle.

Daniel Weinkauf, Assistant Personnel Director, DILHR, had the primary responsibility for constructing the oral exam. He has had fifteen (15) years experience supervising personnel classification,

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[2]One half of the written test was to consist of the Watson-Glaser test of critical thinking, a long-used, standard ninety (90) item prepared exam. However, this part of the test was dropped after a number of persons objected to its use.

recruitment, and staffing activities. He has a bachelor's degree in economics. He selected three (3) people for the oral board from a master list provided by the Employment Security Division. These were a partner in a management consultant firm, an AFL/CIO staff representative, and a retired personnel director of the Department of Health and Social Services. It was not represented that any of these individuals had particular expertise in the areas of personnel testing or psychological measurement, but rather that they were representative of both management and labor as well as state government.

After having consulted with Mr. Kaisler he developed two (2) questions for use on the exam.

William Komarek, an administrative assistant in the DILHR personnel office, actually supervised the oral exam using a rating form which was supplied by Mr. Preston and the prepared questions supplied by Mr. Weinkauf. Mr. Komarek has held his position for five (5) years and has an associate degree in accounting. As a part of his preparation for the exam he sent a letter to the oral board members enclosing a copy of the job description which summarized all of the job elements, not just the six (6) which had been determined would be tested in the oral exam. The letter requested that each member prepare three (3) questions in advance of the exam:

> Please try to have at least three questions prepared before you arrive which should be included in the oral interview. These questions should be such to enable the candidates to demonstrate important opinions and knowledge and give you a solid basis for evaluating their qualifications.

(Respondent's Exhibit 20.)

The oral exam rating form, Respondent's Exhibit 4, page 2, which included the six (6) job elements that were to be rated by the oral exam, was not given to the board members until the morning of the exam. The board members had no knowledge before this which of the job elements listed in the job description they were supposed to rate. Mr. Komarek first learned of the questions determined by the oral board members the morning of the

exam. He felt that the questions were job-related and he did not make any suggestions or comments to the board members with regard to their content. He was the only member of the respondents' exam team that knew what the questions were until after the oral exam had been given. He did not attempt to explain to the board members what the listed job elements meant.

The oral exams lasted approximately fourteen (14) to seventeen (17) minutes each. The board examined eighty-eight (88) applicants out of a total of ninety-two (92) who had taken the written exams.[3]

After the oral exam, the applicants were ranked according to a weight of 60% for the oral exam, 30% for the written, and 10% for seniority, plus veterans' points. There were further oral interviews lasting about one hour each and then the eighteen (18) available positions were filled. The lowest ranking applicant to be selected was ranked thirty (30). Appellant Kuter ranked thirty-one (31) and Appellant North forty-six (46). Because the appointing authority did not get below the thirtieth (30th) applicant in its consideration neither appellant was considered for a position as DESD.[4]

During the course of the hearings before the board, the appellants pointed out that there were certain mathematical errors made in the ranking of the candidates and that the candidate ranked thirtieth (30th) who had been hired for the DESD position in Superior should have been ranked forty-eighth (48th). The Bureau then reopened competition for the Superior position. The record does not indicate whether or not either appellant competed for this position subsequent to the hearing.

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[3]There was no screening by the written exam results, the remaining four (4) dropped out for various reasons of their own.

[4]Without going into detail, the appointing authority worked through the eighteen (18) positions using the rule of three (3), Wis. Stats. 16.20 and the last applicant considered was ranked thirtieth (30th). Not all the first thirty (30) applicants were hired.

Both appellants are white males. There was no showing made that the exam discriminated in any way against any minority group.

UTILIZATION OF EEOC GUIDELINES

In an interim opinion and order entered July 24, 1974, the Board held:

> Independent of our obligation to follow federal law, we adopt as a policy objective the intent of Congress as expressed in Title VII by the EEOC Guidelines.[5] We utilize the standard of measurement that Congress has adopted. page 5.

In their brief submitted at the close of all of the hearings in this matter, Respondent Wettengel requested that the Board reconsider its preliminary ruling. The Board has reconsidered this ruling and affirms it.

In addition to the reasoning set forth in the July 24, 1974, opinion, the Board makes the following observations. The provisions of Title VII, 42 USC 2000e do not require the State of Wisconsin or any other employer to utilize job related tests unless their testing results in a disparate impact on minorities. However, the EEOC guidelines do help insure that exams are job-related and that persons hired are more likely to perform better on the job than persons not hired The State of Wisconsin is bound not only by Title VII and S. 16.14, Wis. stats., with regard to non-discriminatory employment practices, but also by S. 16.12 (4):

> 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.

See also S. 16.01 (2), Wis. stats.

Basic principles of due process require that state action adversely affecting individual property interests in employment bear a rational relationship to a legitimate state interest.

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[5] 29 CFR 1607.

The above statutory provision takes Wisconsin beyond a rational relationship with regard to the job relatedness of civil service examinations.[6]

In considering Title VII and equal protection claims cognizable under 28 USC 1343 and 42 USC 1983, the federal judiciary has fashioned a test of job relatedness that falls somewhere in between the rational relationship test and the compelling state interest test:

> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.
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> * * *
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> 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." Griggs v. Duke Power Co., 401 U.S. 424, 431, 432, 91 S. Ct. 849, 853, 854, 28 L. Ed 2d 158, 3 EPD 8137 (1971). (Emphasis supplied.)

See also Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm., 354 F. Supp. 778, 5 E.P.D. 8502 (D. Conn. 1973), reversed in part on other grounds 482 F. 2d 1333, 6 EPD 8755: "It is easier to place the standard somehwere between compelling interest and rational relationship than to articulate a definitive formulation;" Walston v. Nansemard County School Board, 492 F. 2d 919, 924, 7 EPD 9153 (4th Cir. 1974); NAACP v. Civil Service Commn. of San Francisco, 6 EPD 8956 (N.D. Cal. 1973); Castro v. Beecher, 459 F. 2d 725, 732, 4 EPD 7783 (1st Cir. 1972). In evaluating job-relatedness pursuant to this type of mid-ground standard the federal courts have relatively consistently turned to the EEOC

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[6] C.f., Proposed rules on examining, testing and employment, U.S. Civil Service Commission, S. 300.103 (b) (1): "There shall be a rational relationship between the job to be filled (or the target position, in the case of an entry position) and the employment practice used." 2 EPG Parag. 5006.

guidelines in 42 U.S.C. 1983 equal protection claims as well as in Title VII cases. See Griggs v. Duke Power Co., supra; Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commn., supra; NAACP v. Civil Serv. Comm., supra; Castro v. Beecher, supra; Carter v. Gallagher, 452 F. 2d 315, 320, 326, 452 F. 2d 327, 4 EPD 7616 (8th Cir. 1971) (en banc); Fowler v. Schwartzwalden, 351 F. Supp. 721, 5 EPD 8062 (D. Minn. 1972); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 4 EPD 7116 (E. D Pa. 1972), aff'd. in relevant part 473 F. 2d 1029, 5 EPD 8448 (3d Cir. 1973) (en banc); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351, 4 EPD 7663 (N.D. Cal. 1972).

The Board's earlier holding that the EEOC guidelines would be utilized is in keeping with this basically consistent utilization of the guidelines to measure the standard of job-relatedness enunciated in Griggs in a Title VII context* and adopted or paralleled by other federal courts in 42 USC 1983 equal protection cases. Although the instant case is not one of minority discrimination, the combination of the requirements of the due process clause and Wis. stats. S. 16.12 (4), compels the conclusion that we must apply more than a rational relationship test of job relatedness,[7] and this test of substantial relationship enunciated in Griggs may appropriately be evaluated with the aid of the EEOC guidelines. See U.S. v. Georgia Power Co., 474 F. 2d 906, 913, 5 EPD 8460 (5th Cir. 1973):

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[7]See Bridgeport Guardians, supra, at 791:

"But something more must be shown than mere rationality for this reason; if the patrolman's exam could be used, despite its discriminatory effect, solely because it can rationally be said to measure some indicia of intelligence, than job relatedness as a standard would cease to have meaning."

*The Supreme Court recently reaffirmed its utilization of the EEOC Guidelines in the Albermarle Paper Company v. Moody, 43 LW 4880 (June 25, 1975).

> We view the reference by the Griggs court to EEOC guidelines as an adjunct to the ultimate conclusion that such tests must be demonstrated to be job related. We do not read Griggs as requiring compliance by every employer with each technical form of validation procedure set out in 29 CFR Part 1607. Nevertheless, these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. Their guidance value is such that we hold that they should be followed absent a showing that some cogent reason exists for noncompliance.

BURDEN OF PROOF

The Board also affirms its earlier holding placing the burden of proof of test validity on the respondents despite the absence of any showing of minority discrimination or "disparate impact" in the course of the hearings following the July 24, 1974, decision.[8]

There are no absolute rules governing the allocation of the burden of proof, either in the administrative or the judicial forum. See McCormack, Evidence (2d Ed.), S. 337, pp. 788-789:

> In summary, there is no key principle governing the apportionment of the burdens of proof. Their allocation, either initially or ultimately, will depend upon the weight that is given to any one or more of several factors including: (1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities.

It is also a familiar principle, although again not without qualification, that the burden of disproving a negative allegation is on the party having possession of the necessary proof. 29 Am. Jur. 2d Evidence S. 130, p. 164.

This principle is consistent with the Board's interim order of July 24, 1974, placing the burden on the respondents whose technical personnel developed the exam that has been challenged. Compare Erving Paper Mills v. Hudson Sharp Machine Co., 332 F. 2d 674, 677-678 (7th Cir. 1964):

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[8]In Title VII cases, the burden shifts to the employer only after there is a showing that the test results in discrimination or a disparate impact on minorities.

> We feel that it is placing an unfair and unrealistic burden on Erving to require it to prove the unsalability of this machine. Erving does not manufacture and sell machines of this type and the particular machine in issue has not been built due to difficulties encountered in construction. Further, we cannot understand how a customer can be charged with the burden or proving the unsalability of a product the supplier is unable to produce.

> IX Wigmore, Evidence S. 2486, at 275 (3d ed. 1940), in concluding a discussion of various rules used to determine which party has the burden of proof states, "The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.

> One policy consideration discussed by Wigmore and applied in certain cases, which we feel applicable to the present case, is that "the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false. Ibid. (Emphasis supplied.)

TEST VALIDATION

The EEOC guidelines and the applicable case law recognize three (3) methods for validating an examination as job-related. See Jones v. New York City Human Resources Admin., ___ F. Supp ___, ___, 9 EPD 9905 (S.D.N.Y. 1975):

> (1) "Criterion-related validation is a process by which relative performance on an examination is compared with relative performance on the job either by 'pre-testing' a group of current employees or by subsequent on-the-job evaluation of successful candidates . . . . This method is considered more effective than other validation methods because it clearly establishes the degree of correlation between successful examination performance and successful job performance . . . ."

> (2) "The second recognized method of validation is construct validation, which involves 'identification of the general mental and psychological traits believed necessary to successful performance of the job in question' . . . and the construction of an examination which tests for those qualities."

> (3) "An examination has content validity if the content of the examination matches the content of the job. 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. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job."

See also Vulcan Society v. Civil Service Commission, 490 F. 2d 387, 394-396, 6 EPD 8974 (2d Cir. 1973); Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, 482 F. 2d 1333, 1337, 6 EPD 8755 (2d Cir. 1973).

The EEOC guidelines on validation apply to both written and oral examinations. 29 CFR 1607.2 defines "test" to include "all formal, scored, quantified or standardized techniques of assessing job suitability including . . . interviewers' rating scales . . . ." The respondents' chief expert witness, Mr. Wallock agreed with this:

> I think the guidelines and other documents focus on written tests primarily when they talk about validity. However, the guidelines are clear that an oral examination is certainly a test and is subject to the same requirement as a written test. (T. Vol. II, p. 86.)

The respondents advanced a theory of content validation for their examination. The EEOC guidelines require criterion validation unless it is not feasible. The respondents contended that criterion validation was not feasible primarily because they were filling newly created positions and there were no incumbents to test for comparison. While there was some question whether other similar positions were comparable enough to have provided a pool of individuals for comparative analysis, the preponderance of the record evidence supports the respondents' contention.

THE WRITTEN EXAMINATION

For an exam to be content valid, there must be an adequate correlation between the aptitudes and skills necessary for successful performance on the exam and on the job. It must be demonstrated that the questions or items are relevant to the content of the job as identified in the job analysis.

John Preston, the personnel analyst who actually put the exam together, decided that ten (10) out of the twenty-three (23) job elements included on the rating forms sent to the four (4) managers for their rating as part of the job analysis would not be represented at all in the exam process, and that seven (7) elements would be represented on the written exam and six (6) on the oral exam. He then decided on what items from the Bureau's item bank would be used for each element. The item bank was assembled over a period of years and drew from a variety of sources. Although both Mr. Wallock and Mr. Preston reviewed the items, they did not attempt to present evidence of the job-relatedness of each item. There was no representation that the item bank was reviewed in a systematic manner for job-relatedness.

In explaining the decision to eliminate some of the elements from the exam, Mr. Preston testified:

> Most of the items or some of the items that we eliminated had a fairly high ranking statistic . . . I should repeat that, first of all, we used our judgment on these things. It is entirely possible that the raters could agree that they didn't think something was important, but the Bureau of Personnel in its analysis of its job would feel that it was important so we would test for it because we have the responsibility to do that. It doesn't happen very often, but it is entirely possible.
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> The second thing is that we were just asking these people for their opinions. We used them and benefit from them, but we don't take them as the final say on exactly how we are going to run a test or what we are going to test for. (T. Vol IV, pp. 49-50.)

Mr. Preston then determined the number of items that would be assigned to each element, which in turn determined the weight of each element since each item counted equally in the final score. His testimony concerning the basis for this decision was somewhat similar to the foregoing testimony concerning his reasons for eliminating certain elements:

> . . . based on what I felt was the importance of the element and the number of good items available and there was no elaborate technique for doing this. This is just something you use. (T. Vol. IV, p. 54.)

He explained the markedly disporportionate weight, when compared with the ranking by the four (4) managers consulted, of the element comprised

of written communication, vocabulary, and reading comprehension as follows:

> . . . I felt that even though this was by no means the highest rated element, I felt it was very important.
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> * * *
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> Plus in order to -- these are one of the type of items where in order to get a fairly good sampling you need more than just a few items.
> (T. Vol. IV, pp. 55-56.)

Thus a job element which the four managers rated rather low was tied for the heaviest weight on the written exam.[9]

To reiterate, a content valid exam requires a good job analysis and a satisfactory relationship between the exam content and the content of the job as identified by the job analysis. See Jones v. New York City Human Resources Admin., ____ F. Supp. ____, ____, 9 EPD 9905 (S.D.N.Y. 1975): "It is essential that the examination test these attributes . . . in proportion to their relative importance on the job . . ." See also Vulcan Society v. Civil Service Commission, 490 F. 2d 287, 6 EPD 8974 (2d Cir. 1973); Fowler v. Schwarzwalden, 351 F. Supp. 721, 725-726, 5 EPD 8062 (D. Minn. 1972); Kirkland v. N.Y. State Dept. of Correctional Services, 374 F. Supp. 1361, 1372, 7 EPD 9268 (S.D.N.Y. 1974): ". . . different parts of the exam must be weighted as nearly as possible to reflect the relative importance of the attributes tested for to the job as a whole.;" Western Addition Community Organization v. Alioto, 360 F. Supp. 733, 738, 5 EPD 8624 (N.D. Cal. 1973):

> Further, the proposed examination does not meet the content validation requirement that it must consist of samples 'composing the job in question' because admittedly it purports

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[9]Even if the measurement of written communications, vocabulary, and reading comprehension inherently requires a proportionately larger number of test items, that larger number of items could be weighted less than items for other, more important elements, by the use of a variable formula.

> to test only two skills -- written communication and mechanical aptitude -- which, according to the evidence adduced at the hearings, are admittedly only two out of ten, and by no means, the most important skills and traits related to the Fireman H-2 job -- an obvious over-emphasis on the two skills tested in the written examination.

If the job analysis in this case has any validity, it should be reflected in the examination. This does not mean that there must be an exact straight line ratio between the ranking of the job elements and their exam weight, but substantial variations must be explained by more than administrative convenience or the examiner's intuitive judgment of the importance of various elements.

The state's principal expert, the person who supervised the development of the test, did not really come to grips with this problem. He recognized the validation principle and proffered a general opinion that the test measured the knowledges and skills identified in the job analysis. The respondent's other expert was Thomas Tyler, a testing psychologist with the International Personnel Management Association. He testified that the test appeared to be the kind of exam for which content validation would be an appropriate strategy and that the test appeared to be a performance test and on a par with other such tests he had seen. However, he did not address the specific question of the relationship between the content of the exam and the job analysis and made it very clear that he did not have an opinion or a basis for an opinion on whether or not the test was valid, not being familiar with the entire exam procedure. The Board finds and concludes that the written exam was not valid.

THE ORAL EXAMINATION

As already noted, the oral exam accounted for 60% of the applicants' final scores, and is subject to the same validation standards as the written exam. The oral exam contained a number of infirmities that make it clearly invalid.

Mr. Weinkauf selected the members of the oral board on the basis of their affiliations with and representativeness of management, labor, and government. There was no representation that Mr. Weinkauf or the board members had any expertise in employment testing or psychiatric measurement. Mr. Weinkauf drafted two (2) questions for use by the board that he felt related to the job elements.[10] The board members received a list of job elements before the exam with a letter asking them to prepare three (3) questions for use on the exam. The letter did not explain which of the job elements were to be tested for on the oral exam.[11]

On the morning of the exam, Mr. Komarek gave the board members a rating sheet which identified the specific job elements to be tested for in the oral exam.[12] Mr. Komarek reviewed the exam procedures with the board members. There was no representation that he advised or counseled them regarding the job-relatedness of the questions they had prepared or that he had the expertise to do so in a meaningful way. He was the only one of the respondents' group working on the exam process to see or hear the questions prior to their use on the test.

The non-expert and ad hoc procedures utilized on the oral exam fall short of a showing of validity. Apart from the conclusory

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[10] 1. "How would you define and justify your style of supervision?"
2. "How does a District Employment Security Director go about making a decision about a problem when he or she has conflicting opinions or solutions from his or her staff?" (T. Vol. VI, P. 29.)

[11] Ability to motivate and lead a staff, readiness to make decisions and assume responsibility, initiative, ability to supervise, ability to maintain good working relations, oral communications had been designated for testing on the oral.

[12] The sheet did not indicate any differential weights to be afforded the various job elements, and the persons who assembled the final oral scores weighted the elements equally.

opinions proffered by respondents' employees, there was no expert opinion supporting the oral examination. While Mr. Wallock testified that the entire examination process was content valid, his specific analysis of the oral exam was somewhat limited:

> Thirdly, the point that I mentioned earlier about the content validity of written tests, how appropriate is the oral format in terms of job requirements of the job for which we are selecting people, and I particularly point to oral communications skills and verbal reasoning ability as being necessary to function effectively in an oral examination situation, and I submit those are also necessary to function effectively in the job of District Employment Security Director. (T. Vol. II, pp. 87-88.)

While Mr. Tyler testified that oral exams should have a degree of flexibility, he also expressed the opinion that a good oral exam required a certain amount of structure:

> A Well, once you determine the things that you're going to try to measure in the oral examination, you make a list of those things. You make questions for the Oral Board to ask that you feel will tap those dimensions. You make up some kind of a standardized rating form on those dimensions that will increase the internal judgment agreement on those orals and you have some scoring system for converting this into some kind of final situation. You leave some room for pursuit of idiosyncratic aspects of the oral. I think that is one of the virtues of the oral.
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> Q Would that last part of your statement refer to follow-up questions?
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> A Yes.
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> (T. Vol. IV, p. 35.)

Although Mr. Tyler made no attempt to render an opinion on the validity of the oral exam, his opinion of the rating sheet was severely qualified:

> Q All right, was this Respondent's Exhibit 11 the kind of thing you were talking about in your testimony as to what would, you believe, be a properly developed oral examination?
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> A I would have some questions about this one. I think that, you know, initiative is hard to rate, but I think at least it gives you some focus of which way you're going.

Q This is the type of thing you would like to have?

A Yes

(T. Vol. IY, pp. 36-37.)

The oral exam may have provided a measure of the candidates' verbal communication ability but the Board has no basis for a conclusion that the three members of the oral board developed questions that were a reasonably accurate measure of the other five (5) equally weighted elements that were to be measured in the oral on the record before it. The Board finds and concludes that the oral exam was not valid.

CONCLUSION

The Board heard a great deal of testimony, much of it from experts. There were a great many arguments advanced concerning many aspects of the exam that have not been discussed above. Because of the defects in the examination process already noted the Board finds and concludes that the entire examination is not valid and that the Director's action must be rejected.[13] The Board does not reach aspects of the exam not discussed above.

The Board recognizes that employment testing is a highly complex field. The utilization of the EEOC guidelines and the reference to the body of case law interpreting these guidelines undoubtedly places a heavy burden on the state personnel responsible for developing and administering tests. As the various experts who appeared before the Board testified, and as the literature and the various court decisions recognize, there are no talismanic qualities associated with any particular type of validation. See. e.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commn., 354 F. Supp. 778, 789, 5 EPD 8502 (D. Conn. 1973), reversed in part on other grounds, 482 F. 2d 1333, 6 EPD 8755.

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[13]The Board would have reached the same findings and conclusions if the appellants had been allocated the burden of proof.

All require subjective input, although criterion validation is recognized as least susceptible to error. The development of adequate employee selection and promotion devices and procedures is a matter for the experts in the field, and this Board will not attempt to invade their province. However, the following dicta seem appropriate.

In this case, the state filled eighteen (18) rather high level managerial positions from a group of eighty-eight (88) applicants who were eligible for and completed the examination procedures. These applicants were ranked on the basis of a 60% weight for their score on the oral exam, 30% for the written exam, 10% for seniority, plus veteran's points. The appointing authority worked their way down the list in filling the positions. The last person on the list considered and hired for a position was ranked thirtieth (30th). Noone below that rank was considered. The 10% seniority factor was not weighted for quality of seniority, either with respect to the level of the positions held or the quality of the job performances. Even given the inherent difficulties of evaluating past job experience, it seems anomalous that the state did not make some effort to evaluate past performance in deciding who would be considered for these important positions. By this comment, the Board does not wish to imply that an oral test or interview, or for that matter a written exam, would not necessarily have some utility in evaluating such elements as "ability to motivate and lead a staff," "initiative," and "ability to maintain good working relations." However, the Board does suggest that personnel managers give some consideration to the evaluation of performance in actual or simulated job situations in the measurement of abstract factors frequently identified with upper level management positions.

Another factor that undoubtedly contributed to the respondents' difficulty was the large number of candidates who took the oral examination. The Board suggests consideration of the utilization of a preliminary screening device in similar circumstances that might arise in the future.

While it was unnecessary to rule on the job-relatedness of the specific items on the written exam because of the other deficiencies noted, the Board does observe on the record before it a lack of rigorous scrutiny and review of the bureau item bank. The Board suggests such a review lest long standing items of questionable utility become exam fixtures by default.

Finally, the Board observes that legal requirements and prudence perhaps may eventually dicate the development of selection techniques completely different than the traditional testing procedures with which we are familiar.

ORDER

IT IS ORDERED that the Director's actions and decisions with regard to the examination, certification, and appointments concerning the position of District Employment Security Director are rejected, and this matter is remanded to the Director for action in accordance with this decision.

Dated this 3rd day of May, 1975.

STATE PERSONNEL BOARD

Percy L. Julian, Jr. Chairperson

OFFICIAL

STATE OF WISCONSIN PERSONNEL BOARD

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Department of Industry, Labor,
and Human Relations,

Respondents.

Case No. 73-152 and 73-159

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.

"as Approved Guidelines

The EEOC [illegible] able to show their tests do no [illegible] ion. Such guidelines [illegible] Power Co. 401 U.S.

V

> 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.
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> 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.
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> 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."
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> 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

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[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

PRESENT ORGANIZATION CHART

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

EMPLOYMENT SECURITY

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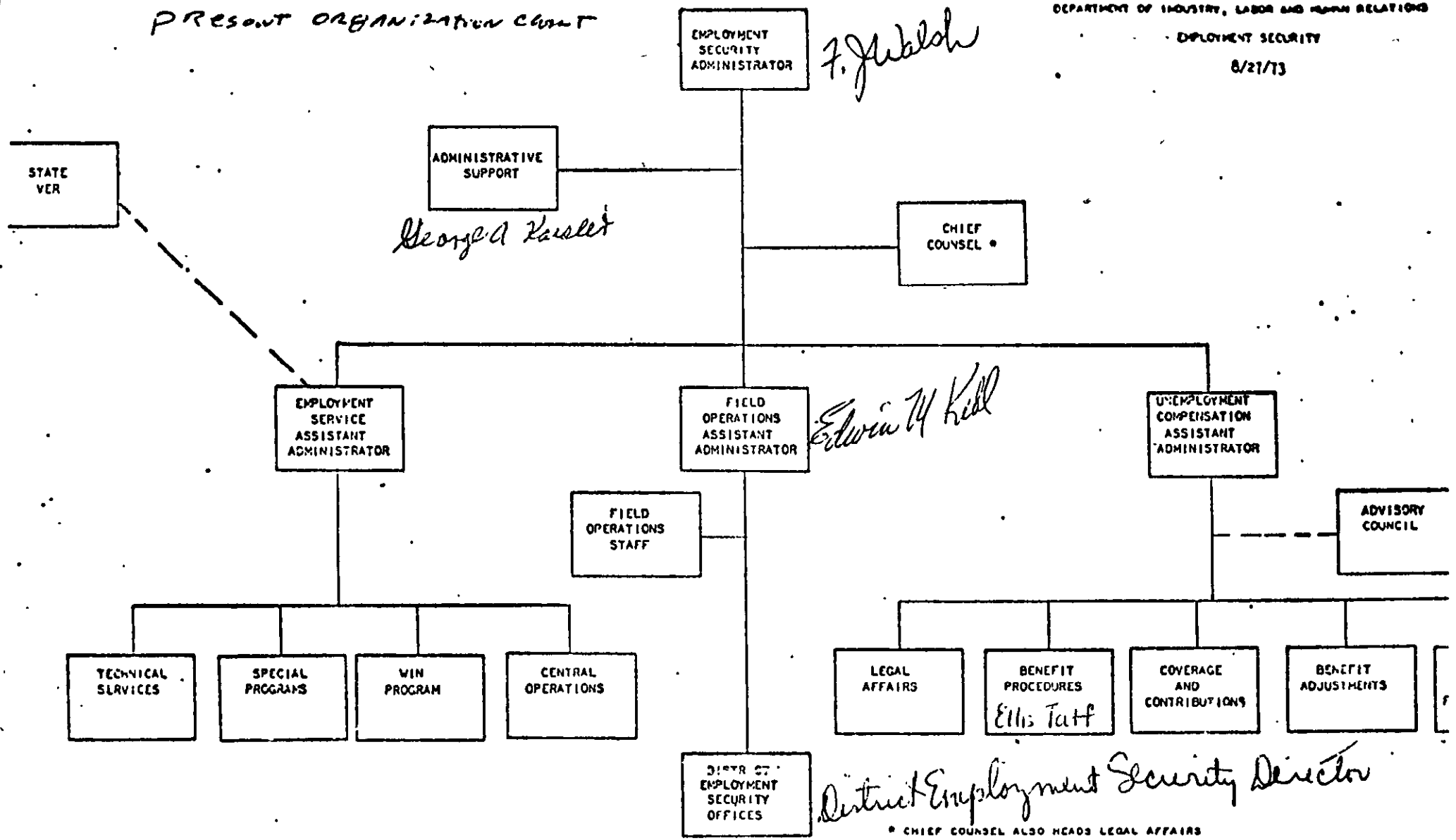

* CHIEF COUNSEL ALSO HEADS LEGAL AFFAIRS

Respondent's Exhibit 1

APPENDIX B