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 *
 WILLIAM S. HILLIARD, *
 *
 Appellant, *
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 v. *
 *
 DENNIS CONTA, Secretary, *
 Department of Revenue, *
 *
 Respondent. *
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 Case No. 76-11 *
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OFFICIAL

INTERIM
OPINION AND ORDER

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

OPINION

This is an appeal of the denial of a grievance pursuant to Section 16.05(7), stats. The parties are in disagreement as to the definition of the issue. The respondent argues that the board does not have subject matter jurisdiction over the issue originally agreed to:

"Whether the performance evaluation of October, 1975, was accurate."

He suggests an alternative statement of the issue which he argues would fall within the board's jurisdiction conferred by the grievance procedure, i.e., involving an unfair application or incorrect interpretation of a Civil Service statute, a rule of the director, or a function delegated to the appointing officer by the director:

"Did respondent violate, through incorrect interpretation or unfair application, a rule of the Personnel Board, Civil Service Statute or a function which the Director of the Bureau of Personnel has affirmatively delegated his authority to the appointing officer by rating the appellant below the manner required?"

The determination of this issue is guided by a Dane County Circuit Court decision, Waggoner & Denniston v. State of Wisconsin Personnel Board, No. 134-442 (7/21/72). In that case the employes appealed the decision of a grievance at the third step refusing to grant them merit increases because no reliable evaluation report was available to the agency. The Personnel Board dismissed the appeal for lack of jurisdiction on the grounds that the grievance involved only the correctness of a judgment decision of the agency. However, the court held that relevant statute, S. 16.105(2)(c), later 16.086(5) 1., "imposes the duty to fairly and accurately evaluate the work of its employees in considering their eligibility for merit salary increase." The court remanded the case to the board with instructions that "they take the necessary action to insure that the petitioners receive fair and accurate performance evaluations for the period in question." While the statute has changed to some extent in the interim, we believe the court's interpretation is still correct and the instant grievance alleges a violation of a civil service statute.

This holding is consistent with subsequent Personnel Board decisions in Jallings & McKay v. Smith, 75-44, 45 (8/23/76), and Ryczek v. Wettengel, 73-26 (7/3/74), as well as the decision of the Wisconsin Supreme Court in Reinke v. Personnel Board, 53 Wis. 2d 123, 191 N.W. 2d 833 (1971). In that case, an appeal of a discharge, the board "looked upon its role as merely to find substantial evidence to support the action of the employer," 53 Wis. 2d at 133-134. The court held:

"The substantial evidence test is applicable only on judicial review; and, therefore, the board misinterpreted its function, when it found that there was substantial evidence to support the appointing authority.

* * *

The Personnel Board is required by law to find ultimate facts

and there is no authority for the board to determine if there is substantial evidence to support the action of the appointing authority. The function of the board is to make findings of fact which it believes are proven to a reasonable certainty by the greater weight of the evidence." 53 Wis. 2d at 134, 137-138.

The respondent expresses concern that the first issue requires the board to substitute its judgment for that of the appointing authority. This is not the case. The appellant has the burden of proof, and therefore has the burden of proving to a reasonable certainty by the greater weight of the evidence that the performance evaluation in question was not accurate. This decisional framework in no way requires the board to substitute its judgment for that of the agency. C.f. Zabel v. Rice, Wis. Pers. Bd. 75-66 (8/23/76), p. 4.

ORDER

It is ordered that the issue for hearing of this appeal is "whether the performance evaluation of October, 1975, was accurate," and the motion to dismiss is denied.

Dated April 25, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson