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 NOAH FIRER, et al.,  
 Appellant,  
 v.  
 MANUEL CARBALLO, Secretary,  
 Department of Health & Social Services,  
 VERNE KNOLL, Deputy Director,  
 State Bureau of Personnel,  
 Respondents.  
 Case No. 77-25  
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**OFFICIAL**  
 DECISION

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

NATURE OF THE CASE

This is an appeal of a decision of the director that appellants would not be allowed to participate in an oral examination. The appellants sought a stay in the selection process pending a ruling on the director's decision. The parties stipulated to a contained hearing on the merits and on the stay request.

FINDINGS OF FACT

The appellants all applied for the position of Social Supervisor II - Division of Corrections - Bureau of Probation & Parole - CP - H&SS, pursuant to an announcement of a competitive promotional examination dated August 3, 1976. (Respondents' Exhibit 1). The announcement contained the following information about the nature of the examination:

"The type of examination will depend upon the nature of the position to be filled. Be sure to describe your training and experience fully on your application. This is the information on which the initial review of your qualifications is based. In addition to an evaluation of training and experience, the examination may consist of one or more of the following parts: a written examination, a performance test, an oral examination, a rating of promotional potential."

The appellants were admitted to the written examination which they took on December 11, 1976. On January 29, 1977, they were notified that although they had received a score over 70 on the written exam they would not be allowed to participate in the next stage of the process, the oral examination (Appellants' Exhibit 4):

"Sixty-eight people received a grade of 70.00 or higher on the written examination for this position. Due to the high cost of administering an oral examination to all sixty-eight people, only those 29 applicants who scored highest on the written test are being invited to participate in an oral examination, the results of which will then be used to establish the employment list."

Prior to receiving this notice, the appellants had no notice from respondents other than as set forth in Respondents' Exhibit 1 as to the nature of the selection process. Based on previous experience the appellants assumed that the examination would be in two parts, written and oral, and that anyone attaining a passing grade (70) on the written would be allowed to take the oral exam. If the appellants had realized in advance of the written exam that the cutoff point for the oral was to be 85, they would have prepared more extensively for the written exam.

This selection process was delegated to DHSS but administered in close cooperation with the Bureau of Personnel. The latter agency made the decision to limit the oral examination to the top 29 applicants from the written exam.

There were 6 vacancies located around the state to be filled by this selection process. At the time of the announcement referred to above, no decision had been made as to the nature of the selection process that would be used. Sixty-eight people took the written exam. After that examination, the scores were analyzed and points were picked for 70 and 100 and then all scores were converted to the traditional civil service scale. On a converted basis, the highest score was 92 and the lowest was 70. The bureau's practice is to establish the traditional passing score of 70 on the basis, at least in part, of a natural breaking point in the distribution of the scores. Here

there was no such breaking point. Another consideration involved in the establishment of the lowest raw score as 70 was that of employe morale, in that the procedure followed would not require informing any applicants that they had "failed" the exam.

The bureau decided on or about January 10, 1977, to limit participation in the oral to 29 persons, based on the following considerations. As noted above, there was no natural break in the distribution of scores that also might have served to establish some other point or number of applicants to be examined. Second, it was felt that 29 was near the outer limit of the number of people that it would be feasible to examine. The bureau's experience has been that it had been difficult to get people to serve on oral boards, and this problem would be exacerbated by increasing the number of persons examined and the resulting additional time needed to complete the examination. Also, the bureau was concerned about the increased fatigue of board members connected with a longer hearing process. Finally, there was some concern about the added expense of examining more than 29 applicants. At the same time the bureau felt that 29 would be a sufficient number to establish a register to fill the 6 positions, which were spread around the state.

Following the examination the scores for certification purposes were established on the basis of 50% for the written exam and 50% for the oral exam.

#### CONCLUSIONS OF LAW

The principal question on the merits is whether the respondents have violated Section 16.12(5), stats.:

"(5)In the interest of sound personnel management, consideration of applicants and service to state departments, the director may set a standard for proceeding to subsequent steps in an examination,

provided that all applicants are fairly treated and due notice has been given. The standard may be at or above the passing point set by the director for the written, oral, physical performance or evaluation of training and experience portions of an examination."

The record supports the conclusion that the respondents were not required to admit all 68 applicants to the oral exam. The significance or importance of the cost factor was not substantially developed by the respondents. There was sufficient uncontradicted evidence, however, that the administration of an oral exam to that many applicants would have hampered the respondents' ability to obtain the necessary examiners or to conduct a reliable examination.

With respect to the notice requirement, the appellants' only notice of the exam process from the respondents was the information contained on the announcement that the "type of examination will depend upon the nature of the position to be filled" and that "the examination may consist of one or more of the following parts: a written examination, a performance test, an oral examination, a rating of promotional potential." As was set forth in the findings the appellants received notice after the written examination that only 29 applicants who scored highest on the written exam would be allowed to take the oral exam. (Appellants' Exhibit 4).

We believe that the terminology "due notice" contained in Section 16.12(5), stats., must be interpreted as reasonable notice under all the circumstances. See Black's Law Dictionary, 4th Edition, p. 589:

"Due Notice. No fixed rule can be established as to what shall constitute 'due notice.' 'Due' is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances."

While in certain situations one can hypothesize that more explicit and specific notice would be required than was given in this case, we conclude that the respondents did not violate the notice requirements of Section 16.12(5), stats., in this case. At the time of the announcement of the examination, the respondents had no way of knowing how many persons would apply for the

position and how many would be qualified for admission to the examination process. At this point, no decision had been made on the nature of the selection process that would be used. Prior to the written exam it was not known what number of correct responses would be assigned the traditional civil service grade of 70 on the written exam. It also hadn't been determined at that point how many persons could or should be orally examined. Even if that determination had been made the respondents had no way of knowing whether the distribution of scores and other factors would have dictated that the passing point would have been established at or near the 29th highest score.

While it might have been preferable to have given the applicants prior to the written exam an explanation of the range of options the bureau might elect to utilize, we can not conclude that the notice given was unreasonable in the statutory sense.

With respect to the question of a stay in the selection process, the conclusions reached on the merits disposes of this question as a practical matter. Furthermore, it appeared from the argument on the motion that the oral examinations had been completed and the certification made to the appointing authority at that point. The Dane County Circuit Court recently decided a case that appears to hold that the board has no jurisdiction to interfere with the appointment process at this juncture. See Department of Administration v. State Personnel Board, No. 147-407 (2/25/77). The recourse suggested by the court implies that the appellants should have directed their request to the director, with the possibility of an appeal to the board of an adverse decision under Section 16.05(1)(f), stats. For the above reasons the requested stay is denied.

ORDER

The actions and decisions of the director here appealed are affirmed and this appeal is dismissed.

Dated April 25, 1977

STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson