

STATE OF WISCONSIN

PERSONNEL COMMISSION

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STEVE BUTLER ET AL.,

Appellants,

v.

Administrator, DIVISION OF
PERSONNEL & Secretary, DEPART-
MENT OF INDUSTRY, LABOR & HUMAN
RELATIONS,

Respondents.

Case No. 79-138-PC

* * * * *

ORIGINAL

DECISION
AND
ORDER

NATURE OF THE CASE

This is an appeal pursuant to §230.44(1)(b), Wis. Stats., of an examination.

FINDINGS OF FACT

1. As a result of an announcement of a competitive examination, appellant Butler took an examination for Administrative Assistant 5-Confidential -- Job Service/Field Operations.
2. Mr. Butler received a civil service grade of 79.01 and a rank of 21, and he was not certified for the available vacancies.
3. Of 45 examinees, 18 were women.
4. The top 5 scorers on the examination were all women.
5. The examination consisted of two equally-weighted parts, an achievement history questionnaire and a simulated in-basket exercise. The decision on this composition and weighting of the exam was made in the initial stages of the examination development procedure.

6. The examination was scored by 6 raters, 3 male and 3 female (the scores of one male rater ultimately were not used because statistical analysis showed his ratings to be unreliable).

7. The examination answers or exercises were identified for the raters only by number so that there was no overt indication of the examinees' name or sex.

8. Following the examination, the respondents conducted a statistical analysis of, among other things, the scores of male and female examinees, how they were rated by male and female raters, and the overall reliability of the examination.

9. There was no statistically significant difference between the average scores of the male and the female examinees.

10. There was no statistically significant differences among the scores when analyzed on the basis of the sexes of the examinees and the raters, e.g., female examinees rated by male vs. female raters.

11. The overall reliability of the examination was high.

12. The examination was developed and administered in accordance with appropriate scientific standards, and included appropriate job analysis, development and analysis of dimensions, and the development of an examination vehicle, all accomplished by qualified exam experts in consultation with qualified job experts.

13. The examination was job-related in accordance with appropriate validation standards, and was conducted in accordance with the requirements of §230.16(4), Wis. Stats.

14. The other appellants to this appeal, besides Mr. Butler, all of whom signed the letter of appeal, were given notice of the hearing by the Commission, but failed to appear at the hearing or to authorize Mr. Butler to represent their interests at the hearing.

CONCLUSIONS OF LAW

1. This case properly is before the Commission pursuant to §230.44(1)(b), Wis. Stats.

2. The appellant has the burden of proving by the greater weight or preponderance of the evidence that the respondents did not conduct the examination in accordance with the requirements of §230.16(4), Wis. Stats.

3. The appellant has not satisfied that burden.

4. The appellant did satisfy his burden of proceeding when he presented his case by presenting enough evidence to require that the respondents proceed to put in their case.

5. The appellants other than Mr. Butler failed to prosecute this matter.

OPINION

In his case-in-chief the appellant established that of 45 examinees, 18 were female, and all of the top 5 scores were awarded to female examinees. The respondents then proceeded to establish that the examination was prepared and conducted in accordance with generally-accepted scientific standards and was job-related. It was established that, overall, there was no significant differences in the scores of the male and female examinees, and there was no statistically significant difference in the scoring

of the raters on the basis of their sex and the sex of the examinees. In the opinion of the Commission the exam was conducted in accordance with §230.16(4), Wis. Stats., and the fact that the five highest scores were achieved by women can be attributed to their superior qualifications for the positions.

The respondents moved to dismiss this appeal at the close of the appellant's case on the ground that he had failed to sustain his burden of proof. This motion was taken under advisement by the examiner. At that stage of the proceeding, it was not actually a question of whether the appellant had met his burden of proof, but rather whether he had met his burden of proceeding or going forward with the evidence. In Vol. 4 Mezzines, Stein, Gruff, Administrative Law, §24.01, the following comment is made on this subject:

"In practice, a trial court sitting without a jury, or an administrative tribunal, may possess considerable flexibility in allocating this shifting burden or even ignoring it in the interests of fairness and convenience."

In a case such as this, where the appellant was not represented by counsel and was challenging an examination, considerable flexibility is called for. The appellant having established that 18 of 45 examinees were women and that all of the five top-ranked examinees were women, it was appropriate to have required the respondents to proceed with their proof. The motion to dismiss should be denied.

The respondents also moved to dismiss the appeal as to the appellants other than Mr. Butler for failure of prosecution. Since they neither appeared at the hearing nor authorized Mr. Butler to represent them, this motion should be granted.

ORDER

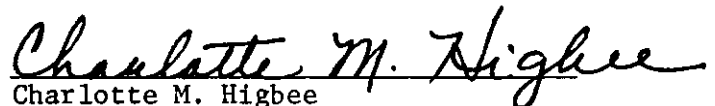
The respondents' motion to dismiss this appeal for lack of prosecution as to all appellants except Mr. Butler is granted, and this appeal is dismissed as to appellants Malinowski, Sasman, Roche, Shorey, and Willardsen.

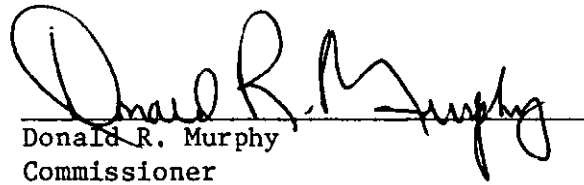
The respondents' motion to dismiss the appeal made when appellant rested his case, on the ground that appellant failed to sustain his burden of proof, is denied.

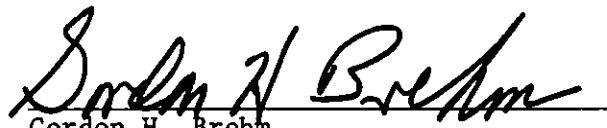
The actions of the respondents are affirmed and this appeal is dismissed.

Dated Sept. 29, 1980

STATE PERSONNEL COMMISSION


Charlotte M. Higbee
Chairperson


Donald R. Murphy
Commissioner


Gordon H. Brehm
Commissioner

PARTIES

The names and addresses of all parties who appeared in this matter are as follows:

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Dennis E. Malinowski
Eugene E. Sasman
John M. Roche
LeRoy Shorey
Duane Willardsen
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