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OFFICIAL OPINION NO. 13

August 11, 1966

**STATE PERSONNEL BOARD—Hiring of Non-Citizens
—Qualified Citizens to be Preferred—
Board's Duty to Make Finding.**

Opinion Requested by Mr. Richard F. McElheny, Personnel
Director, Department of Administration.

In your recent letter to this office you requested clarification of the provisions of the State Personnel Act, Acts 1941, ch. 139, as amended, pertaining to the employment of non-citizens. Those provisions are found in Acts 1941, ch. 139, § 1, as amended by Acts 1965, ch. 369, § 1, the same being Burns IND. STAT. ANN., § 60-1301, which provides:

“This act shall be known and may be cited as the ‘State Personnel Act’; and this act shall be liberally construed to effectuate its policies and purposes to increase governmental efficiency, to insure the appointment of qualified persons to the state service hereinafter defined solely on the basis of proved merit, to offer *any person* a fair and equal opportunity to enter such state service, and to afford the employees in such state service an opportunity for public service and individual advancement according to fair standards of accomplishment based upon merit principles, and to which ends there is by this act established a personnel system based on merit principles and scientific methods relating to the appointment, compensation, promotion, transfer, lay-off, removal and discipline of employees and to other incidents of state employment.

“The term ‘person,’ as used in this section, shall mean any person who is either a citizen of the United

States or who has filed his declaration of intention of becoming a citizen of the United States. *Any person*, not a citizen of the United States but who has filed his declaration of intention of becoming a citizen, before entering any state service under the provisions of this act, shall be required to enter into a written agreement with the state personnel board wherein such person agrees to proceed with his naturalization process within the minimum period of time permitted and prescribed by the federal naturalization laws, and if such person fails to complete his naturalization process in accordance with said agreement, he shall be subject to immediate dismissal, and he shall forthwith be separated from state service. Citizens of the United States shall, other things being equal, be given preference over those persons who have filed their declaration of intention of becoming citizens. Before any person, who is not a citizen of the United States but who has filed his declaration of intention of becoming a citizen, shall be appointed to state service under the provisions of this act, the state personnel board shall enter a finding of record that no citizen of the United States, equally well qualified under the standards and provisions of this act, is available for appointment for the position to be filled." (Emphasis added.)

The 1965 Amendment substituted the emphasized phrase "any person" for the previously used phrase "all citizens," and added the second paragraph.

Your first question concerning the above statute was:

"I. The question arises as to the meaning of *no citizen of the United States, equally well qualified* under the standards and provisions of this act.

"A. Does this mean that a qualified non-citizen may be considered for appointment only in the absence of a citizen who meets the minimum education and experience requirements as established by the State Personnel Board;

or

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- “B. Does this mean that qualified non-citizens should be permitted to take an examination and be ranked on the eligible list with qualified citizens.
- “C. If statement A above should be construed as the correct meaning, would the absence of one or more names on the current register for the classification concerned constitute a lack of available citizens as provided in the act. In other words, would it be necessary to issue an announcement in order to determine whether there were other qualified candidates available.
- “D. If statement B above should be construed as the correct meaning, what method should be used for determining order of preference. Should citizens receive absolute preference.”

As you are aware, the answer to your question turns on the meaning to be attributed to the phrase “equally well qualified.” The statute does not in itself indicate what meaning is to be given to the phrase, and recourse to the principles of statutory interpretation is therefore mandatory.

One such rule has been well stated by the Court in *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 51, 142 N.E. 2d 610, 620 (1957) :

“. . . It is an elemental rule of statutory construction that a single statutory provision cannot be construed standing alone. It must be construed in the light of the entire act to which it applies.”

Looking therefore at the other sections of the State Personnel Act we find the following provisions :

Section 13; Burns § 60-1313—

“Vacancies in the classified service shall be filled only by:

“(a) appointment from an eligible list certified by the director; . . .”

Section 15; Burns § 60-1315—

“(a) The director shall establish and maintain such promotion lists and eligible lists for the various classes of positions in the classified service as he deems necessary or desirable to meet the needs of the service. On each promotion list and eligible list, the eligibles shall be ranked in the order of their ratings earned in the test given for the purpose of establishing such list.”

Section 16; Burns § 60-1316—

“The director shall from time to time conduct such promotion tests and entrance tests as he considers necessary for the purpose of establishing promotion lists and eligible lists. The tests shall be competitive and shall be of such character as to determine the qualifications, fitness and ability of the persons tested to perform the duties of the class of positions for which a list is to be established: . . .”

Section 17; Burns § 60-1317—

“The director with the approval of the board shall determine the qualifications for admission to any test. Subject to such limitations as to age and sex as the director and the board consider for the best interests of the service, admission to tests shall be open to all persons who appear to possess the required qualifications and may be lawfully appointed to a position in the class for which a list is to be established.”

Section 19; Burns § 60-1319—

“. . . The names of all persons attaining the minimum final earned ratings established by the director in advance of the giving of the test shall be placed upon the eligible list in the order of their ratings.”

“G. When in accordance with state personnel laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the state personnel board shall certify, from the

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top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three [3] names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three [3] names available for appointment on such certification, unless objection shall be made, and sustained by the state personnel (personnel) board to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the state personnel board: . . .”

Section 2; Burns § 60-1302—

“As used in this act and in the definition provided in this section, unless a different meaning appears from the context, the following terms shall have the following meanings:

. . .

“(j) ‘Eligible list’ means a list of persons who have been found qualified by an entrance test for appointment to a position in a particular class.

. . .

“(m) ‘Eligible’ means any person whose name is on the reemployment, promotion or eligible list for a given class.”

As a result of the above survey it becomes apparent that, in relation to a given classified position, the Act sets out two separate procedures, one to determine who is qualified to occupy that position and the other to select among the persons qualified. An individual who satisfies the age, sex, education, and other background prerequisites may take the entrance test and, if he passes, he is deemed qualified to hold that position. All persons so qualified are placed on an eligible list, and ranked on that list in accord with their test score. The higher the individual’s ranking, the more apt he is to be considered for that position. However, the qualified individual holding the highest rank is not necessarily the one who will

be appointed to fill a vacancy. It is theoretically possible for the highest ranked qualified individual to be the last appointed.

The Act, then provides both a procedure for determining whether an individual is qualified to hold a position and a procedure for choosing among qualified individuals. Therefore, the phrase "no citizen of the United States, equally well qualified" must be construed as part of the latter procedure. If only two persons, one a citizen and the other a non-citizen, satisfy the background prerequisites and pass the entrance test, thereby showing they are each qualified to fill the position, the citizen must be appointed no matter what their relative performance.

An entirely different principle of statutory interpretation produces the same result. The Legislature, when enacting a law, is presumed to have knowledge of the previous law on the subject, and the construction placed on that previous law. *Grave v. Kittle*, 122 Ind. App. 278, 101 N.E. 2d 830 (1951). This would, of course, be especially true when, as in the present instance, the Legislature amended the existing law.

In 1951 the Honorable W. H. Skinner, at that time State Personnel Director, advised this office that there were a number of vacancies in state positions due to a lack of citizen applicants, and inquired as to whether non-citizens could be employed. In 1951 O.A.G. No. 57, p. 155, Mr. Skinner was advised that the State Personnel Act used the phrase "all citizens," and that therefore non-citizens could not be employed. A short passage from the bottom of page 156 of that opinion is pertinent:

"It is noted that the Legislature limited the availability of the Act, 'to offer all *citizens* a fair and equal opportunity to enter such state service.' Had the Legislature desired to broaden the classification, it could have used the language, 'all persons.'"

In 1951, and probably ever since, a lack of qualified citizen applicants resulted in vacancies in state service even though qualified non-citizens were willing to accept such employment. The Legislature must be deemed to have been aware both of

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the Opinion of the Attorney General and of the problem of the Personnel Division.

The General Assembly, if it so wished, could have made the simple change in phraseology from "all citizens" to "all persons," and thereby not only alleviate the problem but also make citizens and non-citizens equal in any competition for state service. The General Assembly did not choose to do so. Along with the change from "all citizens" to "any person" they added an entire paragraph defining "person" and setting out the conditions under which non-citizens could be employed. Obviously, their intent was not to put non-citizens on a competitive basis with citizens, but rather to remove an obstruction to the efficient operation of state agencies. The apparent concern of the Legislature in this instance was not with the welfare of non-citizens but rather with the need to fill vacancies in the state service. The 1965 amendment to the State Personnel Act must be construed as permitting the employment of qualified non-citizens only when no qualified citizen is available.

Therefore, in response to your first question, subquestion A must be answered in the affirmative and subquestion B in the negative. A qualified non-citizen may be considered for appointment only in the absence of a citizen who meets the minimum requirements as established by the State Personnel Board.

A special note must be made in relation to subquestion B. That subquestion actually contains two separate questions: first, should a non-citizen be permitted to take an examination; second, should a non-citizen who passes the examination be ranked on the eligible list along with those citizens who pass the examination. The answer to the first question must be yes since no individual who has not taken and passed an examination can be considered qualified. The answer to the second question must be no. Non-citizens may be placed on an eligibility list once they have proven themselves qualified, but they are not to be ranked thereon.

In answer to subquestion C, I must again point out the specific language of the first section of the State Personnel Act, Burns § 60-1301.

“ . . . Citizens of the United States shall, other things being equal, be given preference over those persons who have filed their declaration of intention of becoming citizens. Before any person, who is not a citizen of the United States but who has filed his declaration of intention of becoming a citizen, shall be appointed to state service under the provisions of this act, the state personnel board shall enter a finding of record that no citizen of the United States, equally well qualified under the standards and provisions of this act, is available for appointment for the position to be filled.”

The above language clearly indicates that an announcement would be necessary. The only finding the Personnel Board could make on the basis of the absence of one or more names on the current register for the classification concerned would be that those qualified citizens available at the time the register was established are no longer available. No finding as to the current availability of qualified citizens can be based on past records. There is, however, one minor exception to this answer. Section 15 of the Act, Burns § 60-1315, provides, in part:

“(b) The director shall determine at the time any promotion list or eligible list is established the period during which such list shall remain in force, which shall be no less than six [6] months nor more than two [2] years.”

Therefore, the absence of the names of one or more citizens on a list that has been in force less than six months would support a finding that there are no qualified citizens available, and a non-citizen could be appointed from that list.

As a result of the above answers subquestion D is not applicable and need not be answered.

Your second question, reads :

“II. A question also arises in regard to the State Personnel Board’s responsibility for entering a finding of record for each determination.

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- “A. Does this mean that the State Personnel Board must consider and enter the finding in the official Board minutes for each non-citizen appointment; or
- “B. Does this mean that the State Personnel Board may establish procedures for the State Personnel Director and staff to follow in determining eligibility of non-citizens and entering a finding of record in the Personnel Division records but not in the official minutes of the State Personnel Board.”

Once again we must refer to the language of the first section of the State Personnel Act, as amended, Burns § 60-1301.

“. . . Before any person, who is not a citizen of the United States but who has filed his declaration of intention of becoming a citizen, shall be appointed to state service under the provisions of this act, the state personnel board shall enter a finding of record that no citizen of the United States, equally well qualified under the standards and provisions of this act, is available for appointment for the position to be filled.”

One of the basic principles of statutory construction, so basic that it itself has been adopted as statutory law by 2 R.S. 1852, ch. 17, § 1, the same being Burns IND. STAT. ANN., § 1-201, is that words and phrases are to be taken in their usual and ordinary sense. An application of that principle in the present case would result in the Board itself making the finding.

However, that is not the only reason for deciding that the finding must be made by the Board and entered into the minutes of the Board. An examination of sections 6 and 7 of the Act, Burns §§ 60-1306—1307, which set out the duties of the Board and the Director respectively, shows that all discretionary power is vested in the Board. The Director administers the application of the Act, and he may conduct investigations and submit reports and recommendations to the Board, but

he is not given sufficient power or discretion to determine whether there are any qualified citizens available for appointment to a given classified position.

The situation in relation to non-citizens is somewhat analogous to the situation set out in subsection G of section 19 of the Act, as amended, Burns § 60-1319, in relation to veterans. That section provides that an appointing authority who, when selecting from the list of eligibles certified to him, passes over a veteran eligible and selects a non-veteran eligible must file a statement of his reasons for so doing with the State Personnel Board, and the Board must enter a finding as to the sufficiency of such reasons. It is apparent that the Legislature intended that the decision to make appointments from a non-preferred class, whether non-veteran or non-citizen, be more than a routine matter to be delegated by the Board to an administrator.

These rather lengthy answers to your questions can be readily summarized. A non-citizen may take the entrance examination for a position in the state service in order to determine whether he is qualified to hold that position, but no matter how qualified he may prove to be he cannot be appointed to that position unless the State Personnel Board makes a finding, entered into the minutes of the Board, that at the time the appointment must be made to that position no qualified citizen is available.

Your questions have been answered in terms of the usual method of appointment, from eligibility lists, and no mention has been made of the unusual forms of appointment, such as temporary or emergency appointments, or appointments to classifications where exceptional qualifications are required. Such appointments should be made in accord with the principles expressed in relation to appointments made from eligible lists.