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ARNOLD B. SANDSTROM,  
 Grievant,

v.

WILBUR J. SCHMIDT, Secretary,  
 Department of Health and Social  
 Services,  
 Respondent.

Case No. 73-158

\* \* \* \* \*

**OFFICIAL**

OPINION  
 AND  
 ORDER

Before AHRENS, Chairman, SERPE, JULIAN and STEININGER.

Background Facts

On October 13, 1953, Grievant commenced his employment with the State of Wisconsin. In the years before his retirement, he was employed as a Correctional Officer III at the Wisconsin State Prison farm near Waupun, Wisconsin. In 1971, the normal retirement date for employes in the Grievant's classification, who were participants in the Wisconsin Retirement Fund, as was the Grievant, was the day on which the employe attained the age of 60. However, the Respondent could grant extensions beyond such date. Pursuant to such authority, Respondent set the Grievant's retirement date as June 30, 1974. Such date would have resulted in the Grievant's total State service exceeding twenty (20) years and six (6) months. Six months of such service would have been excluded for purposes of benefit entitlement, but nevertheless, Grievant on such retirement date would have had over 20 years service. Under the Fund provisions, the Grievant, who served in the United States Armed Forces for three (3) years, would have received additional retirement benefits because of his military service.

On November 8, 1972, Grievant was notified by the Respondent that the declining inmate population of the institution had resulted in employe layoffs,

which in turn had caused the Respondent to amend its policy on retaining employes beyond their normal retirement age. Such letter of notification advised the Grievant that his retirement date was advanced from June 30, 1974, to September 30, 1973.

The Grievant filed a timely grievance under the Department of Health & Social Services grievance procedure for non-labor contract grievances, alleging a violation of various sections of Chapter 16, Wis. Stats., 1971, Subchapter II, Civil Service, including Section 16.01. In his grievance, the Grievant claimed that he had been unlawfully denied employment beyond his retirement date. The Respondent's decision stated that work extensions after retirement were permitted "only when the employe's services are deemed essential and unusual difficulties are experienced in securing a replacement." He stated further that such conditions did apply to Grievant's case. The Grievant filed a timely appeal to the Board.

We find these to be the material background facts and additional findings will be made hereafter in conjunction with our discussion of the issues.

The Board Has Jurisdiction To Hear

The Appeal on the Alleged Violation

of the Civil Service Statute

The Department of Health & Social Services grievance procedure provides for the appeal of alleged violations of the civil service law and rules to the Board.

It provides as follows:

"Step 3 - ...The decision of the Secretary will be final and binding on all grievances filed under the Departmental procedure, except those which allege a violation, incorrect interpretation or unfair application of:

1. A rule of the Personnel Board or a civil service statute (S. 16.01-16.32).

...

Step 4 - The decision of the Secretary on grievances which allege a violation incorrect interpretation or unfair application of civil service laws or rules...as stated above may be appealed to the Personnel Board provided action is taken within 10 workdays following receipt of the Step 3 decision."

We find that the grievance, as well as the appeal to the Board of the Respondent's third step decision, alleges a violation of Section 16.01 of the Statutes, and, therefore, the Board has jurisdiction to proceed to hear and decide the merits of the claim. In his Motion to Dismiss, the Respondent contends that the Board does not have subject matter jurisdiction because the grievance does not involve a violation of the civil service law. That may well be the Respondent's contention concerning the merits of the Grievant's grievance, but it has nothing to do with jurisdiction. Such is based upon the allegation that certain acts by the Respondent constitute a violation of law. As we have found, the Grievant has made such allegations and, therefore, the Respondent's Motion is denied.

Section 16.01(2) Requires That The State's Action Be  
Based on Employee Competence and Not on Unlawful Reasons

The civil service law provides that employes be treated on the basis of their competence and fitness. Section 16.01(2), Wis. Stats., 1971 provides:

"It is the policy of the state to maintain a strong coordinated personnel management program...To these ends the bureau of personnel with advice and quasi-judicial assistance by the personnel board shall develop, improve and protect a statewide personnel management program which assures that the state...bases the treatment of its employes upon...his demonstrated competence and fitness."

In the instant case, if the Respondent's action in refusing to extend the Grievant's employment past his normal retirement age was in violation of any specific prohibition contained in Subchapter II Civil Service of Chapter 16, or a Rule of the Director of the State Bureau of Personnel, or, if such action was unlawful or arbitrary, then it would also violate Section 16.01(2). The Board would be derelict in its duty to assure that employes are treated on the basis of their demonstrated competence and fitness, if in individual cases, the Board permitted employes to be treated in an illegal manner in contravention of their rights under the Civil Service Statute, the Director's Rules, and the Constitution and Laws of Wisconsin and the United States.

Grievant Was Not Unlawfully Refused

Employment Past Retirement

The issue in this proceeding is whether the Respondent unlawfully refused to extend Grievant's employment past his normal retirement age. The Grievant argues that he was really laid off in violation of the layoff and limited term employment statute and rules. This is based on the fact that approximately two months after he was retired, his replacement had a heart attack, and the Grievant was hired as a limited term employee for approximately a six months and 10 day period, performing the same job he did before his retirement. We find that on September 30, 1973, Grievant's employment was terminated by reason of his compulsory retirement and that he was not laid off. Further, we find that he was later hired as a limited term employe to temporarily fill a position occupied by a permanent employe who was recuperating from a heart attack.

Grievant contends that the refusal to extend his employment was contrary to the laws against discrimination. Both state and federal statutes prohibit discrimination in employment against employes who have not reached age sixty-five (65), such as the Grievant, except under a retirement policy, which is not a subterfuge to evade the anti-age discrimination law. Section 111.32(3)(c), Wis. Stats., 1971. 29 U.S.C. 623(f). Nothing in the record shows that benefits from the Wisconsin Retirement Fund are unsubstantial or in jeopardy of not being paid. We find them to be substantial and reasonably certain of payment. Walker Mfg. Co. v. Industrial Commission, (1965) 27 Wis. 2d 669; 29 ALR 3rd 1413. We conclude that Respondent's refusal to extend the Grievant's employment was not a violation of the anti-age discrimination laws.

The Grievant argues that since the state originally advised him that his retirement date was June 30, 1974, it is estopped from advancing it to September 30, 1973. While the State's announcement of the 1974 date was action that it evidently made with the intent that the Grievant shall rely upon it, we do not find that the

Grievant did rely upon it to his detriment. The only testimony on this matter was to the effect that the Grievant had hoped that he would have the added work so that he would have additional wages and that he would have a larger pension by his military service being counted in the benefit computation. As this turned out, he received most of the added wages, but didn't get the additional pension credits. We conclude that he did not rely to his detriment upon the Respondent's action.

ORDER

IT IS ORDERED that the appeal of the Grievant's grievance is hereby dismissed.

Dated January 2, 1975

STATE PERSONNEL BOARD

BY



William Ahrens, Chairman