



The background for this decision as set forth by Respondents and which we find as fact is as follows. Previous to the time the Governor took office in January 1971 all of the members of the Parole Board were white caucasian males. The Governor desired that the membership of the parole board should be more representative of the population as a whole and the Wisconsin prison population, in particular, and therefore should include women and minorities. Further, the parole board deals heavily in matters which affect the lives of juveniles, and the Governor felt a woman's viewpoint would be particularly appropriate in dealing with questions involving juveniles.

Subsequent to January 1971 four vacancies occurred on the parole board other than the restricted register position in question here, either because of resignations or the creation of new positions, for a total of five positions. The Governor was aware of this and also of the fact that previous efforts to appoint a woman to the parole board were frustrated, at least in part, because of veterans points, and the only success at appointing a minority person or a woman occurred for the last vacancy when a minority was appointed. All five of these vacancies were considered together when the Governor made his recommendation to establish this special register and authorize creation of the new position of parole board member contingent upon the appointment being a woman. Thus, it was the Governor's understanding that this recommendation would establish a ratio of two positions for minorities and women and three positions for unrestricted competition out of a total of five positions since January 1971. This recommendation was adopted by the Board of Governmental Operations at its December 21, 1973, meeting and the special register hiring ensued.

The Appellant is a state employe and a male. Subsequent to the appearance of the job announcement and on March 12, 1974, he wrote a letter to the Bureau of Personnel objecting to the establishment of a special employment register. The Director responded by letter dated March 14, 1974, stating that he felt there was an adequate statutory basis for the action in question in S. 16.08 (7), Wis. Stats., and Chapter Pers. 27, Wisconsin Administrative Code. The Appellant's appeal to the Personnel Board was received March 28, 1974.

#### CONCLUSIONS OF LAW

We must first determine the appropriate scope of review of Chapter Pers. 27 and its utilization here. The Appellant argues that Pers. 27 and the Director's

action contravene state and federal statutes and the state and federal constitutions.<sup>1</sup> The Respondents take the position that "administrative agencies such as the Personnel Board do not have the power to rule a provision of the Administrative Code or a statute to be unconstitutional . . . ." (letter from Edward Main dated December 16, 1974, p. 2).

In Fulton Foundation v. Department of Taxation, 13 Wis. 2d 1, 13 (1961), the Wisconsin Supreme Court dealt with the question of the power of administrative agencies to determine the constitutionality of state statutes. This case applied to both the state and federal constitutions. The court held that the agency had such power in "situations involving issues of great public concern."

The instant case raises questions concerning the Fourteenth Amendment requirement of equal protection of the laws as it relates to public employment and the problem of "reverse discrimination." We conclude that this is an issue "of great public concern."

Reaching the merits of Appellant's Fourteenth Amendment challenge, we turn to our decision in Krajco v. Wettengel, Wisconsin Personnel Board 74-68, July 30, 1975. There we upheld a utilization of Pers. 27 to restrict hiring for an electrician apprentice position to women and minorities. We adopt the same reasoning to include that it is not impermissible per se to limit selection for a position in whole or in part on the basis of sex. Relying further on our decision in Krajco, which in turn relied on the Wisconsin Supreme Court's holding in Warshafsky v. The Journal Co., 63 Wis. 2d 130 (1974), we conclude that the restriction, which only relates to sex, must only pass the "rational relationship test" enunciated in Warshafsky, 63 Wis. 2d at 140:

This court is also reluctant to deviate from the traditional test of upholding a legislative classification unless said classification is patently arbitrary and bears no rational relationship to a legitimate governmental interest in the instant action.

The governmental interests identified by Respondents that would be served by having female representation on the board are making the parole board more representative of the population as a whole and the prison population in particular, and increasing the board's effectiveness in dealing

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<sup>1</sup>The Appellant's position on the latter is somewhat unclear as he prefaces his remarks with: "Although it is probably beyond the scope of the Board of Personnel to decide matters of Federal Constitutional Law . . . .," Appellant's brief, p. 4.

with women, minorities, and juveniles. We conclude that these are legitimate government interests. We further conclude that there exists a rational relationship between these interests and the placement of at least one woman on the board, and that there exists a rational relationship between the creation of a restricted employment register in this case and the placement of at least one woman on the board. Finally, we conclude that the classification established by the creation of the register is not arbitrary. Thus we conclude that the actions of the Respondents in this case do not contravene the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

We further conclude that the actions of the Respondents do not contravene any state statutes. The Wisconsin Supreme Court has held that the state and state agencies (such as the Department of Health and Social Services) are not included within the terms of S. 111.32, Wis. Stats. See State ex rel Wisconsin Department of Public Instruction v. Wisconsin Department of Industry, Labor and Human Relations, 68 Wis. 2d 677 (1975). Thus at the time of the establishment of the register in question the Respondents were not covered by the statute. While it has since been amended, to include the state as an employer, the act by its terms would not apply to appeals before this Board. See Chapter 31, Laws of 1975, Section 2:

Applicability. This act applies to complaints filed under subchapter II of chapter 111 of the statutes prior to and on the effective date of this act and to causes of action arising under that subchapter which the statute of limitations has not extinguished.

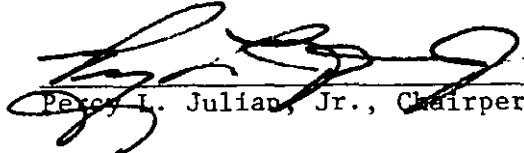
We further conclude that we do not have the jurisdiction necessary to determine the legality of this matter under the federal provisions of Title VII of the Civil Rights Act of 1964. Jurisdiction of these matters is lodged with the Equal Employment Opportunity Commission and the federal judiciary, 42 USC SS. 2000e-4, 2000e-5. There are no statutory provisions granting jurisdiction over such matters to the Wisconsin State Personnel Board.

ORDER

IT IS HEREBY ORDERED that the action of the Director from which the Appellant appealed is affirmed.

Dated November 25, 1975.

STATE PERSONNEL BOARD

  
Percy I. Julian, Jr., Chairperson