

**OFFICIAL**

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CAROLYN G. RIDDLE,

Appellant,

v.

MANUEL CARBALLO, Secretary,  
Department, of Health & Social Services,

Respondent.

Case No. 76-127

\* \* \* \* \*

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

INTERIM  
OPINION AND ORDER

NATURE OF THE CASE

This case involves certain matters relative to the closing of the Wisconsin School for Girls (WSG) - Oregon. At the prehearing conference it was determined that the appellant's counsel would file more particular pleadings and that the issues presented for the board by this appeal are as follows:

- "1. Whether the personnel board has jurisdiction under Section 16.05, Wis. Stats., to hear this appeal?
- 2. Whether the Board should exercise its discretion and hear this appeal under Art. X of the Agreement between AFSCME Council 24, WSEU, AFL-CIO and the State of Wisconsin?"

OPINION

The appellant through counsel alleges that at the time of the closing of WSG she and others she represents were employed there as youth counselors to its juvenile offenders. The facility was subsequently reopened as an adult offender camp (Oakwood), and appellant was laid off effective June 30, 1976. Thereafter the appellant and others similarly situated participated in a promotional competitive examination for Officer 3-Trainee at Oakwood. Appellant was informed that she passed the exam and was

certified for the position, but approximately contemporaneously was told that she was being removed from the register on account of age (55). However, she subsequently was advised that her name was being maintained on an eligibility list for Officer 3 positions in the adult camp systems. Appellant's counsel further alleges that his investigation leads him to believe that when other elements of the camp system were converted from youthful to adult offender, males who were "grandfathered" were allowed to continue past the age of 55, while classified as Officer 3's, while appellant and those she represents were not given similar treatment.

As part of his response to these allegations, respondent, through counsel, argues that officer classifications are included in "protective occupations" pursuant to S. 41. 11(6), stats., and that S. 41.02(23), stats., establishes 55 years of age as the normal retirement date for those in protective occupations. The respondent acknowledges that the appellant was removed from the Officer 3 register because of her age, and alleges that she was inadvertently sent a form letter mailed to all persons on that register. Respondent denies ever appointing any person, male or female, over the age of 55 to a new position in the protective occupations. Respondent further denies that any male over the age of 55 was deliberately certified to the camp system for Officer 3 positions; that any male over the age of 55 was allowed to remain on the certification register (on information and belief that no 55 year old men were or are on the register in question); or that any male over the age of 55 was appointed to any position in the protective occupations in any corrections institution.

Pursuant to Article X of the contract, appeals under that provision are discretionary with the board. In our view, the question of age dis-

crimination is foreclosed by the provisions of S. 41.02(23), stats. Even if the board had the authority as an administrative agency to rule on the constitutionality of this statute, a proposition which is not altogether clear, the constitutionality of this type of provision has been upheld by the United State Supreme Court, see Mass. Bd. of Retirement v. Murgia, 96 S. Ct. 2562 (1976). We perceive no basis of jurisdiction other than under S. 16.05(1)(h), stats., "Review and act on decisions of impartial hearing officers under S. 111.91(3)," the authority for Art. X of the contract. The only allegation of appellant that would constitute potential error or irregularity on the part of the respondent is the "belief" that male employes were "grandfathered" while females were not. This respondent denies.

ORDER

This case will be held in abeyance for 30 days after the date of service of this interim opinion and order. During that period, the appellant may file and serve an affidavit or other evidence relative to the allegation that males similarly situated to appellant were "grandfathered." Respondent may file and serve a reply 7 days after service of such material. It will then be determined if an evidentiary hearing or any further proceedings are appropriate. The appeal will be dismissed at the end of 30 days if nothing further is filed.

Dated July 22, 1977.

STATE PERSONNEL BOARD

  
Laurene DeWitt, Chairperson