

STATE OF WISCONSIN

STATE PERSONNEL BOARD

LARRY ALBERTS, THOMAS BRUCKNER,
KENNETH SHIMOTA and DARRELL ARNDT,

Appellants,

v.

MANUEL CARBALLO, Secretary,
Dept. of Health & Social Services, and
VERNE KNOLL, Deputy Director,
State Bureau of Personnel,

Respondents.

Case Nos. 76-93, 76-94, 76-95 and 76-96

OFFICIAL

OPINION AND ORDER

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

NATURE OF THE CASE

This is an appeal of a selection process pursuant to Section 16.05(1)(f), stats. The appellants allege they were discriminated against in violation of S. 16.14, stats., by the utilization by the respondents of a restricted register pursuant to Chapter Pers. 27, W.A.C.

FINDINGS OF FACT

Respondents announced an examination, delegated by the director to the department, via S. 16.03(2), stats., for the position of parole board member. The announcement (Respondent's Exhibit 1) contained in part the following language:

"Pursuant to Wisconsin Administrative Code Chapter Pers. 27, a special employment register may be established to provide selective certification of persons who are members of the following occupationally disadvantaged groups: Women, Blacks, Hispanics, American Indians, Asian Americans, for positions to be filled from this recruitment."

The appellants all applied for this position. The response received

from the department personnel manager (Appellants' Exhibit 1 dated May 7, 1976) contained in part the following language:

"After reviewing the recruitment results, it has been determined that a special employment register will be established and used to fill the current openings.

As your application or other materials do not indicate that you are a member of the named disadvantaged groups, you will not be scheduled for further steps in the selection process for these positions."

As set forth in the letters the appellants were excluded from further participation in the selection process for the stated reasons.

The determination by respondents to utilize a Pers. 27 register was based on two factors. First, the affirmative action goal of including a more representative percentage of women and minorities in the state's workforce in the professional occupational area. Second, it was part of a conciliation agreement in another proceeding challenging a prior selection process for parole board member, on the grounds that it discriminated against women and minorities, that the vacancy in question here would be filled from a pool consisting of women and minority applicants. (Respondents' Exhibit 2). This stipulation and the proceedings in which it was reached did not involve the instant appellants as parties.

As a final result of the selection process in question, a minority male was appointed to the vacancy.

CONCLUSIONS OF LAW

Since the filing of this appeal and the hearing in this case the Supreme Court has spoken on certain issues raised by the use of Pers. 27. State v. DILHR, 77 Wis. 2d 126, ___ N.W. 2d ___ (April 19, 1977). That case involved a selection process which limited applicants as follows:

". . . only applicants who are women, or who are members of the six

minority groups as defined by the EEOC may apply for this position."

Further facts were stated by the court as follows:

"On December 26, 1972, Patzer filed an application for this position. In a letter to Patzer, the Bureau of Personnel inquired as to whether he was a member of one of the target groups indicated in the announcement, and he responded that he was a white male. Patzer was then notified that his application could not be considered because he was not a member of the target groups to which eligibility to apply was extended." 77 Wis. 2d at 131.

The court went on to analyze the question whether Pers. 27 is a valid exercise of legislative authority pursuant to S. 16.08(7), which authorizes exceptional methods and kinds of employment for the occupationally disadvantaged. The court analyzed the general legislative intent of subchapter II of Chapter 16 as follows:

"Thus, the basic purpose of the legislature's delegation is clear--the Director is to establish a system which tests the ability of applicants for particular jobs so that the most qualified are employed." 77 Wis. 2d at 134-135.

The court then held that there was neither express nor implied authority in S. 16.08(7) for the "declaration of policy made in Pers 27 regarding extraordinary employment of minorities and women in order to correct past alleged evils of discrimination." 77 Wis. 2d at 136.

The court concluded:

"Therefore, the power to utilize absolute preferences is not granted to the Director of the Personnel Board. Insofar as Pers. 27 authorizes the establishment of employment lists which constitute absolute preferences based upon sex or race, it is void ab initio Accordingly, Pers. 27, upon which the appellants rely, is not valid authority for the exclusion of Patzer solely because of his race or sex." 77 Wis. 2d at 140-141.

It is concluded that the facts in the four cases under consideration do not differ in any material way that would exclude them from the rule expressed by the Supreme Court in the foregoing decision. The only difference in the two selection procedures are the facts that Mr. Patzer

was not allowed to file an application once it was determined that he was not in one of the identified "disadvantaged" groups, while the four appellants in the instant cases were allowed to file applications but were not allowed to participate further in the selection process once it had been determined that they were not in one of the identified groups.

This distinction is not sufficient to except these cases from the rule enunciated by the Supreme Court. The four appellants were prohibited from participating in the selection process for parole board member solely because of their race and sex. The fact that they were allowed to file applications before being screened out does not make the respondents' actions any the less an implementation of an "absolute preferences based upon sex or race," an initial step in the "establishment of employment lists which constitute absolute preferences based upon sex or race," and "the exclusion of [respondents] solely because of [their] race or sex." 77 Wis. 2d at 140-141.

The fact that the utilization of Pers. 27 in this case was at least in part the result of a stipulation agreed to in other litigation does not mandate a different result. The appellants were not parties to that stipulation and cannot be held bound to it as are the voluntary signatories. While the director undoubtedly was bound by the stipulation at the time he effectuated it through utilization of Pers. 27, there is no legal theory that insulates the director's actions from review when third parties make charges of statutory violation in derogation of their rights.

While it is concluded, therefore, that the actions of respondents excluding the appellants from the selection process for parole board member must be rejected, there remains the question of what remedy, if any, can be provided at this point. Inasmuch as an appointment has been made

as a result of this selection process, it would be necessary to void that appointment in order to enable the appellants to compete for the position. The Dane County Circuit Court has held that the Personnel Board does not have the authority to void appointments in such a situation.

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(2/25/77). The court did indicate that the appellants could have appealed the appointments to the director pursuant to S. 16.03(4)(a), stats. requesting that he vacate them, with a further appeal to the board if the director refused to act as requested. This was not done in this case, and, the board can take no action with respect to the appointment at this time. However, this board decision should provide a precedent with respect to the same or other positions for which appellants might apply.

ORDER

The actions of respondents excluding appellants from the selection process for the position of parole board member are rejected and this matter is remanded for appropriate action.

Dated July 22, 1977.

STATE PERSONNEL BOARD


Laurene DeWitt, Chairperson