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DELORES WARNKE,

Appellant,

v.

SECRETARY, Department of Health  
and Social Services,

Respondent.

Case No. 77-123

\* \* \* \* \*

**OFFICIAL**

OPINION AND  
ORDER

Before: James R. Morgan, Calvin Hessert and Dana Warren, Board Members.

NATURE OF THE CASE

This is an appeal of a termination of a probationary employe pursuant to Article IV, Section 10, of the contract between the state and the WSEU.

FINDINGS OF FACT

1. Appellant commenced employment as an officer 1 on 6 months probation at the Wisconsin Correctional Institution (WCI), Fox Lake, on September 20, 1976.

2. On January 21, 1977, appellant resigned her position effective February 26, 1977.

3. At the time of filing this resignation the appellant was informed by the institutional personnel manager that if there were a drastic improvement in her work in the next 5 weeks the letter of resignation could be reconsidered, but otherwise her choice was between resignation and probationary termination.

4. The appellant's supervisors did not determine that her performance had improved sufficiently during this period to warrant retention as an employe at the WCI.

5. During the period of her probationary employment, the appellant's performance and training progress were evaluated on an ongoing basis by security staff supervisors and other employes who submitted ratings and reports

to Lt. Otto, the then training officer.

6. These ratings and reports were analyzed and summarized by Lt. Otto on monthly evaluation reports which evaluated the employe pursuant to the following traits or rating areas: rate of learning, judgement, quality of work, quantity of work, work habits, human relations, and overall fitness for position.

7. These reports for appellant during the period of her probationary employment were generally poor or below average.

8. On December 28, 1976, the appellant while on guard duty in a tower failed for a protracted period to become aware of the presence of a supervisor who had approached and remained near the tower with his car at night with the headlights and interior lights on.

9. The appellant on occasion sought medical treatment and medication, on a non-emergency basis, from the WCI doctor.

10. The decision to terminate appellant's employment was based at least in part on reports from 14 different officers and supervisors.

11. Of 4 other female officers hired at WCI since the beginning of appellant's employment 2 successfully passed probation and 2 were still on probation as of January 19, 1978.

#### CONCLUSIONS OF LAW

1. The appellant resigned from her position of employment with the WCI.
2. The Personnel Board lacks jurisdiction over this case under Article IV, §10, of the WSEU contract, and §16.05(1)(h), Wisconsin statutes, or under any other jurisdictional basis, appellant having resigned from her position of employment.

#### OPINION

Article IV, §10 of the WSEU contract provides for a limited right of appeal for employes who "are released." See In re request of AFSCME, etc. for declaratory ruling

Wis. Pers. Bd. no 75-206 (8/24/76). An employe who resigns is not "released" as contemplated by this provision. The appellant referred to an "involuntary" resignation in her appeal letter. However, the Board discussed the meaning of an involuntary resignation in Biesel v. Bartell, 77-115 (9/15/77). Such a resignation requires "an actual overriding of the judgment and will" and does not include a situation where an employe is given a choice between resignation and firing. In the opinion of the Board, it makes no difference that the employe is also told that the resignation might be withdrawn if there is an improvement in her performance between the date of submission of the resignation and its effective date.

Since there was a hearing on the merits, the Board will discuss by way of dictum or comment on the appellant's separation as if it had been a release or termination of a probationary employe.

On a review of such a transaction, the legal standard is whether the termination was arbitrary and capricious and the burden is on the employe to establish this. See In re request of AFSCME, etc., for a declaratory ruling, Wis. Pers. Bd. No. 75-206 (8/24/76). This provides much less protection for the probationary employe than for the permanent employe, who is protected by a "just cause" legal standard with the burden of proof being on the employer. If any event, in this case, there was substantial dissatisfaction with appellant's performance and particular incidents of unsatisfactory performance. The possibility that the separation was motivated by personality conflicts is gainsaid by the wide distribution of negative evaluations and reports. There is nothing in this record, including the statistical data presented that would substantiate a finding or conclusion of sex discrimination. The employer's action cannot be characterized as arbitrary and capricious.

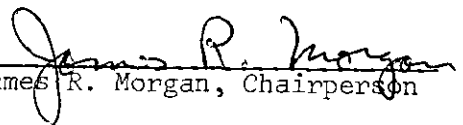
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ORDER

This appeal is dismissed.

Dated: April 11, 1978

STATE PERSONNEL BOARD

  
James R. Morgan, Chairperson