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PHILIP H. HAERLE,

Appellant,

v.

C. K. WETTENGEL, Director,  
State Bureau of Personnel,

Respondent.

Case No. 73-139

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**ORIGINAL**

OPINION AND ORDER

Before JULIAN, Chairperson, STEININGER, AHRENS, SERPE and WILSON

OPINION

I. Findings of Fact

Appellant who was thirty-four years old applied for the position of police cadet. He was subsequently certified to take the oral exam given on July 23 and 24, 1973.

The Oral Board was properly composed of three members who were experts in the field being tested. (Sec. 16.12(3).) Generally before the testing is commenced they are instructed by a person from the Department of Administration not to ask questions which could be construed as discriminatory regarding race, color, creed, religion, origin, age, sex, etc. The Oral Board in the instant case received this warning from Oscar Cervera, Service Specialist 2, before the examination began. Mr. Cervera was present during the entire exam in order to monitor the questions asked and equipment used.

During the course of an oral examination the tape recorder would not ordinarily be stopped. However, if a discriminatory question were asked by the Board, the tape would be stopped immediately. The proctor would then inform the members that the question was improper. The examination would continue with the discriminatory question recorded, but no answer given.

If a board member had a question which he thought might be discriminatory or improper, the tape would be also stopped to determine its propriety. If the applicant had a question which he did not want on the tape or, if he wished to consult with someone for a reason, the tape would be stopped for that time. Otherwise, the tape would only be stopped if there were a need to change the tape or if there were a malfunction.

Early in Appellant's interview the tape was stopped twice because of apparent mechanical problems. Because of this difficulty with the tape, part of Appellant's examination was not recorded or was distorted. There were no questions regarding age recorded.

## II. CONCLUSIONS

The Personnel Board has jurisdiction to hear a case arising out of alleged improprieties at an oral examination. (Sec. 16.05(1)(f).)

The Appellant has the burden of proof on a case such as this. It is a well established legal principal that the part asserting the affirmative of the case has the burden of proof. 29 Am. Jur. 2d 127.

There were no improprieties during  
the Appellant's oral examination

Appellant contends that the examination was improper in two ways. First, he claims that the Board asked him an improper question regarding his age. If this were established, it could be inferred that the Board based its decision on his answer, thereby discriminating against him because of his age. The second alleged area of impropriety centered around the Board's refusing to accept letters of recommendation which Appellant first presented during the oral examination.

The transcript of the oral examination reveals only two periods during which a question about age could have been asked. These were the times the tape was stopped. However, a close look at the written transcript of the oral examination shows that no such question could have been asked and answered. At the first point of difficulty, it is only part of Appellant's answer to the opening set of questions which is missing. The part recorded indicates not a great deal was lost since he is apparently answering the first question.

At the second point of difficulty there was a 13 second recorded pause as well as a point when the tape was stopped. Again the transcript indicates that no question regarding age could have been asked since the transcribed material has no relation to that subject.

Appellant raised the possibility that the tape was tampered with or erased. He did not present any evidence on this point for which he had the burden of proof. Therefore, this allegation must fail.

Assuming that a question were asked regarding Appellant's age, it could not be construed as discriminatory. Appellant testified that the oral board "made a statement verifying my age which I verified."  
(Transcript of Hearing, page 9)

In order for a question to be discriminatory it must fall within one of the suspect categories and it must be able to be construed as discriminatory. The second requirement is missing.

Section 111.32(5)(b)(1) states:

It is discrimination because of age for an employer . . . because an individual is between the ages of 40 and 65, to refuse to hire . . . such individual . . . .

Appellant being thirty-four years old at the time of the interview does not fit this definition. Furthermore, under Section 111.32(5)(e):

The prohibition against discrimination because of age shall not apply to hazardous occupations including, . . . law enforcement . . . .

The Board Members had before them a copy of Appellant's application plus all papers submitted by him. The application contained information concerning his age. A simple verification of age would not indicate bias against the Appellant.

The tape was not stopped except at the two times discussed above. At neither of those times was a discriminatory question asked. If one had been, Mr. Cervera testified he as proctor would have so indicated before the examination and the tape continued.

Although it is the present policy to stop the tape during the interview should a discriminatory question be asked, this Board believes that this practice should be halted. The individual being examined has the right to a continuous recording that would include the reprimand as well as the discriminatory question. This is for the protection of that individual and the Oral Board.

The only reason a tape ought to be stopped during an oral examination is if mechanical difficulties arise. This was the case in the instant appeal.

Appellant's second contention of impropriety is equally without merit. In accepting applications, the Bureau of Personnel does not encourage the inclusion of letters of recommendation. Only additional letters which verify information contained in the application are added to the file and presented to the oral board. The oral board acted correctly in refusing to accept Appellant's letter. Even if Appellant had submitted them at the time he filed his application, they would not have been given to the board for its evaluation and decision.

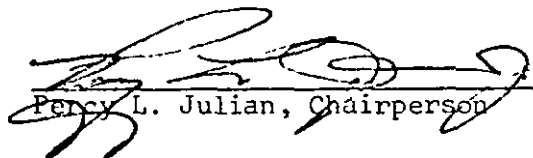
Therefore, the Board finds that there were no improprieties during the Appellant's oral examination, and accordingly affirms Respondent's action.

ORDER

IT IS ORDERED that the action of the Respondent is affirmed.

Dated this 3rd day of June, 1975.

STATE PERSONNEL BOARD

  
Percy L. Julian, Chairperson