BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
NORTHEAST WISCONSIN TECHNICAL COLLEGE EDUCATIONAL SUPPORT PERSONNEL	:	Case 79 No. 49775 MA-8057
and	:	
NORTHEAST WISCONSIN VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	:	

Appearances:

Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, on behalf of the Northeast Wisconsin Technical College Educational Support Personnel.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Robert W. Burns, on behalf of the Northeast Wisconsin Vocational, Technical and Adult Education District.

ARBITRATION AWARD

The Northeast Wisconsin Technical College Educational Support Personnel, hereinafter the Union, and the Northeast Wisconsin Vocational, Technical and Adult Education District, hereinafter the District, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the District in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on November 16, 1993, in Green Bay, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by February 1, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues.

The Union would state the issue as follows:

> Did the Employer violate the collective bargaining agreement when it eliminated the full-time positions of Grievants Ben Binon and Barry Olson and did not reassign them to full-

time positions at lower salary levels pursuant to the reassignment language of the collective bargaining agreement?

The District states the issues as being:

> 1. [I]s the grievance arbitrable under the provisions of the collective bargaining agreement in that the grievance was filed after the expiration of a time line waiver agreement entered into between the parties;
>
> 2. [I]f an arbitrable grievance exists did the District violate Article IV, Section A of the collective bargaining agreement by not applying the reassignment provisions to a reduction in hours of the grievants where the staff positions were not eliminated. If so, what is the appropriate remedy?

The undersigned concludes that the issues to be decided may be stated as follows:

> (1) Is the grievance arbitrable?
>
> If the grievance is arbitrable, then,
>
> (2) Did the District violate Article IV, Section A, of the parties' Collective Bargaining Agreement by not applying the reassignment provisions to the employment actions it took with regard to Grievants Binon and Olson? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1991-1993 Agreement are cited:

ARTICLE II

MANAGEMENT RIGHTS RESERVED

> The Board, unless otherwise herein provided, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and Constitution of the State of Wisconsin, and of the United States, including but without limiting the generality of the foregoing the right:
>
> A. To the executive management and administrative control of the

school system and its properties and facilities, and the activities of its employees as they relate to their employment.

B. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions, to relieve from duty because of lack of work, to discipline, demote, or dismiss for proper cause, and to transfer such employee.

The above outlines the management responsibilities and rights of existing Wisconsin laws, and nothing in the above shall reduce the rights of employee recourse to the grievance procedure as provided within this agreement.

. . .

ARTICLE IV

SENIORITY

. . .

REASSIGNMENT, LAYOFF, RECALL

A. Reassignment

Where staff position(s) are being eliminated, the incumbent in any given position shall be reassigned within the following constraints:

1. It shall be assigned to that position held by the least senior employee on the same salary level; or if none less senior of the same salary level, the least senior on the next lower salary level; or if none, to the next and subsequent lower salary levels. Should such reassignment result in a reduction in pay, said reduction shall not exceed 10% for a period of no more than two semesters (nine months), at which time it would be adjusted to the appropriate position pay.

2. Reassignment shall not take place outside of the employee's listed campus.

3. Reassignment shall only be available to a position having a comparable number of hours per pay period. No distinction shall be made for work schedules of 12 or less months. For the purpose of determining comparable hours, all staff shall be divided into two groups, those assigned less than 75% of a full work week and those assigned 75% and more.

4. Reassignment shall not be made unless the employees remaining are qualified to perform the remaining work.

B. Layoff

Staff remaining unassigned or who are unable to be assigned within the constraints above shall be laid off subject to the rights and restrictions of the Master Working Agreement.

1. Except where layoff is the result of circumstances outside the control of the District, the District shall provide written notice of layoff at least two calendar weeks prior to the effective date of layoff, or two week's pay in lieu of said notice.

2. Employees placed on layoff status may request payment of any and all accrued vacation pay anytime during their period of layoff at the rate of pay last received. Said payment would not extend the effective date of layoff nor would it extend any recall rights.

3. Any employee with at least six months' seniority shall be permitted to continue membership in the insurance program(s) for a

period of twelve (12) months after the effective date of layoff, eighteen (18) months for those having more than two years' seniority, as long as such participation is not against the policies or regulations of the carrier(s) and so long as the employee remits the full cost of the premium(s) for such participation in a timely manner.

4. Non-probationary employees who are on layoff status shall be offered any long term substitute or temporary position for which they are qualified which may occur during the period of their layoff on their original campus of assignment. For the purposes of this section only, long term substitute and temporary positions shall be defined as those which would provide at least thirty (30) work days. All rights and benefits associated with a permanent position will be provided an employee filling the position under this section, except that time spent in said substitute/temporary position shall not extend the effective date of any recall rights. Employees shall be provided ten (10) days' notice to report for said work; failure to report shall result in the employees' termination, and any and all rights under the Master Working Agreement shall cease.

. . .

ARTICLE XII

GRIEVANCE PROCEDURE

1. A grievance is herewith defined as any dispute or difference between the Employer and the Union or employees so represented with respect to the interpretation or application of any provision of this Agreement.

A. The union shall have the right to present, process, or appeal a grievance at any level in its own behalf.

B. The employee shall have the right to be represented by counsel at any step in this procedure.

C. The grievance procedures provided in the agreement shall be supplementary or cumulative to, rather than exclusive of, any procedures or remedies afforded to any employee by law.

D. No decision or adjustment shall be contrary to any provision of this agreement existing between the parties hereto.

E. Failure at any step of this procedure by the employer to communicate the decision on a grievance within the specified time limit shall permit the Union to submit an appeal at the next step of this procedure.

F. The time limits specified in this procedure may be extended in any specific instance by mutual agreement in writing.

G. In instances where an employee is dismissed and chooses to grieve the action, the grievance process may begin at Step 3.

PROCEDURE

STEP 1. Any employee in the bargaining unit, or the union in its own behalf, claiming to have a grievance shall meet with the appropriate supervisor, either directly or accompanied with a union representative, with the object of resolving the matter informally within fifteen (15) days of discovery.

STEP 2. In the event that the matter is not resolved informally, the grievance stated in writing may be submitted to the director or his designee within five (5) working days.

A. Within five (5) working days after receiving the grievance, the director shall communicate his decision in writing, together with the supporting reasons.

B. The director shall furnish one copy to the employee who submitted the grievance and one copy to the Union representative.

STEP 3. If the grievance has not been resolved satisfactorily within five (5) working days after receiving the decision of the director, the grievance may be submitted to arbitration in accordance with the procedure in Article XIII, ARBITRATION.

ARTICLE XIII

ARBITRATION

When a controversy cannot be settled through the grievance procedure, the union may appeal directly to the Wisconsin Employment Relations Commission for arbitration.

The decision of the arbitrator shall be in writing and shall set forth his opinions and conclusions on the issues submitted to him at the hearing and in writing.

The decision of the arbitrator, if made in accordance with his jurisdiction and authority under this agreement, will be accepted as final by the parties to the dispute and both parties will abide by it.

No arbitrator shall have the right to change, add to, subtract from or modify any of the

terms of any written agreement existing between the parties.

BACKGROUND

The District is responsible for maintaining and operating the Northeast Wisconsin Technical College located in Green Bay, Wisconsin. The Union is the exclusive collective bargaining representative for all regular full-time and regular part-time technical support employes of the District working 18 3/4 hours or more per week. The District and the Union are parties to a collective bargaining agreement covering those employes.

The Grievants, Ben Binon and Barry Olson, were employed by the District as Auto Lab Aides on a full-time basis. By the following letter of July 2, 1993, Binon was notified of a change in his employment status:

> Dear Mr. Binon:
>
> Instructional Services has been reviewing the present and historic enrollments within Auto Mechanics. It has been clear for a number of years that enrollments do not justify present staffing levels.
>
> Based upon the above review, the college has determined to staff your position as second year Auto Lab Aide on a half-time (18 3/4 hour per week) basis. Hopefully, I was able to reach you by phone before you receive this letter. It is my hope to discuss with you both the rationale and impacts of this decision.
>
> Effective with the fall semester, both the hours and the level of which benefits would be paid will be adjusted. I have asked Kim Jameson from my office to provide you with specific figures regarding the benefit cost. The hours and specific work schedule would best be obtained from the department.

I am sure you may have additional questions. Please feel free to contact me and/or John Pogorelc or Marv Bausman at your convenience.

Sincerely,

William C. Evans /s/
William C. Evans
Vice President, Personnel

jt

c: ESP President (Karen Parr)
Bayland Teachers' United (Dennis Muehl)
c: File

Olson received an identical letter addressed to him from Evans. The parties stipulated that the actual change in status for both Grievants was from full-time to half-time and was effective with the start of the 1993-94 school year.

On July 20, 1993, Sharon Van Den Heuvel and Karen Parr, the Union's Grievance Chairperson and President, respectively, approached the District's Vice-President of Human Resources, William Evans, regarding obtaining a waiver of the time lines for filing a grievance on behalf of Binon and Olson and asked him to sign the written waiver set forth below. Evans indicated he would not agree to an "open ended" waiver, but could agree to waive the time lines through the end of the month and wrote in "Waiver through July 93" and signed the document. Van Den Heuvel and Parr had signed the document before giving it to Evans. After signing the document and adding the notation on it, Evans had copies made of the document and Van Den Heuvel subsequently received a copy of the document that read as follows:

GRIEVANCE AGREEMENT

July 20, 1993

It is agreed by both the NWTC-ESP Union and management to waive the deadline for filing a grievance regarding the layoff status of both Ben Binon and Barry Olson.
The waiver agreement was found necessary as all involved were unable to meet within the deadline to resolve this layoff issue. This agreement grants the union the right to file a formal grievance at a later date and management agrees to accept the notice without regard to the normal deadline as addressed in

the technical contract.

Waiver through July 93 /s/

William Evans /s/
Bill Evans, Vice President Personnel Services

Sharon Van Den Heuvel /s/
Sharon Van Den Heuvel, Grievance Chairperson, NWTC-ESP

Karen Parr /s/
Karen Parr, NWTC-ESP President and Witness

On August 12, 1993, the instant grievance was filed on behalf of Binon and Olson alleging a violation of Article IV, Reassignment, Layoff and Recall, on the basis that they were not the least senior employes. The grievance also stated, in relevant part, as follows:

> **Date Facts Became Known:** July 20, 1993 a Grievance Agreement was signed by Union and Management granting the union the right to file at a later date without regard to normal deadline.
>
> **Article:** IV **Section:** _____ **Allegedly Violated**
>
> Reassignment, Layoff, Recall
>
> **What Previous Action Has Been Taken To Resolve The Problem:**
>
> Layoffs were discussed with Vice President Personnel, and Assistant with regard to possible solutions satisfactory to both sides and the employees involved.
>
> Grievance Agreement was signed allowing the Union to file a grievance if necessary at a later date without the restriction of the normal deadline.

Evans responded to the grievance by letter of August 18, 1993 which stated, in relevant part, as follows:

Answer to Aggrieved:

Your grievance, our number G272, has been reviewed in light of the contract language cited, other related contract language, negotiations notes and the procedural interpretations put forth by the union. Based upon the foregoing, your grievance is denied. The college is acting within its contractual obligation and responsibility. This decision is based on the following:

1. Procedurally, as noted, the college did waive grievance timelines but specifically only through the end of July. The grievance was filed August 12;

2. The grievance alleges a layoff and, further, in relief requests reassignment. The cited point, "reassignment, layoff, recall", specifically provides Reassignment only "where staff position(s) are being eliminated....." and does <u>not</u> provide reassignment options for a reduction in hours;

Subpoint B, Layoff, is likewise only available to those unassigned or unable to be assigned within the constraints of subpoint A. Neither of these subpoints are available/actuated as a result of a reduction in hours;

3. The concept of changes in hours is not one totally ignored by the Master Working Agreement and, thus, the potential contemplated outcome must be viewed as having been considered;

4. The relief requested and associated processes as proposed by the unit are inconsistent with the reassignment, layoff and recall language and intent and ambiguous even as presented by the union.

Again, for the above reasons and as a result of the collection and analysis of related date, this grievance must be denied.

The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Procedural Arbitrability

District

The District asserts that the grievance is untimely, and, therefore, not arbitrable. The Union came to Evans with a typed agreement to waive the time limits for filing a grievance and Evans stated his concern about agreeing to an "open-ended" waiver. Evans instead limited the waiver to only through July of 1993, and noted that in writing on the agreement when he signed it. Part of Evans' concern stemmed from the need to know where things stood prior to the early August starting dates of Binon and Olson. The Union did not file the grievance until August 12, 1993.

The parties' Agreement, at Article XII, clearly calls for a written waiver of time lines. There is no evidence in this case of any waiver beyond July of 1993. The fact that the Union's representatives went to see Evans to secure a waiver indicates their recognition of the importance of following the grievance time lines in the Agreement. Article XIII, of the Agreement states that an arbitrator does not have the right to "change, add to, subtract from or modify any of the terms" of the Agreement. Under the terms of Article XII and Article XIII, of the Agreement, the Union's failure to comply with the grievance procedure must be enforced and the Arbitrator is without jurisdiction to reach the substance of the grievance. Citing, Elkouri and Elkouri, How Arbitration Works, (4th Ed.), at p. 209.

In its reply brief, the District asserts that the Union's arguments concerning the virtues of informal resolution of grievances are not helpful. Here, the parties did agree to extend the time lines to allow for attempts to resolve the matter; however, the Union failed to file the grievance within the extended time limit. There is no evidence that there were any attempts to resolve the matter after July 31st, so it cannot be said that enforcing the time lines somehow cut off settlement attempts.

With regard to the Union's argument that the Arbitrator lacks contractual authority to dismiss the grievance on procedural grounds, the District asserts that argument ignores the contractual requirement of a mutual agreement in writing to extend the time lines. That requirement, coupled with the prohibitions on the Arbitrator's authority in Article XIII, requires a conclusion opposite from the Union's contention.

As to the Union witnesses' lack of recollection of Evans'

writing "Through July 93" on the waiver agreement, the Union produced no signed waiver without that notation. The Union's argument that there was no "meeting of the minds" on a July, 1993 cutoff on the waiver, coupled with the record, requires either a conclusion that there was no waiver and the grievance is obviously untimely, or there was only the waiver through July of 1993 and the grievance filed on August 12th is still untimely. The District notes, however, that the grievance itself states that there was a waiver agreement. The District concludes that the parties bargained timelines in their grievance procedure which were to be altered only by written extensions and the Arbitrator may not selectively ignore that provision in the parties' Agreement.

Union

The Union contends that if there was a violation of the contractual time lines for filing a grievance, it was only de minimis and, therefore, should not control the disposition of the substantive issue. The Union cites judicial authority and arbitral precedent, which it argues establishes a public policy favoring the use of the grievance procedure to resolve disputes regarding the application of the labor agreement. To rule that the grievance is not arbitrable in this case would contradict that public policy in favor of reaching a decision on the merits.

The Union cites Step 1. of Article XII, requiring that the employe meet with the appropriate supervisor to attempt to informally resolve the matter within 15 days of discovery. The testimony of Evans and the Union's witnesses shows that the parties met a number of times to resolve the assignments of the two Grievants. They also testified that the District and the Union have traditionally extended time lines and attempted to informally resolve grievances prior to initiating a formal written grievance. The Grievants in this case should not be penalized because the Union and the District attempted to resolve the problem without resorting to the grievance procedure. As a result of those attempts, the time lines issue is blurred. To restrict that discussion process would be burdensome and would be detrimental to a positive labor-management relationship. The Union asserts the parties have traditionally extended the time lines and cites arbitral precedent for the proposition where such a practice exists, the grievance will be considered arbitrable.

The Union also cites the testimony of Van Den Heuvel and Parr that there was very little discussion regarding the agreement to extend the time lines, no discussion regarding a specific limit on an extension and that they did not recall the handwritten notation being on the agreement. The Union asserts that, therefore, the parties did not have a meeting of the minds as to, nor a mutual understanding of, the specificity of the extension.

Even if it assumed there was a meeting of the minds regarding an extension through July, the Union would still have had five working days to file a written grievance, i.e., until August 6th. The grievance was filed on August 12th, only four working days later. Balanced against the Grievants' job rights, that is hardly a long time. The record indicates that the Union was acting in good faith and not abusing the procedure or attempting deliberate delay. It waited only until settlement possibilities became unrealistic before filing the written grievance. In cases where the substantiation process was undertaken in good faith and the employer has not been prejudiced by the delay, a subsequent grievance filed beyond the contract's time lines has been held to be arbitrable. Further, where there is ambiguity as to whether the time limits have been met, such ambiguity will be resolved in favor of considering the merits of the grievance. Equity considerations also favor finding the grievance arbitrable. Given the time and effort expended by the Union to obtain a hearing, the significance of the issue and the overwhelming merit of the grievance, it would be unjust to deny a meritorious grievance on the basis of a perceived procedural defect that did not adversely affect the District.

Lastly, the Union cites Article XII, 1., D. and Article XIII, of the Agreement and asserts that the Arbitrator lacks contractual authority to dismiss a grievance on procedural grounds. There is nothing in the grievance procedure that expressly bars the grievance. The Union also cites cases where arbitrators held that grievances were not arbitrable on procedural grounds, but points out the express contractual provisions in those cases requiring dismissal of the grievances where they are filed untimely. The Union asserts the parties' Agreement contains no such express provisions and does not grant the Arbitrator the authority to dismiss the grievance based on exceeding the time limits. The Union analogizes this case with the situation in an award by Arbitrator Raleigh Jones in Advance Stone Co., where the contract did not contain an express penalty for failing to comply with the steps in the grievance procedure. In that case, the grievance was found to be arbitrable despite a number of procedural defects in its filing. Similarly, the grievance in this case should be decided on its merits.

In its reply brief, the Union reiterates its arguments that the Arbitrator lacks authority to dismiss the grievance on procedural grounds, that it is consistent with the public policy not to dismiss the grievance on procedural grounds, and that this is not a case of abuse of the grievance procedure or undue delay to the prejudice of the employer. The Union concludes that it is in the interests of all of the parties to resolve the substantive issue.

DISCUSSION

The Arbitrator agrees that there is a "policy" on both the federal and state level of encouraging the arbitration of contract interpretation disputes. That does not mean, however, that contractual time lines for filing a grievance and moving it through the grievance procedure may be ignored. Such time lines are as much a part of the contract to be enforced as any other provision of the Agreement.

The Arbitrator does agree that where circumstances make it unclear as to when contractual time lines began to run or where it is unclear whether the timelines were not followed, arbitrators often have resolved such ambiguity in favor of resolving the merits of the dispute. In this case, however, there was a written agreement to extend the deadline only through July of 1993. The District produced the agreement signed by Evans and the Union's representatives with the handwritten notation limiting the extension to July. If the Union had a copy of the signed agreement without the notation, it did not produce such a document to rebut the District's evidence in that regard. If, as the Union asserts, there was no meeting of the minds on the waiver agreement, then there was no mutual agreement to waive the time limits. By filing the grievance on August 12th, i.e., more than five working days from the end of the extension, the Union clearly failed to meet the extended deadline for filing a grievance. The Arbitrator finds no ambiguity in that regard.

The Union cites a number of arbitration awards for the proposition that a grievant should not be penalized for his/her union's attempts to resolve a problem without resorting to the formal grievance procedure, and that if an employer willingly participates in such discussions, the timeliness issue is blurred as a result. A review of the cited awards reveals that the circumstances involved in those cases included the employer not timely raising the timeliness issue, having waited until the parties had tried and failed to settle the dispute. 1/ That is not the case here, as circumstances giving rise to the timeliness issue arose with the filing of the grievances after the talks had ended and the extended time limit had run. In the award cited regarding employer participation in the discussions blurring the time lines, 2/ the arbitrator concluded that the time line did not begin to run until the discussions had ended, and the contract did not contain a specific time line, only a requirement that discussions "should be held promptly after the date of the event out of which the request or complaint arises." In this case, the parties' discussions had ended by the end of the extension of the contractual deadline,, and there is no ambiguity to resolve.

1/ Quality Electric Steel Castings, 62 LA 1157.

2/ Weirton Steel Co., 54 LA 1049.

Since the parties had agreed to extend the deadline for the purposes of attempting to resolve the issue of Binon's and Olson's assignment, made such attempts, albeit unsuccessfully, enforcing the time line in this case does not cut off or discourage such attempts. The Arbitrator disagrees that where the parties have a practice of extending time lines in an attempt to resolve a grievance, it should follow that a grievance is arbitrable even if filed untimely. The cases cited by the Union in that regard do not support such a proposition. Those cases involved confusion regarding when the Union received the Employer's response in one case 3/ and a practice of customarily ignoring the time lines in another case. 4/ Again, there is no ambiguity as to the extent of the waiver in this case and no history of ignoring the time lines. To the contrary, the testimony indicates the parties have been careful in the past to seek mutual extensions of the deadlines, rather than ignoring them.

The Arbitrator has no doubt that the Union was acting in good faith and was not attempting to deliberately delay matters. The Arbitrator simply disagrees with the award cited by the Union that in such a case the grievance should be decided on the merits. The arbitrator in that case decided that the Union's case on the merits was so strong it should be heard regardless of timeliness defects. 5/ Under that rationale, contractual timelines would only be enforced where the Union was likely to lose anyway on the merits. Besides putting the cart before the horse, that rationale ignores the contractual limitations the parties negotiated. The Union also cites an award for the proposition that where it was acting in good faith in filing the grievance as soon as settlement possibilities became unrealistic and the District was not prejudiced by the alleged delay, the grievance should be considered arbitrable despite the running of the contractual filing timeline. 6/ In that case, unlike here, the contract did not contain a specific deadline, rather it required only "prompt utilization of the grievance procedure". In such cases, the arbitrator is left to determine what is to be considered "prompt" under the circumstances. The parties' Agreement does not leave such discretion to the Arbitrator.

The Union points out that the parties' Agreement contains no express penalty for the failure to timely file or process a grievance, and argues that the restrictions on the Arbitrator's authority in Article XIII precludes him from dismissing the grievance on that basis. The argument is not persuasive in this

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3/ Great Plains Co., 83 LA 1281.

4/ Cement Asbestos Products Co., 70 LA 180; Coca-Cola Co., 65 LA 165.

5/ Defense General Supply Center, 63 LA 901.

6/ Armstrong Cook Co., 64 LA 128.

case. The Agreement contains specific deadlines for filing a grievance and processing it through the steps of the grievance procedure. Article XII, Paragraph F, also provides that:

. . .

> F. The time limits specified in this procedure may be extended in any specific instance by mutual agreement in writing.

. . .

To find that the parties intended there to be no consequence to missing the deadlines would render meaningless both the specific time lines and the requirement of a mutual written waiver to extend those time lines. It would also appear to be contrary to the parties' intent as evidenced by their history of following the time lines or seeking the mutual written waivers extending the timelines, as the Union did in this instance. The Union's Grievance Chairperson also testified that she was aware of, and understood, the importance of meeting time lines.

It is concluded that enforcing the contractual time lines is consistent both with the parties' intent and the provisions of Article XII and Article XIII, of their Agreement. 7/ As the grievance was filed more than five working days beyond the extended deadline, it is deemed to be untimely.

Based upon the foregoing, the evidence, and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

The grievance is not timely and, therefore, is not arbitrable.

Dated at Madison, Wisconsin this 2nd day of May, 1994.

By David E. Shaw /s/

7/ It is noted that the award of Arbitrator Jones in Advanced Stone did not involve failure to meet contractual time lines in the grievance procedure; rather, it recognized that there was no purpose served by requiring the grievance to be filed at Step 1 with a person lower in the management hierarchy than the person who had made the decision to terminate the grievant.