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JON GRAND,

Appellant,

v.

SECRETARY, Department of
Natural Resources,

Respondent.

Case No. 77-213

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INTERIM
DECISION

NATURE OF THE CASE

This is an appeal of a grievance pursuant to section 16.05(7), Wis. Stats., (1975). The respondent has raised a number of objections to commission jurisdiction which this decision will address. The findings set forth below are based on material which appears to be undisputed in the file. The commission takes official notice of the APM on the unilateral grievance procedure referred to in findings 5 and 6, below.

FINDINGS OF FACT

1. The appellant at all relevant times has been employed by respondent with permanent status in class and has not been in a certified bargaining unit.
2. The respondent denied the appellant a Section 16.086(5)(a), Stats., discretionary performance award, effective July 3, 1977.
3. The appellant filed a unilateral (non-contractual) grievance seeking reinstatement of this award.

4. The grievance was denied at all three steps within the agency and appellant appealed to the Personnel Board.

5. Pursuant to APM, Bulletin Number 1, non-contractual employe grievance procedure, effective 8/24/66, revised 10/1/74, promulgated by the director of the Bureau of Personnel pursuant to Section Pers 25.01, WAC, the Personnel Board forwarded the appeal to the director for investigation and report.

6. The aforesaid APM provides at Section I.D.1.j.:

The Personnel Board shall refer the grievance involving matters enumerated in standard b-1) or b-2) to the Director of the State Bureau of Personnel for investigation.

- 1) If during the investigation the Director discerns that agency action in the grieved matter is an action that involves his authority and responsibility he shall, within 15 work days following the Board's receipt of the grievance, issue an order affirming or overruling the agency decision. Either the employe or the agency may, within 15 days, directly appeal the action of the Director to the State Personnel Board under s.16.05(1), Wis. Stats. Any decision rendered by the State Personnel Board on such matters shall be binding unless appealed to a court under s. 16.05(1), Wis. Stats.

7. The DNR non-contractual grievance procedure provides under "Step 4":

"If within its jurisdiction, grievances which have not been settled to the grievant's satisfaction under the foregoing grievance procedure may be appealed to the State Personnel Board..."

8. The director on February 10, 1978, made the following determination:

Based on Mr. Turman's investigation, I find that Mr. Grand did not receive an opportunity to have his 1976-77 job performance properly evaluated in accordance with the employe evaluation and development mechanism currently in place in the Department of Natural Resources. Furthermore, I find that the Department acted improperly in not providing Mr. Grand explicit formal documentation

as to the criteria used to deny him merit increase on July 3, 1977.

Therefore, based on the above findings, it is my determination that by March 3, 1978, the Department must reevaluate Mr. Grand's performance for 1976-77 on the basis of the guidelines established under the Department's individual employe evaluation and development program. In addition, and based on the above reevaluation of Mr. Grand's 1976-77 performance, the Department will either affirm their denial of merit monies to Mr. Grand or grant merit monies to Mr. Grand. In either case, and in accordance with the Statewide Guidelines for Performance Awards (Exhibit A), the Department must formally document the criteria by which the decision is made.

On the basis of the relevant facts produced in this investigation, I believe the above disposition of this grievance is appropriate.

9. Neither party appealed this determination.

10. The respondent took steps to comply with the aforesaid determination of the director, by completing a performance evaluation, maintaining its denial of a discretionary performance award, and providing documentation of the criteria used in its decision-making process. This was completed on March 7, 1978.

11. In a letter dated March 21, 1978, filed with the board March 22, 1978, the appellant requested "an immediate formal hearing" on his grievance, alleging, among other things, that the agency had failed to comply with the March 3, 1978, deadline established by the director, that the director had not responded to appellant's inquiry about the matter, that the agency had not provided him with formal documentation of the criteria in response to his requests, that the reasons assigned for the denial of the award had not been substantiated, and that the Bureau of Personnel was reluctant to enforce orders.

12. The DNR grievance procedure (Manual Code 9108.1) provides under "Step 4":

If within its jurisdiction, grievances which have not been settled to the grievant's satisfaction under the foregoing procedure may be appealed to the State Personnel Board within *fifteen (15) calendar days* from receipt of the decision in step three.

CONCLUSIONS OF LAW

1. The personnel commission has jurisdiction over the subject matter of this grievance.

2. The procedures involved in the initial denial of appellant's merit award (effective date July 3, 1978) are not reviewable by the commission at this time because there was no appeal of the director's determination of February 10, 1978.

3. It is appropriate at this time to remand this matter to the administrator for a determination of whether the agency complied with the director's order of February 10, 1978, following which either party may seek further review by the commission.

OPINION

This opinion will deal first with the most substantive argument advanced by respondent, that the Personnel Board or Commission lacks jurisdiction over this transaction in the first instance. Respondent argues in his brief in support of motion to dismiss:

Subsection 16.05(7), Stats., does not confer jurisdiction on the board since the subject approved state grievance procedure (Manual Code 9108.1) only provides for appeals to the personnel board if the subject matter of the appeal has separate and independent authority to be heard by the board.

The cited grievance procedure provides under "Step 4:"

If within its jurisdiction, grievances which have not been settled to the grievant's satisfaction under the foregoing procedure may be appealed to the State Personnel Board...

As set forth above the respondent argues that this fourth step only applies if the subject matter of the grievance is independently appealable to the board. The commission disagrees with this interpretation. If a transaction is independently appealable the employe does not need to pursue a grievance but can appeal directly to the board. The DNR grievance procedure acknowledges this under its "General Provisions:"

The following procedure does not preclude the appeal rights provided employes under the Rules of the Director, State Bureau of Personnel, and Chapter 16, Wisconsin Statutes.

See also, to the same effect, Section I.C.1., APM, Bulletin No. 1, non-contractual employe grievance procedure, effective 8/24/66, revised 10/1/74. Further, if an employe were to file a grievance concerning a matter over which the board had independent jurisdiction, and then appeal to the board or commission at the fourth step, he or she might then be out of time. See Section 16.05(2), Stats. (1975):

The board shall not grant an appeal under sub(1)(e) or (f) unless a written request therefor is received within 15 days after the effective date of the decision, or within 15 days after the appellant is notified of such decision, whichever is later.

In the commission's opinion, the language concerning Personnel Board jurisdiction under Step 4 of the DNR grievance

refers to the personnel board jurisdiction set forth in the grievance procedure standards established pursuant to Section Pers 25.01, W.A.C. See Section I.D.1.b. of this procedure (APM, Bulletin No. 1, non-contractual employe grievance procedure, effective 8/24/66, revised 10/1/74):

1. The following revised standards are to be followed by each state agency and must be reflected in its grievance procedure:

* * *

However, only those complaints which allege that an agency has violated, through incorrect interpretation or unfair application:

1) a rule of the Director, State Bureau of Personnel or a Civil Service Statute (s. 16.01-16.38, Wis. Stats.)

or

2) a function where the Director ... has expressly delegated his authority to the appointing officer... may be appealed to the State Personnel Board.

The personnel board in interpreting this provision has held that this does not require that the appeal allege a specific violation of a specific statutory or administrative code rule. See Neitzel v. Carballo, Wis. Pers. Bd. No. 73-32 (8/23/76); Graham v. Weaver, Wis. Pers. Bd. No. 75-124 (3/11/76).

In Mr. Grand's appeal letter dated November 15, 1977, he states, among other things:

It is my contention that the facts pertaining to the reasons cited for denial of merit refute the allegations of low productivity and inability to get along with people.

Section 16.32(1), Stats. (1975), in part provides:

In cooperation with appointing authorities the director shall establish a uniform employe work planning and progress evaluation program, incorporating the principles of management by objectives, to provide a continuing record of employe development and, when applicable, to serve as a basis for decision-making on employe pay increases and decreases...

Section 16.01(2), Stats. (1975), provides in part:

...The bureau of personnel with advice and quasi-judicial assistance by the personnel board shall develop, improve and protect a statewide personnel management program which assures that the state hires the best qualified persons available and bases the treatment of its employees upon the relative value of each employee's services and his demonstrated competence and fitness.

The appellant's letter of November 15, 1977, which is not subject to technical rules of pleading, is sufficient to invoke the jurisdiction of the board under Section 16.05(7) and the above-cited APM.

The respondent in his briefs in support of motions to dismiss makes a number of other arguments concerning jurisdiction over the issues identified by the appellant at the prehearing conference. These will be discussed in the order in which they were raised.

2a. Whether or not a proper and timely performance evaluation form should have been prepared.

Respondent argues that this issue is now moot inasmuch as an allegedly proper evaluation form was filed in response to the director's order.

In the opinion of the commission, while it is not a question of mootness, the original procedure preceeding the merit award denial which triggered the grievance is now beyond its purview. The director, acting in accordance with the grievance procedure, overruled the respondent's action with respect to Mr. Grand's merit increase. However, the only relief ordered was that the agency re-evaluate the appellant and either affirm the denial of or grant the merit award. The appellant could have but did not appeal this order to the board pursuant to the grievance procedure on the theory that he had been entitled to a more definitive or substantive remedy. The new transaction,

which relates to the old transaction at least to the extent that the new transaction affirmed the denial of the merit award, remains susceptible of review. To the extent that the issues designated 2b - 2d apply to the second transaction they may or may not properly be before the commission. However, the resolution of these issues involve substantive questions which will not be addressed on this decision on these motions to dismiss.

The issue identified as 3 is "Whether or not respondent complied with the Deputy Director's letter of February 10, 1978." The respondent contends in his brief in support of motions to dismiss:

The appellant has not requested the director to make a determination as to non-compliance with the February 10, 1978, order. The director has not independently determined that there was no compliance. Subsection 16.03(5), Stats., indicates that the initial determination of compliance with a director's order lies with the director. The board's role is clearly delineated as an appellate body to review the director's determination of compliance or non-compliance. Therefore the commission does not have jurisdiction over whether the respondent complied with the deputy director's order of February 10, 1978, nor any issues addressed therein."

In the opinion of the commission, the situation is a good deal more amorphous than this. In the first place, the appellant alleged in his letter of March 21, 1978, to the board, that he contacted the director twice about the matter but had not gotten a response. Second, the grievance procedure does not spell out exactly what procedure is to be followed in a situation like this where, following referral of a grievance, the director orders the agency to in essence "redo," under correct procedure and policy, the transaction which prompted

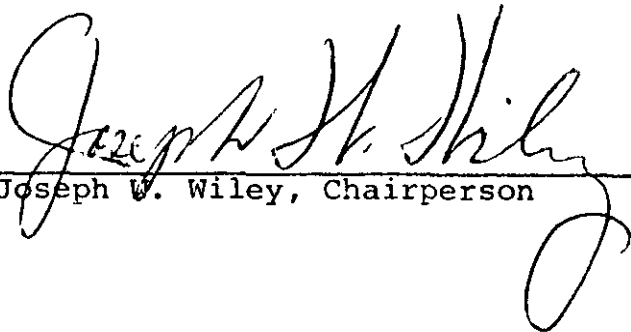
the initial grievance. Further, nowhere in the statutes, administrative code, or the grievance procedure is there any real delineation of the extent of the commission's remedial authority or its authority to regulate proceedings before it in the context of the grievance procedure. (Sections I.D.1.p. and q. of the APM do restrict the retroactivity of grievance settlements, and do require that settlement of grievances involving the statutes or personnel rules shall not exceed the provisions set forth in the statutes or rules.)

Laying to one side the question of remedies, the commission is of the opinion that under these circumstances it has broad authority to regulate proceedings before it. In the current posture of this case it is appropriate to remand this matter to the director to determine whether the February 10, 1978, order has been complied with. Either party can then request review by the commission.

ORDER

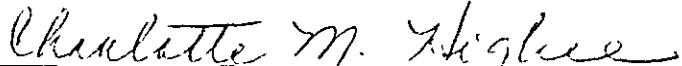
The motions to dismiss are denied. This matter is remanded to the administrator, Division of Personnel for review of the respondent's actions to determine within 30 calendar days of the date of entry of this order, whether there has been compliance with the director's order of February 10, 1978. Either party may request review by the commission of the administrator's decision by filing such request within 15 calendar days of the date of the administrator's decision.

Dated 9-13, 1978



Joseph W. Wiley, Chairperson

Dated 9/13, 1978



Charlotte M. Higbee, Commissioner

Dated 9-13, 1978



Edward D. Durkin, Commissioner