STATE OF WISCONSIN PERSONNEL COMMISSION

DAVID P. MILLER,

Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

Case No. 78-114-PC

DECISION

NATURE OF THE CASE

This is an appeal of a non-contractual grievance at the fourth step (personnel commission).

FINDINGS OF FACT

1. The appellant submitted the non-contractual grievance which is the subject of this appeal at the first step on April 14, 1978.

2. The appellant submitted the third step on May 19, 1978.

3. A step three grievance meeting was held on June 2, 1978.

4. The appellant's last day of employment was June 2, 1978, due to his resignation.

5. The appellant's last day on the state payroll was June 7, 1978.

6. The step three grievance was returned by management on June 23, 1978.

7. The management response at step three was as follows:

> "Administrative Practices Manual, Bulletin 1 regarding non-contractual employe grievance procedures states in part the following: 'An employe who voluntarily terminates employment while a grievance is in process will have his grievance immediately withdrawn. Therefore, the relief you are seeking will not be granted. Grievance denied."

8. The APM on non-contractual grievances promulgated by the director of the bureau of personnel pursuant to §Pers. 25.01, W.A.C., respondent's exhibit 1, provides at § I.D.1.o.:

> "An employe who voluntarily terminates employment while a grievance is in process will have his grievance immediately withdrawn ...."

9. The DHSS non-contractual grievance procedure provides in part under "step 3":

> " ... the written decision of the Secretary will be placed on the grievance form and returned to you within 10 days of receipt."

10. The director's APM on non-contractual grievances, respondent's exhibit 1, provides at §I.D.1.g. 3)

> "Failure of agency management to give a written answer within the prescribed time limits shall constitute an authorization for the employe to process his grievance to the next step if such action is taken by the employe within 5 working days following the date he was to have received his/her answer."

11. The appeal document in this case, letter to personnel commission from Mr. Miller and attorney Schmidt dated July 7, 1978, commission's exhibit 1, was received by the commission on July 7, 1978.

CONCLUSIONS OF LAW

1. The provision of the DHSS grievance procedure requiring a response at step 3 within 10 days is directory and not mandatory in nature.

2. Once the appellant's employment with the state was terminated by his resignation, his grievance was appropriately dismissed.

3. The respondent's disposition of the appellant's grievance at the third step was correct.

OPINION

This grievance involves a situation where the appellant's non-contractual grievance was not decided in a timely fashion pursuant to the

grievance procedure at the third step. Following the time that the grievance should have been decided the appellant's employment with the state was terminated by his resignation. The respondent then denied the grievance in reliance on the APM provision cited in finding #8, above.

In the opinion of the commission the grievance procedure provision that the third step decision be rendered in 10 days is of a directory rather than a mandatory nature.

In Will v. DHSS, 44 Wis. 2d 507, 516-517, 171 N.W. 2d 378 (1969), the supreme court discussed the question of whether internal DHSS rules governing time limits for AFDC hearings were mandatory or directory. The rules involved were not part of the Wisconsin Administrative Code.

> "There is dispute as to whether the manual constitutes a rule or regulation as statutorily defined, particularly because it was not enacted pursuant to the normal and statutorily prescribed procedure. The contention is that the manual material is no more than a set of suggested guidelines for the conduct of review hearings. However, we hold that the manual material does constitute a rule or statement of policy within the meaning of the statute, particularly so because the legislature has exempted purely procedural rules from the notice and hearing requirements of ch. 227.
>
> Is such rule or statement of policy mandatory or directive? The trial court held it to be directive, not mandatory, and we agree. Since the rulemaking process of an administrative agency is derivatively a part of the legislative process, this court has applied statutory rules of construction to the construction of administrative agency rules."

Pursuant to §Pers. 25.01 W.A.C., the director has a specific and authoritative role in the regulation of non-contractual employe grievance procedures, and he has promulgated an APM to regulate that process. In the commission's opinion, the holding of the Will case, that the manual provision should be treated the same as an administrative rule in the context of a determination as to its character as mandatory or directive, should be applied here.

A general statement of statutory interpretation as directory or mandatory if found in State ex rel. Werlein v. Elamore, 33 Wis. 2d 288, 293 (1967):

> "In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation. Marathon County v. Eau Claire County (1958), 3 Wis. (2d) 622, 666, 89 N.W. (2d) 271; Warachek v. Stephenson Town School Dist. (1955), 270 Wis. 116, 70 N.W. (2d) 657. We have also stated that directory statutes are those having requirements 'which are not of the substance of things provided for.' Manninen v. Liss (1953), 265 Wis. 355, 357, 61 N.W. (2d) 336.
>
> In 2 Sutherland, Statutory Construction (3d ed.), p. 216, sec. 2802, the author observes that provisions are normally considered directory 'which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey no prejudice will occur to those whose rights are protected by the statute.' The text further (p. 217, sec. 2804) states that a provision is interpreted as directory where the 'manner of performing the action directed by the statute is not essential to the purpose of the statute.'"

A recent supreme court discussion of this issue involved a statute in the personnel field, one requiring a hearing of charges against a suspended employe within 3 weeks. See Karow v. Milwaukee County Civil Service Commission, 82 Wis. 2d 565, 572-573 263 N.W. 2d 214 (1978).

> "We have said that a time limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury. Appleton v. Outagamie County, 197 Wis. 4, 9, 220 N.W. 393 (1928). But where the failure to act within the statutory time limit does work an injury or wrong, this court has construed the time limit as mandatory. In State v. Rosen, 72 Wis. 2d 200, 240 N.W. 2d 168 (1976), we held that the statutory time limit for holding a hearing on the forfeiture of a car under the Uniform Controlled Substances Act was mandatory; the car owner's legitimate interest in having use of the car is jeopardized unless there is strict compliance with the statutory procedure for the time of the hearing. Construing the time provision as mandatory did not impede the legislature's objective of protecting the public from

drug traffic.

To construe sec. 63.10(2), Stats., we must ascertain the consequences of holding that the time period is directory, and we must determine whether these consequences comport with the legislative purposes.

As a result of the charges and suspension Karow is not working and is not being paid. Any delay in the hearing continues Karow in this status and thus works an injury on him.

The county civil service statute reflects the legislature's balance of the interests of the public and those of individual county employes. The public has a legitimate interest in not being burdened with inefficient or otherwise undesirable employes. That interest is adequately protected by the statutory procedure for disciplining an employe, particularly the provision which permits suspension of the employe between the time when charges are filed and the hearing. See sec. 63.10(1), Stats. At the same time there is public interest-which is shared by the employe-in the employe not being wrongly deprived of his or her livelihood and not suffering injury to reputation on the basis of charges which might prove unfounded. This interest can be protected only by holding a hearing promptly.

In view of the language of the statute, the consequences of delaying the hearing, and the objectives sought to be accomplished by the legislature, we conclude that the time for hearing set forth in sec. 63.10(2), Stats., is mandatory.

See also State v. Industrial Commn., 233 Wis. 461, 466, 289 N.W. 769 (1940):

"A statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation."

In the instant case, the APM does not provide a penalty for failure to act within the required time or deprive the agency of its power to act. Rather, the APM provides an option for employes whose grievances are not answered within the required time frame, see §I.D.1.g. 3):

"Failure of agency management to give a written answer within the prescribed time limits shall constitute an authorization for the employe to process his grievance to the next step if such action is taken by the employe within 5 work days following

the date he was to have received his/her answer."

Thus the employe can either move to the next step or wait for a belated response at the step where a timely response was not given.

With respect to the effect of a delay in decision on the employe, this is not a situation like that in Karow where the employe is on indefinite suspension and out of work until the decision is rendered.*

In the particular fact setting of this case, the delay worked to deprive appellant of a third step decision because of the termination of his employment during this period. However, delay in an administrative proceeding always increases the probability that changes in circumstances might occur which would, in effect, render that proceeding moot. That this general consideration materialized in this particular case does not change the weight to be accorded this general consideration in determining whether the time limit is mandatory or directory.

The commission would like to emphasize that it does not condone the delay in the processing of the appellant's grievance by the respondent agency. However, the question before the commission is the appropriate disposition of this appeal given the facts in this record, which include the termination by the appellant of his employment prior to the time the agency rendered its third step decision. Given this fact and the conclusion that the 10 day decision requirement was not mandatory, the commission is lead to the conclusion that the agency did not err in denying the grievance because of the termination of appellant's employment.

---

*Disciplinary matters are appealed directly to the commission pursuant to §230.44(1)(c), stats. (1977).

ORDER

The respondents disposition of this grievance is sustained and this appeal is dismissed.

Dated: 2/5, 1979.

STATE PERSONNEL COMMISSION

Joseph W. Wiley, Chairperson

Edward D. Durkin, Commissioner

Charlotte M. Higbee, Commissioner